



(1) Reportable: No
(2) Of interest to other Judges: No

Signature

31 July 2026
Date

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case No: **C539/2023**

In the matter between:

ANDRE RHEEDER

Applicant

and

SANLAM LIFE INSURANCE LTD

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

D DU PLESSIS N.O.

Third Respondent

Heard: 30 June 2025

Delivered: 31 July 2026

JUDGMENT

VAN VOORE AJ

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995, as amended ("the LRA"). Andre Rheeder, (the applicant) launched an application to, *inter alia*, review and set aside an arbitration award of Mr D Du Plessis ("the commissioner"), the third respondent. The commissioner presided over arbitration proceedings under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA"), the second respondent.
- [2] The relief sought by the applicant includes that this court reviews and sets aside an arbitration award under CCMA case number WECT-19449-22 ("the arbitration award") or corrects the award, that this court substitutes the arbitration award with a finding that the dismissal of the applicant by the first respondent was substantively unfair and that the applicant be retrospectively reinstated, or that the arbitration award be set aside and referred to the CCMA for re-hearing before a commissioner other than the third respondent.

Applicant's grounds of review

- [3] The applicant's grounds of review include the following:
- 3.1 The commissioner, in conflict with the behests of the LRA failed to apply his mind, misconducted himself, committed a gross irregularity and/or acted unreasonably, unjustifiably and irrationally in finding that the applicant was fairly dismissed;¹
- 3.2 The award is further defective as it reflects gross irregularities and/or legal errors on the part of the commissioner. The commissioner further misconducted himself in the performance of his duties as an arbitrator and/or that the commissioner exceeded his powers. Consequently, the commissioner reached a decision that no reasonable decision-maker could have reached. The applicant was denied the right to a fair hearing.²

¹ Pleadings, Founding Affidavit, paragraph 10

² Ibid, paragraph 11

- 3.3 The commissioner failed to properly assess the evidence and to resolve material disputes of fact which required him to have regard to, *inter alia*, the credibility of the witnesses.³
- 3.4 It was not possible for the commissioner to properly determine the credibility of the witnesses, their candour and demeanour and the calibre and cogency of their evidence without an opportunity to observe them personally.⁴

Background

- [4] The applicant was previously employed by Sanlam Investment Group, a division of Sanlam Life Insurance Limited (the first respondent) for a considerable period of time (more than 30 years). In the period immediately prior to his dismissal, the applicant was employed as the Head of Sanlam Properties and was in charge of the property department from 2013 / 2014.
- [5] The first respondent convened a disciplinary hearing into allegations of serious misconduct⁵. The disciplinary hearing notice is dated 16 April 2019.
- [6] The allegations of misconduct included, *inter alia*, the following:
- 6.1 As the Head of Sanlam Properties you failed and/or refused to avoid/properly address or remove yourself from a conflict of interest and/or breached the trust relationship and/or misused/abused your position and/or willfully or negligently engaged in conduct which could have damaged the reputation of the Company and/or failed to act in terms of your duties towards the Company or in the best interests of the Company, when you visited a development site on 13 July 2018 and ultimately purchased wood from the developer for your own use;
- 6.2 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow

³ Applicant's heads of argument, paragraph 33

⁴ Applicant's heads of argument, paragraph 33

⁵ Record Volume 2, pages 1 - 4

reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam as your line manager, on various occasions;

6.3 Notwithstanding the fact that you are a senior manager in the Company and/or after having been directed to embrace/advance the transformation initiatives, culture and/or strategy of the Company, you failed and/or refused to comply with your transformation obligations.

[7] The applicant was found guilty of misconduct and was dismissed. The applicant referred an alleged unfair dismissal dispute to the CCMA.

[8] In the CCMA proceedings the applicant and the first respondent concluded a pre-arbitration minute⁶. The pre-arbitration minute is dated 6 June 2023. The pre-arbitration minute records, *inter alia*, the following:

"8 The parties have agreed that there is no need for all the evidence to be reheard at the arbitration as a transcript of the evidence that was led at the previous arbitration is available.

9 The parties have agreed that the Arbitrator will determine the matter on the transcript of the previous arbitration proceedings and the bundles of documents that were placed before the erstwhile Arbitrator. There will be no need to lead any further evidence.

10. Once the Arbitrator has had an opportunity to consider the transcript and bundles, the parties request they be afforded an opportunity to submit written arguments, with an opportunity to orally present their respective arguments to the Arbitrator.⁷

[9] The commissioner was provided with a copy of the pre-arbitration minute. The commissioner expressed some reservations in relation to the matter being determined on the record. The commissioner's reservations included

⁶ Record, volume 1, pages 55 – 68

⁷ Record, volume 1, page 56

that the matter was complex and in his opinion the procedure contemplated by the parties would not put him in a position to adequately evaluate the demeanour of the witnesses and ask clarifying questions.⁸

[10] On 8 June 2023 the commissioner issued a ruling that the matter would be heard afresh and further directives regarding the delivery of a statement of case and a statement of response. The directive also included a request to the parties that they agree on common cause facts and that they agree to adjust the pre-arbitration minute.⁹

[11] Subsequent to 8 June 2023 and after engagement with the parties, the commissioner issued a further ruling on 23 August 2023. In that process ruling the commissioner records that "*In terms of the agreement between the parties and as per the pre-arbitration minute, the matter would be considered on the evidence previously presented and recorded. I was given the full recording and a transcript of the recording.*"¹⁰ The agreement referred to in the 28 August 2023 ruling is the pre-arbitration minute dated 6 June 2023.

[12] One of the applicant's grounds of review is that the proceedings which culminated in the arbitration award dated 19 September 2023 under CCMA reference number WECT19449-22 constitute a nullity.¹¹

[13] In brief, the applicant contends that the commissioner issued a ruling dated 8 June 2023 to the effect that the matter be heard afresh and that in the absence of an application to review the 8 June 2023 ruling or an application to vary or rescind the 8 June 2023 ruling, the commissioner was *functus officio*.

Assessment: Proceedings an alleged Nullity

[14] The applicant and the first respondent concluded a pre-arbitration minute.¹²

⁸ Record, volume 7, page 3

⁹ Record, volume 7, pages 1 – 4

¹⁰ Record Volume 7, page 58

¹¹ Applicant's Heads of Argument, paragraph 22

¹² Record Volume 1, pages 55 to 68

- [15] On 26 June 2023, the first respondent's attorneys addressed a letter to the CCMA (its National Director, the Western Cape Senior Convening Commissioner and other officials). In effect, the first respondent's attorneys objected to the third respondent's 8 June 2023 ruling and were instructed to "*escalate the matter internally in the CCMA and to request that the matter be determined on the basis as agreed between the parties' agreed pre-arbitration minute*".¹³
- [16] On 26 June 2023, the applicant's attorney sent an electronic mail to the second respondent and the first respondent's attorneys replying to the letter from the first respondent's attorneys also of 26 June 2023.¹⁴ The applicant's attorneys, with reference to the commissioner's ruling of 8 June 2023, submitted that the "*arbitration must run as an arbitration normally would*".
- [17] The senior convening commissioner of the CCMA Western Cape proposed a meeting. The meeting took place on 7 July 2023. The commissioner attended the meeting of 7 July 2023. At the meeting the commissioner states that: "*...the pre-arbitration minute, and for some other reason, I didn't really realise that it was a signed minute. My feeling is if it's a signed minute, then we are bound by it.*"¹⁵
- [18] During the course of the 7 July 2023 meeting, the commissioner and the parties' attorneys referred to a range of issues including the transcript, the length of the transcript, the fact that an audio recording is available, the bundles of documents and the full documentary record. During the course of that part of the discussion the commissioner also canvasses that he would listen to the recording and have regard to the documentary record. In the meeting the commissioner observes: "*Alright. Ja, because I will also in the event... look at the documents that were introduced during the arbitration hearing... and ... then probably... I am not sure Vusi... must it then be [her]*

¹³ Record Volume 7, pages 6 – 10, paragraph 20

¹⁴ Record Volume 7, page 12

¹⁵ Record Volume 7, page 38

*submissions made in September? Must we arrange a date for that, or... I see".*¹⁶

- [19] During the course of the meeting, the parties also dealt with logistical arrangements as to delivery of the documentary record to the offices of the second respondent as well as making the audio recordings of the arbitration proceedings available to the commissioner.¹⁷
- [20] It is apparent that at the meeting of 7 July 2023 the parties were engaging in a co-operative manner in order to address the situation and find a practical way to deal with the manner in which the alleged unfair dismissal dispute would be heard and determined by the commissioner. Both the senior convening commissioner and the commissioner thanked the parties for their co-operation.¹⁸
- [21] Towards the end of the meeting the applicant's attorney enquired whether the parties are now waiting for a further directive. The commissioner responded that he did not think that they needed a further directive. The commissioner then informed the parties that he would probably attend to the matter in the second week of August 2023.¹⁹
- [22] The parties and the commissioner left the 7 July 2023 meeting on the basis that the full documentary record would be made available to the commissioner by delivery to the offices of the CCMA, the audio recording of the arbitration proceedings would be made available to the commissioner, the commissioner would consider the record and, subject to submissions in argument to be made by the parties, would determine the matter on that basis. The outcome of the meeting was that through a discussion the parties had arrived at a practical way to address the commissioner's process ruling of 8 June 2023 and ultimately to give effect to the signed pre-arbitration minute dated 6 June 2023.

¹⁶ Record Volume 7, page 46

¹⁷ Record Volume 7, page 50

¹⁸ Record Volume 7, page 53

¹⁹ Record Volume 7, page 54

- [23] The commissioner issued a process ruling on 23 August 2023.²⁰ In that process ruling the commissioner records that *"In terms of the agreement between the parties and as per the pre-arbitration minute, the matter would be considered on the evidence previously presented and recorded. I was given the full recording and a transcript of the recording."*²¹
- [24] In the process ruling of 23 August 2023, the commissioner also records that he had listened to the entire recording and had made his own notes from the recordings. The commissioner further directed the parties to revise their closing submissions, to exclude from it any reference to any past proceedings and to submit the revised written closing submissions by 11 September 2023.²²
- [25] Whilst the applicant's attorneys had, in their electronic mail dated 26 June 2023 recorded *inter alia* "We await your confirmation that the matter will proceed as per the ruling setting out the further conduct of the matter", it was clear to the parties that a process different to that contemplated in the 8 June 2023 process ruling would be followed. The outcome of the meeting of 7 July 2023 was that a process other than that recorded in the commissioner's process ruling of 8 June 2023 would be followed, ultimately to give effect to the signed pre-arbitration minute dated 6 June 2023.
- [26] At no point during or after the meeting of 7 July 2023 and prior to the process ruling dated 23 August 2023 did the applicant's attorneys record any opposition to the exploration of a process different to the 8 June 2023 process ruling. The applicant's attorneys participated in that process and acquiesced in a co-operative attempt to have the alleged unfair dismissal dispute determined.
- [27] The commissioner issued the arbitration award under CCMA reference number WECT19449-22. The arbitration award is dated 19 September 2023.

²⁰ Record Volume 7, pages 57 - 59

²¹ Record Volume 7, page 58

²² Record Volume 7, pages 58 and 59

[28] The applicant contends that in the absence of an application to review the process ruling dated 8 June 2023 or an application to vary or rescind the process ruling of 8 June 2023, that ruling remained binding on the parties and that the commissioner was *functus officio*. The applicant submits that proceedings subsequent to 8 June 2023 which culminated in the commissioner's arbitration award constitute a nullity. These contentions are not sustainable.

[29] Section 144 of the LRA provides, *inter alia*, as follows:

"144. Variation and rescission of arbitration awards and rulings

Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on the commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling –

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;*
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;*
- (c) granted as a result of a mistake common to the parties to the proceedings; or*
- (d) made in the absence of any party, on good cause shown."*

[30] In **Crown Chicken (Pty) Ltd T/A Sovereign Foods v Commission for Conciliation, Mediation & Arbitration & Others** (2013) 34 ILJ 2872 LC the court held:

"[11] The purpose of granting commissioners the power to rescind their rulings of their own accord is partly to save a party who is a victim of a commissioner's error

from suffering the prejudice of an erroneous ruling and the hardship of having to make a rescission application with its concomitant potential prejudice. The case before the commissioner is a classic example of the mischief the legislation sought to address by granting commissioners that power because in its absence or had the commissioner refused to exercise it, the third respondent would be compelled to apply for the rescission of the dismissal ruling, be compelled to approach this court at substantial expense to reclaim his right to be heard.

[12] The legislature has bestowed on CCMA commissioners the power to rescind their rulings of their own accord. This does not readily deny commissioners their statutory powers. When the commissioner had to determine the rescission application he had the power to rescind his ruling based on his knowledge of the presence of Faltein at the CCMA when his case was called. He also had the authority to base his decision on the application before him. He had to choose the power to exercise and he elected to rescind his own ruling of his own accord. He can therefore not be faulted for preferring rescinding his ruling of his own accord over basing his rescission ruling on the opposed rescission application before him.

[13] Ideally, the arbitrator should have exercised his power to rescind his ruling of his own accord soon after realizing that he had acted erroneously by dismissing the third respondent's matter. However, the commissioner's delay and the filing of the rescission application did not oust the commissioner's power to rescind his dismissal ruling of his own accord. I

therefore find the commissioner's finding reasonable and consistent with s144(a) of the LRA."

- [31] In the matter of ***PT Operational Services (Pty) Ltd v Retail & Allied Workers Union on behalf of Ngweletsana*** (2013) 24 ILJ 1138 (LAC) the Court held that the doctrine of *functus officio* applied to the actions of CCMA commissioners "except where the LRA showed a contrary intention, as it does in s144. They therefore have a limited right to revoke their own decisions".
- [32] The commissioner's ruling of 8 June 2023 is correctly described as a process ruling. That ruling does not have the consequence that the commissioner had finally or fully exercised or performed his functions or duties in relation to the merits of the alleged unfair dismissal dispute.²³ The commissioner's further process ruling of 23 August 2023, issued by the commissioner of his own accord and following engagement with the parties, did not require an application to vary or rescind the earlier process ruling of 8 June 2023.
- [33] The Notice of Motion refers to relief sought in relation to the arbitration award dated 19 September 2023. The Notice of Motion does not refer to the 23 August 2023 process ruling and does not expressly seek any relief in relation to the 23 August 2023 process ruling.
- [34] The applicant and the first respondent concluded a pre-arbitration minute dated 6 June 2023.²⁴ Parties are bound by a pre-arbitration minute and its terms. In ***Mbeje and Others v Department of Health Kwa-Zulu Natal and Others***²⁵ the LAC per Nkutha-Ntontwana JA held:

"[18] The binding nature of a pre-arbitration minute is well accepted. Like a pre-trial minute, a pre-arbitration minute "... is a consensual document which binds the parties thereto and obliges the

²³ *PT Operational Services (Pty) Ltd v Retail & Allied Workers Union on behalf of Ngweletsana* (2013) 24 ILJ 1138 (LAC) at paragraphs 27 and 37

²⁴ Record Volume 1, pages 55 - 68

²⁵ *Mbeje and Others v Department of Health Kwa-Zulu Natal and Others* (DA33/2022) [2024] ZALAC 38; [2024] 11 BLLR 1111 (LAC); [2024] 45 ILJ 2681 (LAC) (22 August 2024)

[arbitrator] (in the same way as the parties' pleadings do) to decide only the issues set out therein. In **South African Breweries (Pty) Ltd v Louw**, this Court per Sutherland JA, suitably restated the purpose of a minute as follows:

"The chief objective of the pre-trial conference is to agree on limiting the issues that go to trial. Properly applied, a typical minute – cum – agreement will shrink the scope of the issues to be advanced by the litigants. This means axiomatically, that a litigant cannot fall back on the broader terms of the pleadings to evade the narrowing effect of the terms of a minute. A minute, quite properly, may contradict the pleadings, by, for example, giving an admission which replaces an earlier denial. When, such as in the typical retrenchment case, there are a potential plethora of facts, issues and sub-issues, by the time the pre-trial conference is convened, counsel for the respective litigants have to make choices about the ground upon which they want to contest the case. There is no room for any sleight of hand, or clever nuanced or contorted interpretations of the terms of the minute or of the pleadings to sneak record back in what has been excluded by the terms of a minute. The trimmed down issues alone may be legitimately advanced. Necessarily, therefore, the strategic choices made in a pre-trial conference need to be carefully thought through, seriously made, and scrupulously adhered to. It is not open to a court to undo the laces of the strait-jacket into which the litigants have confined themselves."

- [35] The applicant, the first respondent and the commissioner were bound by the pre-arbitration minute of 6 June 2023. The process ruling of 23 August 2023, is consistent with and gives effect to the binding pre-arbitration minute of 6 June 2023.
- [36] As at the date of the conclusion of the pre-arbitration minute (6 June 2023) the applicant, with the benefit of legal advice, accepted and agreed that “*there is no need for all of the evidence to be reheard at arbitration as a transcript of the evidence that was led at the previous arbitration is available*”.²⁶ In addition, the applicant accepted that an arbitrator would determine the matter on the transcript of the previous arbitration proceedings and the bundles of documents that were placed before the previous arbitration proceedings and in addition that there “*will be no need to lead any further evidence*”.²⁷
- [37] At the time of the conclusion of the pre-arbitration minute (6 June 2023) the applicant accepted and agreed and in fact required the commissioner to determine a number of issues, including whether or not the applicant was guilty of the allegations of misconduct against him and whether or not he was unfairly dismissed. This necessarily and quite plainly means that the applicant then (as at 6 June 2023) accepted and agreed that the commissioner need not hear oral evidence afresh and that the absence of observing the demeanour of the witnesses whose evidence the commissioner was to consider would not have the result that the applicant is denied the right to a fair hearing, including the right to a fair trial of the issues. which the pre-arbitration minute requires the commissioner to decide. Differently put, the applicant had a full appreciation that an observation as to the demeanour of witnesses would not come into play. This, quite properly so, did not present as a hurdle, let alone an insurmountable hurdle, to the commissioner, where necessary, preferring one version as more probable than another and more generally to a fair trial of the issues.
- [38] A practical consequence of the contention that the parties were bound by the 8 June 2023 process ruling is to give effect to a process ruling which in

²⁶ Record Volume 1, page 56, paragraph 8

²⁷ Record Volume 1, page 56, paragraph 9

material respects was in defiance of the binding pre-arbitration minute. These contentions seek to undermine a binding pre-arbitration minute and impermissibly elevate process rulings, which have no impact as to the merits and a genuine right to be heard, to the principal building blocks of a right to a fair trial of the issues.

- [39] In the result, the arbitration proceedings which culminated in the arbitration award dated 19 September 2023 under CCMA reference number WCET19449-22 are not a nullity.

The Arbitration Award

- [40] In relation to allegation 1 (the Wood transaction), the commissioner records, *inter alia*, the following:

“63. *The respondent’s case about the first allegation of misconduct related to the wood transaction, is that the applicant had certain fiduciary duties to the respondent and that he acted in breach of his duty by offering to buy the wood from Isipani Construction when he should have known that the transaction would create a conflict of interest. The question therefore is whether the applicant had a fiduciary duty and whether there was a conflict of interest in him approaching Isipani Construction.*

64. *The applicant went on a site visit when he made the offer to purchase the wood. He was willing to pay up to R20 000.00. He paid R11 000.00 to have the wood removed. Eventually a wine rack was made from the wood. The wood was therefore not valueless as the applicant wished to portray. The applicant made the offer in the presence of Messrs Hilton and Frankeiss. On the evidence neither is more senior than the applicant. The evidence was not that, even if assumed they carried authority as representatives of the client, that he asked them.*

He spoke to the Isipani representative to whom he made the offer. A month and a half later, he told Mr Van Rensburg that he made the offer to purchase the wood. The wood was shortly thereafter salvaged when the house was torn down. On 12 October 2018, the applicant informed Mr Shanmugham about the wood transaction. Part of the applicant's case was that ownership had not passed to him in July. The wood might have been used in another house that was going to be restored. It was not used in that restoration project.

65. *Three of the applicant's seniors testified that the first person he should have informed of, even his intention to purchase the wood, was Mr Shanmugham. As it is, he was the last person to be informed. All three were of the opinion that the applicant was wrong. The only party who says that the applicant did nothing wrong is the applicant. That the applicant agreed with Rudy Rutters to store the wood until a final determination as to whether it would be used in the restoration project, does not take away from the facts that the applicant made the offer to buy the wood, he paid R11 000.00 and the last person he informed about this was Mr Shanmugham.*
66. *The applicant's closing submissions, in referring to the Forensic Report that Mr Shanmugham commissioned to investigate the transaction, the suggestion is that the report exonerated the applicant from wrongdoing. That is not so. I agree that the report states that he did not hide the fact that he bought the wood and informed at least three other Sanlam employees and Mr Rutters.*

However, the report found that the applicant should have known that the transaction could place him in a precarious position and that he should have asked permission from Mr Shanmugham before salvaging the wood.

67. The applicant conceded that as Head of Sanlam Properties he held considerable responsibility as a Sanlam Investment employee. He knows that he would face conflicts of interest in his daily activities and conceded that his employer trusted him to take the correct decision. In this case the applicant did not think that he needed to ask permission from Mr Shanmugham. Thus, the rule or standard of conduct expected was not to place oneself, particularly such a senior employee in a position that could amount to a conflict of interest. This is both reasonable and necessary. The applicant had 30 years of experience in the financial field where trust and transparency are very important. The reference to DIKOBÉ vs SUN CITY (JA) 45/20/15 [2016] SALAC 67 does not support the applicant's case. The matter was about whether there was a rule prohibiting possession and use of certain vouchers by the employee. The facts are distinctly different. I do not agree with the submission that the applicant put Sanlam's interests first. He did not when he made the offer to buy the wood. Had the applicant gone to Mr Shanmugam to indicate that he wanted to buy the wood, this would not have been an issue. The respondent did not accuse him of dishonesty and no witness, apart from the applicant, testified that there were such rumours. Not even the Forensic Report referred to possible dishonesty.

68. *I therefore agree, that because the applicant conceded that he had certain fiduciary duties, that his fiduciary duty, which is implied in his contract of employment, covers the issue of conflict of interest and sets the rule or standard of conduct. Even if there was no written policy, it would be reasonably expected of the applicant to have been aware of the expected standard of conduct. The applicant acted contrary to what was expected of him in this regard. No explanation was given why he could not have spoken any earlier to Mr Shanmugham about the matter. He spoke to him at a time when it was already a done deal. The commission of the misconduct complained of was proven. Nobody thinks that the applicant was dishonest. The commission of the misconduct complained of was proven.*"²⁸

[41] In relation to the second allegation the commissioner records, *inter alia*, the following:

"69. *The second allegation of insubordination / insolence / disrespect etc., was presented by the respondent by way of Mr Shanmugham's recollection of conversations with the applicant and reference to email correspondence. It was testified that the applicant either bypassed Mr Shanmugam or questioned his authority. Nine incidents were testified about. In this regard there can be no dispute that there is a relevant rule or standard of conduct, that it is reasonable and that the respondent is aware of this. The conduct complained of often finds its way into an employer's*

²⁸ Pleadings, pages 28 and 29

disciplinary code. It is conduct that is referred to in Schedule 8. The question then is whether the applicant acted in breach of this, or these rules as stated in the notice to attend the disciplinary hearing. What inference could be drawn from the evidence? The email correspondence relied on by the respondent, was not disputed, neither the content of the emails, nor the identity of the recipients in those cases where emails, correspondence from the applicant was relied upon. The applicant's case was that he never acted inappropriately and there was no need to always send correspondence to his manager.

70. The applicant did not dispute Mr Shanmugham's evidence about his comment during the very first meeting. Mr Shanmugam did not simply laugh this comment off. He interpreted this as an aggressive comment. Mr Shanmugham's evidence was that, at the time, he was trying to build rapport with the team and get buy-in from them. It seems that his style is not to micro-manage nor to deal with people in a way that they are constantly monitored and given warnings.

...

72. ... I am unable to criticise any of the respondent's four witnesses. The three line-managers to the applicant, Messrs Shanmugham, Naidoo and Roux corroborated each other's versions where applicable. All three stood by their criticism of the applicant's conduct. Ms Brink's version also corroborated certain aspects of both Mr Roux and Mr Shanmugham's evidence. In his closing submissions Mr Geldenhuys submitted that Mr

Shanmugham lied under oath. I do not agree. The applicant, basically a single witness because his two witnesses did not necessarily support his version in all aspects and could not corroborate his version. He may not have lied or made false statements, but his version amounts to a bald denial of wrongdoing in a case where he should have explained his actions and failed to do so. There were also minor aspects of the applicant's case that were not put to the respondent's witnesses. The applicant's version is therefore evaluated with circumspection.

...

81. *At this level of seniority, it is imperative that people work together to further their employer's interests. They are after all spearheading the activities. I accept that such seniority is also accompanied by years of experience, know-how and institutional knowledge and that there will be differences of opinion, even arguments. But, the reporting lines must still be honored so that the top structure does not become dysfunctional. There should not be a need to remind senior colleagues of this obligation. The overall impression is that the applicant disregarded Mr Shanmugham's authority over him. One implication of not having "kept him in the loop", might have caused embarrassment to Mr Shanmugham and made him be seen as incompetent if he was unable to answer queries in respect of his domain. Part of the applicant's duties was to keep him so "in the loop". I hold that the commission of the misconduct as set out in the second allegation of misconduct as [was] put to the*

applicant, was proven, particularly in the sense that the applicant's behaviour had a pattern of showing disregard for Mr Shanmugham's authority. He did not challenge him outright, but clearly did not wish to subject himself to his newly appointed manager's authority."

[42] In relation to the third allegation commissioner's arbitration award records, *inter alia*, the following:

"82. *The third allegation of misconduct deals with rules and standards of conduct which the applicant should have been aware of. In fact, it relates to issues that are extremely topical. Sanlam's history is known. It was known that many Afrikaner white men ran the institution. It seems even as late as the time of the arbitration hearing, there were still transformation issues plaguing the Respondent. One glaring example is the Propco membership. The applicant wished to make out a case that he created an inclusive environment. The witness he called, Manka Sebastian, testified that people were still speaking Afrikaans in the Sanlam Properties section. This was in breach of the clear policy to use to English as the workplace medium of communication. I do not agree with the submission that she corroborated the applicant's version. She did not testify that the department complied fully with the policy, as was submitted. The matter must be viewed against the legacy of Apartheid and the ongoing calls for transformation in business. Ms Brink's evidence about the transformation strategy and the steps being taken to sensitise employees to diversity was not contested.*

83. *In these circumstances where the applicant must have been very aware of pressure regarding transformation and diversity, he and his team attended a one-day workshop diversity training on 25 March 2019. The Exco members had previously done the training to set an example and to lead from the top. The applicant left the workshop early, citing as reason an urgent site meeting in Newlands. He was informed that the Stefanutti stocks MD was highly upset. What about, was not explained, neither during evidence nor in the closing submissions. The applicant's version was that Stefanutti stocks were threatening to down tools and leave the site. The applicant and one Ralph went to the site at about 14h30. The applicant went to the site and gave certain verbal assurances that satisfied the MD, it was testified. There is no merit in the submission that had the applicant not gone to the site, he would have been disciplined. He was attending a workshop that his employer saw as very necessary and important. Nobody else, but the applicant thinks that he acted correctly by leaving the workshop early.*

84 *Ms Brink's evidence that the after-lunch session was critical, was not disputed. The applicant testified that the workshop presenter said that the afternoon session would not be critical, cannot be accepted. Had that been the case, the presenter would have been called as witness or at least some agenda to indicate the sessions of the day would have been presented as evidence. This behaviour did not demonstrate a commitment to transformation and diversity that the employer*

was asking from him. This is further confirmed by his attitude about the "power hour" sessions. Had he been serious to comply, he could have attended such a session.

85. *Ms Brink's evidence of having to deal with the applicant after grievances were laid about transformation issues, was not questioned. Neither was her evidence that the contract of an African graduate was prematurely terminated and the person paid out the balance of the contract due to issues between the graduate employee and the applicant related to inclusivity issues. These incidents were not the reason for the dismissal but were relied on to demonstrate the applicant's pattern of workplace behaviour regarding transformation and diversity. The inference, given the past history, the continued use of Afrikaans and not English as the lingua franca and this recent conduct is that the applicant did not display an attitude that he was serious about transformation and diversity issues within Sanlam. As a very senior employee it was incumbent on him to set an example. He did not.*

86. *The last issue to determine regarding the allegations of misconduct is the reason why Mr Shanmugam was disrespected or bypassed. I had already found that the Applicant disrespected his authority over him. Mr Shanmugham's evidence was that he did not know what motivated the applicant. He did some introspection and thought that he is competent otherwise he would not have been appointed as the CEO. He then thought that perhaps it was his race.*

87. Much reliance was placed on Ms Sebastian's evidence about her relationship with the applicant. She was junior to him. She testified about her relationship with the applicant. She could not comment on the applicant's relationship with Mr Shanmugham. The dynamics in these two relationships were completely different. In the one the applicant was the senior, in the other, he was the junior and had to yield to authority. The applicant's evidence was that he did not disrespect his manager. His manager though felt that he was disrespected. After reflecting, he thought that the only reason could be his race. The applicant's submissions are that the race allegation was an afterthought, that the allegation is defamatory and has no rational basis. Mr Shanmugham did not testify that the applicant is a racist. During his cross-examination, it was pointed out to him that he might be mistaken in his perception. The applicant also did not testify that. His version based on the denial that he did not disrespect Mr Shanmugham's authority. The accusation is that the applicant "... excluded, by-passed or sidelined Mr Shanmugam as a person of colour". This is specifically in reference to the allegations set out in the second allegation related to insubordination/insolence/disrespect etc. as stated above, the applicant gave no reasonable explanation for his actions. If I understand his argument, it is that Mr Shanmugam fabricated the race issue to bolster the respondent's case. He is a liar, it is submitted. Many of my findings were based on inference and the impressions left by the evidence presented. I already commented above

on questions posed during cross-examination, in which the applicant's case was shown to be that, it is Mr Shanmugam who is wrong and that he is not a reasonable manager. This might mean many things. The applicant clearly portrays Mr Shanmugham as the problem. The fact is, the applicant's conduct impacted on Mr Shanmugam and made him question his worth and ability. Given my findings above about the applicant's demonstrated attitude about transformation, inclusivity and diversity in the workplace, coupled with the bare denial and the fact that Mr Shanmugham's impressions are his valid impressions, and it must be accepted that his impression of the pattern of behaviour was not a knee-jerk reaction or fabrication to somehow "get" the applicant, I hold that the respondent's version in this regard is accepted as more probable.

88. I hold therefore that the commission of the misconduct complained of was proven. Was dismissal the appropriate sanction? I bear in mind that the applicant has throughout the proceedings portrayed himself as the only one who was correct. He was given ample opportunity to reflect, yet never conceded that somehow he might have been wrong. According to him, his three managers have their own views, particularly Mr Shanmugham, as he stated during cross-examination. He thinks that Mr Shanmugham, is/was not a reasonable manager as was stated to him during his cross-examination. This was repeated in the closing submissions. There is no reliable evidence that Mr Shanmugham is not a good manager. As he testified, he was appointed in the position because

*his superiors were of the opinion that he was up to the challenge. This was not challenged. He also stated that it was a difficult decision, especially considering the applicant's years of service."*²⁹

Relevant Legal Principles

[43] The relevant legal principles are well known. Those principles were restated in ***Herholdt vs Nedbank Ltd and Congress of South Africa Trade Union*** 2013(6) SA 224 (SCA) [2013 (11) BLLR 1074 (SCA)]. In that matter the Court held:

"[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls in one of the grounds in S145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particulars facts, are not in and of themselves sufficient for an award to be set aside but are only of any consequence if the effect is to render the outcome unreasonable"

[44] In the matter of ***Nyathikazi vs Public Health and Social Development Bargaining Council and others*** (2021) 42 ILJ 1686 and at paragraph 21 the Court held:

"[21] After the decision in Sidumo and another vs Rustenburg Platinum Mines Ltd and another 2008 (2) SA 24 CC and the further explication in Heroldt vs Nedbank Limited 2013 (6) SA 224 (SCA), it is clear that our law dictates that an award delivered by an Arbitrator will only be considered to be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before him or her. A material error of fact and the particular weight to be attached to a particular fact may in and of itself not be sufficient to set aside the award but will only be done if the consequence thereof is to render the ultimate outcome unreasonable"

²⁹ Pleadings, pages 34 – 35; Arbitration Award paragraphs 86 - 88

- [45] In the matter of **Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mining) v CCMA and Others** [2014] 1 BLLR 20 (LAC) and at paragraph 21 the Court held:

"Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see Minister of Health and Another vs New Clicks South Africa (Pty) Ltd and Others 2006 (2) SA 311 (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piece meal analysis. As soon as it is done in a piece meal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as a process. It follows that the argument that the failure to have regard to material facts may potentially result in a wrong decision has no place in review applications. Failure to have regard to material facts must actually defeat the constitutional imperative that the award must be rational and reasonable – there is no room for conjecture and guess work."

- [46] In **CUSA v Tao Yang Metal Industries and Others** [2009] 1 BLLR 1 (CC) the Court held:

"[65] Consistent with the objectives of the LRA, commissioners are required to "deal with the substantial merits of the dispute with the minimum of legal formalities." This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counterclaims and reach for the real dispute between the parties to perform this task effectively. Commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus, the LRA permits commissioners to "conduct the arbitration in a manner that the commissioner considers appropriate. But in doing so, commissioners must be guided by at least 3 considerations. The first is that they must resolve the real dispute between the parties. They must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do".

- [47] In the matter of **Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others** (2021) 42 ILJ 1071 (LAC) the Court held:

"[19] The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless capable of justification for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

[20] This court has eschewed a piecemeal approach to a review application by the Labour Court. The proper approach is for the Labour Court to consider the totality of the evidence in deciding whether the decision made by the arbitrator is one that a reasonable decisionmaker could make."

- [48] The review test has been recently restated in the matter of ***Makuleni v Standard Bank of SA (Pty) Ltd & Others*** (2023) 44 ILJ 1005 LAC. In *Makuleni* the Court restated the review test as follows:

*"[4] The import of these remarks demands a reflection in order to digest the essence of the exercise that a commissioner embarks upon. 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] The Labour Court's view of the case differed from that of the commissioner. As shall be addressed hereafter there are serious flaws in the reasoning articulated in the judgment. However, what is immediately deserving of emphasis is that, even if the perspective of the Labour Court is plausible and reasonable, that is an insufficient reason to displace the award in terms of the review test addressed above. **To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.** In our view, no material*

criticism can be advanced of the award that meets the threshold test for review."

(emphasis added)

[49] It is in light of these principles that the commissioner's award and the arbitration proceedings ought to be assessed.

The Wood transaction

[50] The evidence that served before the commissioner included the following:

- 50.1 On 13 July 2018, the applicant made an offer to Isipani, the contractor in the Village Square development, to acquire Oregon Pine wood from a house on the site which was due to be demolished ³⁰;
- 50.2 Mervyn Shanmugam (Shanmugam) is the applicant's line manager ³¹;
- 50.3 Wayne Hilton (Hilton) and Haydn Franckeiss (Franckeiss) were present on a site visit when the applicant told Isipani that he wanted to acquire the wood ³²;
- 50.4 On 31 August 2018, the applicant told Neil van Rensburg (van Rensburg) the chairman of Propco that he had made an offer to acquire the wood ³³;
- 50.5 The fact of the presence of Hilton and Franckeiss is irrelevant, the applicant ought to have first approached Shanmugam "*saying to him, this is what I want to do*" and obtained prior permission ³⁴;
- 50.6 Mr van Deventer (van Deventer), a contractor appointed by the applicant, removed the wood during the period 3 – 7 September 2018 ³⁵;

³⁰ Record, Volume 6, page 279, lines 17 - 23 and

³¹ Record, Volume 6, page 24, lines 13 -16; page 342, lines 4 - 5

³² Record, Volume 6, page 279, lines 17 - 23

³³ Record, Volume 6, page 282, lines 22 - 263

³⁴ Record, Volume 6, page 28, lines 7 – 19

³⁵ Record, Volume 6, page 281, lines 1 - 6

- 50.7 The applicant made payment to van Deventer for services at the Geelhuis, invoice amount R11,160.00 ³⁶;
- 50.8 When an employee is attending to their employer's business and an opportunity arises to obtain a personal benefit, that is a potential conflict of interest ³⁷;
- 50.9 Before taking any steps in relation to the wood the applicant ought to have gone to Shanmugam, his superior, to seek permission ³⁸;
- 50.10 The Oregon Pine wood had some value, the wood was not without value³⁹;
- 50.11 The value of the wood is not the principal concern, it is the process that the employee needs to follow in handling a conflict of interest ⁴⁰;
- 50.12 On 12 October 2018 the applicant informed Shanmugam of the wood transaction, that he acquired the wood and removed the wood ⁴¹;
- 50.13 As the Head of Sanlam Properties for several years, the applicant was in a position of senior management with significant responsibility ⁴²;
- 50.14 The applicant knew that in his position, managing property, conflicts of interest would arise ⁴³;
- 50.15 The first respondent needed to trust the applicant to make the right judgment calls when conflicts of interest arose ⁴⁴;

³⁶ Record Volume 6, page 333, lines 1 - 4

³⁷ Transcript page 326, lines 8 - 23

³⁸ Record, Volume 6, page 28, lines 1 – 6

³⁹ Record, Volume 6, page 194, lines 4 – 5, and page 339, lines 16 -17

⁴⁰ Record, Volume 6, page 29, lines 25 - 29

⁴¹ Record, Volume 6, page 283, lines 1 - 5

⁴² Record Volume 6, page 324, lines 1 - 9

⁴³ Record Volume 6, page 324, lines 10 - 11

⁴⁴ Record Volume 6, page 325, lines 1 - 10

- 50.16 Whenever the applicant is attending to the first respondent's business and an opportunity arises to obtain a personal benefit that is a potential conflict of interest ⁴⁵;
- 50.17 The first respondent has an interest in not having its employees acquiring benefits from situations in which they are acting on behalf of the first respondent ⁴⁶;
- 50.18 When in doubt an employee has to disclose a circumstance involving a potential conflict of interest to the first respondent ⁴⁷;
- 50.19 At a meeting on 12 October 2018, the applicant informed Shanmugam of the wood transaction, that he had acquired the wood ⁴⁸;
- 50.20 The applicant confirmed that there is value to the wood ⁴⁹;
- 50.21 At the point when the applicant made the decision to acquire the wood, to make the offer for the wood, he could see that there was a potential conflict of interest and that is why he mentioned it to Hilton and Franckeiss.⁵⁰ Hilton and Franckeiss are Fund Managers of the Sanlam Capital Fund;
- 50.22 At the point in time when he made the offer, the applicant was going to acquire the wood for himself ⁵¹;
- 50.23 As a matter of principle, a person managing property and visiting property developments almost on a daily basis cannot be seen to take any benefit for himself without attaining permission ⁵².

⁴⁵ Record Volume 6, page 325, lines 11 -12

⁴⁶ Record Volume 6, page 325, lines 19 - 21

⁴⁷ Record Volume 6, page 326, lines 14 - 22

⁴⁸ Record Volume 6, Page 333, lines 12 - 19

⁴⁹ Record Volume 6, Page 339, lines 15 - 19

⁵⁰ Record Volume 6, page 340, lines 1 - 5

⁵¹ Record Volume 6, page 341, lines 7 - 11

⁵² Record Volume 6, page 341, lines 12 - 18

[51] The evidence referred to above includes material parts of applicant's version
The applicant's version also included the following:

51.1 The Yellow House contained original Oregon Pine flooring which would be destroyed during the demolition.⁵³

51.2 On 31 July 2018, he offered to buy the wood flooring from Isipani.⁵⁴

51.3 He has an affinity for wood.⁵⁵

51.4 Hilton and Franckeiss were present on a site visit when the applicant told Isipani that he wanted to acquire the wood. Hilton and Franckeiss are Fund Managers of the Sanlam Capital Fund.

51.5 He does not think that he would have done things differently⁵⁶.

51.6 In an electronic mail dated 11 February 2019 to Shanmugam copied to Kilkenny, Warren Young, Roux and Naidoo, Pieter Joubert (Joubert) the first respondent's internal Legal Counsel wrote, *inter alia*, the following:

*"If the decision is that Andre may not retain the timber, Sanlam Life needs to take possession of the timber and compensate Andre for the cost to remove and store the timber to date."*⁵⁷

[52] The material facts that served before the arbitrator may be summarised as follows:

52.1 the applicant was a senior employee with some 30 years of experience and was aware that in the execution of his duties he would from time to time face potential conflicts of interest;

52.2 on 13 July 2018 the applicant visited the site and made an offer to acquire the Oregon Pine wood;

⁵³ Record Volume 6, page 279, lines 10 - 19

⁵⁴ Record Volume 6, page 279, lines 10 - 19

⁵⁵ Record Volume 6, page 279, lines 17 - 19

⁵⁶ Record Volume 6, page 342, lines 11 - 14

⁵⁷ Record, Volume 3, page 78

- 52.3 at the point in time when he made the offer, the applicant was going to acquire the wood for himself⁵⁸;
- 52.4 at the point when the applicant made the decision to acquire the wood, to make the offer for the wood, he could see that there was a potential conflict of interest;
- 52.5 Hilton and Franckeiss were present when the applicant made the offer to acquire the wood;
- 52.6 Hilton and Franckeiss are not the applicant's line manager;
- 52.7 on 31 August 2018 the applicant told van Rensburg that he had made an offer to acquire the wood;
- 52.8 the wood in question did have some value;
- 52.9 the applicant engaged the services of a private contractor (van Deventer) to salvage and remove the wood from the site.
- 52.10 the removal of the wood from the site took place during the period 3 September to 7 September 2018;
- 52.11 an employee attending to the employer's business and when an opportunity arises to obtain personal benefit faces potential conflict of interest;
- 52.12 the applicant knew that in his position managing property, conflicts of interest would arise;
- 52.13 a person in the applicant's position cannot be seen to be taking any benefit for himself without attaining prior permission;
- 52.14 Shanmugam was the applicant's line manager, the applicant ought to have obtained prior permission from Shanmugam in relation to the wood transaction;

⁵⁸ Record Volume 6, page 341, lines 7 - 11

52.15 the applicant did not seek Shamugam's prior permission in relation to the wood transaction;

52.16 the applicant first informed Shanmugan of the wood transaction on 12 October 2018, several months after the transaction;

[53] The material facts are not genuinely in dispute.

[54] It is submitted on behalf of the applicant, *inter alia*, that the commissioner *"failed to properly assess the evidence and to resolve material disputes of fact which required him to have regard to inter alia, the credibility of the witnesses. It is submitted that it was not possible for him to properly determine the credibility of the witnesses, their candour and demeanour and the calibre and cogency of their evidence without an opportunity to observe them personally. This is particularly so where his findings are based on "inference and the impression left by the evidence presented."*⁵⁹

[55] On the applicant's own version

55.1 he visited the site on 13 July 2018, made an offer to acquire the wood, when he did so he was going to acquire the wood for himself ⁶⁰;

55.2 he informed van Rensburg (the Chairman of Propco) on 31 August 2018 that he had made an offer to acquire the wood, he engaged a private contractor, during the period 3 to 7 September 2018 the wood was salvaged and removed by the private contractor engaged by him; and

55.3 the applicant knew that in his position, managing property, conflicts of interest would arise ⁶¹;

55.4 the first respondent needed to trust the applicant to make the right judgment calls when conflicts of interest arose ⁶²;

⁵⁹ Applicant's Heads of Argument, paragraph 33

⁶⁰ Record Volume 6, page 341, lines 7 - 11

⁶¹ Record Volume 6, page 324, lines 10 - 11

⁶² Record Volume 6, page 325, lines 1 - 10

- 55.5 whenever the applicant is attending to the first respondent's business and an opportunity arises to obtain a personal benefit that is a potential conflict of interest ⁶³;
- 55.6 the first respondent has an interest in not having its employees acquiring benefits from situations in which they are acting on behalf of the first respondent ⁶⁴;
- 55.7 when in doubt an employee has to disclose a circumstance involving a potential conflict of interest to the first respondent ⁶⁵;
- 55.8 he first informed Shanmugam on 12 October 2018.

[56] In addition, under cross-examination the applicant conceded that "*It is a matter of principle that a person managing property and visiting property developments almost on a daily basis can't be seen to take any benefit for himself without attaining permission*"⁶⁶

[57] It cannot reasonably be contended that the established facts as recorded above could be undone or disturbed by observations as to candour or demeanour of the witnesses who gave that evidence as captured in the transcript that served before the commissioner. An observation, for example, as to the applicant's candour or demeanour would not undo the established facts that arise from his own evidence. In addition, the weight of the established facts is not diminished by an absence of the commissioner observing the witnesses personally and taking a view as to their candour and demeanour.

[58] In the arbitration award the commissioner engages with the applicant's version including that he made the offer to acquire the wood in the presence of Hilton and Franckeiss⁶⁷, that "*part of the applicant's case was that*

⁶³ Record Volume 6, page 325, lines 11 -12

⁶⁴ Record Volume 6, page 325, lines 19 - 21

⁶⁵ Record Volume 6, page 326, lines 14 - 22

⁶⁶ Record Volume 6, page 341, lines 12 - 18

⁶⁷ Arbitration Award, paragraph 64

*ownership had not passed to him in July*⁶⁸, that *“the wood might have been used in another house that was going to be restored”*⁶⁹ and that *“the applicant agreed with Rudi Rutters to store the wood until a final determination as to whether it would be used in the restoration project”*⁷⁰.

- [59] It is contended that the commissioner *“completely ignored or dismissed”*⁷¹ the evidence of Rudolph Rutters (Rutters). This contention is not sustainable. The commissioner refers to Rutters and summarises his evidence at paragraphs 59 and 60 of the arbitration award. Rutters’ evidence does not disturb or undo the objective facts as to the alleged misconduct arising from the Wood transaction. The facts of the conflict of interest, the applicant’s failure or refusal to avoid the conflict of interest and the applicant’s failure or refusal to disclose the proposed transaction to Shanmugam and to seek his prior permission are not undone or disturbed by the evidence of Rutters.
- [60] It is contended that Joubert’s electronic mail was ignored. This contention is unsustainable. Joubert’s electronic mail of 11 February 2019 does not deal with the issue as to a conflict of interest and the applicant’s obligations in those circumstances. In any event, Joubert’s electronic mail of 11 February 2019 does not dispute nor displace the established facts in the evidence that served before the commissioner.
- [61] The commissioner’s survey of the evidence in relation to the Wood transaction is consistent with the evidence that served before him. That evidence included the evidence of the applicant himself and Rutters. Roux’s evidence included that Shanmugam should have been the first to be informed of the proposed transaction and that the applicant should have sought Shanmugam’s prior permission. This is not a matter in which the transcript reflects mutually exclusive or equally probable versions on the facts in relation to the Wood transaction. Properly put, on the evidence that served before the commissioner, it formed no part of the applicant’s case that he did

⁶⁸ Arbitration Award, paragraph 64

⁶⁹ Arbitration Award, paragraph 64

⁷⁰ Arbitration Award, paragraph 65

⁷¹ Applicant’s Heads of Argument, paragraph 35

not visit the site, that he did not make an offer to acquire the wood, that he did not instruct a private contractor to salvage and remove the wood, that he sought the permission of his direct superior (Shanmugam) prior to making an offer to acquire the wood or that he was unaware that a potential conflict of interest had arisen. In relation to the Wood transaction the material facts are not genuinely in dispute. The evidence of the first respondent's witnesses on the Wood transaction, Roux and Shanmugam, is entirely consistent with the objective facts. In those circumstances it cannot reasonably be contended that the commissioner made '*superficial findings*' as to credibility. The commissioner's findings as to credibility are firmly rooted in the evidence that served before him.

- [62] The commissioner's assessment that "*The only party who says that the applicant did nothing wrong is the applicant*" is entirely consistent with the facts that served before him. Self-evidently, the commissioner did not accept the proposition that the applicant did "*nothing wrong*". Similarly, the commissioner's assessment that the applicant did not "*put Sanlam's interests first*" is grounded in and supported by the evidence that served before him.
- [63] It is contended that "*it is common cause that the first respondent did not have a rule in place which regulated this issue. It was further accepted that this issue had not arisen in the past which would account for the different responses to the applicant's disclosures.*" ⁷² These contentions are unsustainable.
- [64] As dealt with above, the evidence that served before the commissioner establishes that the applicant is a senior managerial employee of the first respondent. In the ordinary course of his duties the applicant is required to avoid a conflict of interest. When a potential conflict of interest does arise the applicant is required to put the interests of the employer first. The applicant knew of a conflict of interest in relation to the Wood transaction. The applicant was required to inform Shanmugam, his direct superior, of the proposed transaction and to seek his prior permission. The applicant did not do so and only informed Shanmugam after the Wood transaction and some three

⁷² Applicant's Heads of Argument, paragraph 73. Record Volume 6, page 341, lines 12 - 18

months later. The breach of the applicant's obligations to the first respondent as his employer in relation to the Wood transaction is firmly established in the evidence.

- [65] In the arbitration award the commissioner expressly deals with the applicant's fiduciary duties, the issue of conflict of interest and the standard of conduct required of the applicant. In this regard, paragraph 68 of the arbitration award records, *inter alia*, the following:

"I therefore agree that, because the applicant conceded that he had certain fiduciary duties, that his fiduciary duty, which is implied in his contract of employment covers the issue of conflict of interest and sets the rule or standard of conduct. Even if there was no written policy, it would reasonably be expected of the applicant to have been aware of the expected standard of conduct. The applicant acted contrary to what was expected of him in this regard".

- [66] On the evidence that served before the commissioner, the applicant's established misconduct in relation to the Wood transaction is serious misconduct. The applicant as a senior managerial employee in the financial services industry was obliged to avoid conflicts of interest and the first respondent as his employer needs to trust that the applicant would make the right judgment calls when conflicts of interest arise. The applicant as a senior managerial employee did not put the interests of the employer first.
- [67] There can be no serious suggestion that the established facts are other than as set out above. That being the case, inferences are properly drawn from the established facts. The commissioner, to the extent that he drew inferences, did so on the basis of the established facts. In doing so, the commissioner did not act improperly, nor did he misconduct himself in relation to his duties as a commissioner. In the circumstances the commissioner's

finding that the commission of the misconduct was proven⁷³, is grounded in and properly supported by the evidence that served before him.

[68] On the evidence that served before the commissioner the applicant made an offer to buy the wood on 13 July 2018 and informed Shanmugam of the wood transaction on 12 October 2018. During December 2018 steps were taken to institute a forensic investigation into the Wood transaction. Shanmugam informed the applicant of the forensic report on or about 6 March 2019. In relation to the Wood transaction, it cannot reasonably be contended that there was any delay in the institution of disciplinary action and specifically the disciplinary notice dated 16 April 2019.

[69] In relation to the Wood transaction there can be no serious or sustainable contention that the commissioner's reasoning and findings are "*entirely disconnected with the evidence, unsupported by any evidence and involves speculation*" as contemplated in *Securitas*.⁷⁴

The Second Allegation

Propco

[70] The evidence that served before the commissioner included the following:

70.1 Shanmugam was appointed to the position of CEO of the Alternatives Business on 1 July 2018. Shanmugam took over from Ben Kodisang (Kodisang).⁷⁵ By that time, the applicant had been the Head of Sanlam Properties for three years.

70.2 The applicant could not dispute nor deny that during Shanmugam's first meeting with the whole team, he said words to Shanmuga to the following effect: "*don't try and do what your predecessor tried to do*".⁷⁶

⁷³ Arbitration Award, paragraph 68

⁷⁴ *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2021) 42 ILJ 1071 (LAC)

⁷⁵ Record Volume 6, page 344, lines 10 - 15

⁷⁶ Record Volume 6, page 344, lines 16 - 21

- 70.3 Shanmugam testified that *"of course it was disrespectful"*.⁷⁷
- 70.4 It was necessary for committees like Propco to be transformed and that that was very much part of Shanmugam's mandate coming into the position of CEO of the Alternatives Business.⁷⁸
- 70.5 The applicant confirmed that the issue as to transformation is one of the first questions potential investors might ask.⁷⁹
- 70.6 Shanmugam had a number of discussions with the applicant in relation to the composition of Propco; ⁸⁰
- 70.7 The applicant did say to Shanmugam that Propco already had good people.⁸¹
- 70.8 At the relevant time Propco comprised six white men, including the applicant. ⁸²
- 70.9 It was Roux's evidence that:

"So, for me, the thing is, what is very clear in our world is that if you want build a successful business, diversity is very, very important for us to get right as a business. So therefore, whether the structure is right to say just people of colour, just on its own merit, you know, you can talk about that as well, but for me the reality is of diversity in the, you know, in Propco will be of critical importance, of critical standing to make sure that you create a successful business.

...

⁷⁷ Record Volume 6, page 144, lines 13 - 16

⁷⁸ Record Volume 6, page 345, lines 5 - 12

⁷⁹ Record Volume 6, page 345, lines 13 - 15

⁸⁰ Record Volume 6, page 146, lines 18 – 28 and page 147, lines 1 - 11

⁸¹ Record Volume 6, page 146, lines 18-78, page 186, lines 20 – 24, page 187, lines 1 – 8 and page 348, lines 4-9

⁸² Record Volume 6, page 32, lines 1 - 7

Sanlam comes from a history of being white Afrikaner male, we all have to acknowledge that and I am just as white and Afrikaans as everyone. But the reality is that we need the diversity of all these types of things that I have described now not so elegantly. But what I have tried to say is that Propco would be a better place if it is more diverse and that would include as I said, women, colour, whatever it is and I think that Mervyn is correct in driving that.”⁸³

70.10 Shanmugam’s evidence was that he did not ask the applicant to put him on Propco.⁸⁴

70.11 The applicant was of the view that Propco had good people and that it functioned efficiently.⁸⁵

70.12 The applicant’s view was that Propco as currently constituted could conclude its business in a relatively short period of time and specifically:

“My comment to him was, we function quite well as a committee and the reason for that was we had very good people so we probably finished meetings in two hours, that would take four hours if you didn’t have good people.”⁸⁶

70.13 It was Shanmugam’s assessment that the applicant at that stage was not willing to change the composition of Propco and that, it would only change if the applicant thought there was a good reason: *“What it said to me was that, you know, if he was unwilling, you know, to expand on ideas, that it would only change if he thought there was a good reason, you know to change it and you know only if he thought that we could change it. So, in*

⁸³ Record Volume 6, page 32, lines 7 - 25

⁸⁴ Record Volume 6, page 186, lines 20 – 24 and page 187, lines 1-8

⁸⁵ Record Volume 6, page 292, lines 19 – 24 and page 293, lines 1 - 12

⁸⁶ Record, volume 6, page 292, lines 19 – 24 and page 293, lines 1 – 12

*that respect I felt that my view was not important at all. You know he was basically having disregard for my opinion”.*⁸⁷

[71] The commissioner’s arbitration award on this score surveys the material evidence before him. The commissioner’s arbitration award reads, *inter alia*, as follows:

“19. Mr Roux testified that Sanlam comes from a history of white Afrikaner males being in charge. Diversity in the Group and in all committees, including Propco has become imperative to build a successful business. The notion should not be that the people already on Propco are good enough. Diversity includes people with different skills, race groups and to include women. Propco would be a better place if it was more diverse. Mr Shanmugam was correct to drive that point. Mr Naidoo confirmed that transformation is a very high priority in the financial services industry. They need a more diverse and inclusive Propco and all other committees ought to be looked at.

20. Mr Shanmugam testified that from the beginning he had “quite a relationship” with the applicant. During the first meeting he had with the team, when he asked for input after his presentation, the applicant remarked “don’t do what you predecessor did”. He thought at the time that the response was slightly disrespectful. His task as the newly appointed CEO was to improve the governance structures and transformation within the business and to attract clients. In a meeting soon thereafter about the composition of Propco, that is run by six white males, he said to the applicant that it must be transformed to illustrate to the market that Sanlam has transformed to attract third party funds. The applicant’s opinion was that Propco was already functioning, had very good people

⁸⁷ Record, Volume 6, page 146, lines 18 – 28 and page 147, lines 1 – 11

and he saw no need to change it. From that he got the impression of opposition to transformation, that the applicant was unwilling to engage and that his views were not important enough for the applicant. He assured the applicant that transformation would involve thorough consultations. He hoped that the relationship would improve. It did not.

21. The applicant testified that he and Mr Shanmugham had one or two maybe three discussions. In the first meeting Mr Shanmugham asked him whether he could put him on Propco. He responded that it was not within his powers to do so, but he could request that he be made an attendee. That he then did. That way Mr Shanmugham got all Propco documents.

...

45. Mr Shanmugham, during cross-examination, denied that he never had meetings with the applicant. They had regular catch ups in addition to the Exco meetings when the applicant gave feedback. He conceded that by March 2019 his view was not that dismissal need be resorted to. Thereafter, he had more time to consider the situation. He disagreed that he could not interfere with the applicant in relation to his Propco activities. Propco manages investments only. Applicant was a member of the committee but was employed by Sanlam Investments not Propco or Sanlam Properties. In accordance with the Charter, responsibility filters down from Mr Roux to Mr Naidoo, to himself and then to the applicant. The applicant had to keep him up to date with decisions before going to Propco. He denied that he asked the applicant to [become] member of Propco. He asked that Propco be transformed. He disagreed that the relationship between him and the applicant started off on a good footing. The

relationship was difficult since the beginning when the applicant confronted him in front of everyone.

...

47. He did not deny that members of Propco are good. It does need diversity though. A consultant was engaged to review the governance process. Since the beginning he wanted to get by-in. the applicant was not open to discussions on transformation. He did not have unreasonable expectations. He did expect the applicant to keep him abreast of material changes."

- [72] The commissioner's survey of the material evidence is a fair reflection and assessment of the evidence that served before him. The commissioner then records the following:

"73. I cannot conclude that Mr Shanmugam asked the applicant to get him onto Propco as a committee member. I do accept that he raised the fact that the committee was not diverse with the applicant. This was part and parcel of Mr Shanmugam's mandate, to drive transformation or improve corporate governance. The issue though is not whether Mr Shanmugam asked to become a Propco Committee member, the issue is about the applicant's response. I agree that his response indicated opposition to the idea of transformation in Propco. Mr Shanmugam is entitled to his opinions and inferences. These are valid. I am unable to conclude that he was oversensitive or irrational in drawing conclusions from the interaction. The applicant was of the opinion that Propco already had good people and there was not need for transformation. He clearly disregarded Mr Shanmugam's view. By the time, he must have already known that Mr Shanmugam was going to drive transformation within Alternative Investments."

[73] In the commissioner's assessment the *"issue though is not whether Mr Shanmugam asked to become a Propco committee member, the issue is about the applicant's response, I agree that his response indicated opposition to the idea of transformation in Propco."*⁸⁸ The commissioner's assessment is supported by the evidence that served before him.

[74] Allegation 2 is, *inter alia*, in the following terms:

"6.2 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insulant and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam as your line manager, on various occasions."

[75] The gravamen of allegation 2 includes disregard and disrespect for Shanmugam and undermining Shanmugam's authority. The employer's concern was with the applicant's conduct towards Shanmugam as his line manager. A key part of Shanmugam's mandate as the newly appointed CEO of the Alternative Business was driving transformation, which includes the need for Diversity in relation to Propco. The first respondent's concern was the applicant undermining his line manager as is recorded in allegation 2.⁸⁹ The allegation of misconduct does not turn on its wording or a construction as to whether Shanmugam asked to become a member of Propco. The evidence that served before the commissioner is a proper basis for the commissioner's assessment that *"the applicant was of the opinion that Propco already had good people and there was not need for transformation."*⁹⁰

⁸⁸ Arbitration Award, paragraph 3

⁸⁹ Record Volume 2, page 1, paragraph 2

⁹⁰ Arbitration Award, paragraph 73

[76] It is contended on behalf of the applicant that:

"62. The third respondent abdicates his responsibility to resolve the dispute about whether Shanmugam asked to become a member of Propco. This ultimately leads to the irrational finding that "The issue though is not whether Mr Shanmugam asked to be a Propco member, the issue is about the applicant's response". It is submitted that it is not possible to assess the applicant's response in the absence of determining what he was responding to."

[77] It is further contended on behalf of the applicant that:

*"64. The wording of the charge turned directly on whether Shanmugam asked to be placed on Propco. Accordingly, in the absence of making a proper determination on the nature of the discussion, it was unreasonable to impute an anti-transformation flavour to the applicant's response."*⁹¹

[78] These contentions are misguided and unsustainable. As noted above, the first respondent did indeed have concerns about the applicant's conduct. Those concerns include the applicant's approach and attitude to transformation in the business of the first respondent. Shanmugam is the applicant's line manager. Shanmugam had concerns as to the composition of Propco as it relates to Diversity. Shanmugam had a number of meetings with the applicant on the composition of Propco. Shanmugam's evidence includes that the applicant was unwilling to engage on changes to the composition of Propco and that the applicant disregarded his views.⁹²

[79] The record that served before the commissioner is a proper basis for the commissioner to conclude as he did:

"I agree that his response indicated opposition to the idea of transformation in Propco. Mr Shanmugham is entitled to his opinions and inferences. These are valid. I am

⁹¹ Applicant's Heads of Argument, paragraphs 62 and 64

⁹² Record Volume 6, page 146, lines 18 – 28 and page 147, lines 1 – 11

unable to conclude that he was oversensitive or irrational in drawing conclusions from the interaction. The applicant was of the opinion that Propco already had good people and there was no need for transformation. He clearly disregarded Mr Shanmugham's view. By that time, he must have already known that Mr Shanmugham was going to drive transformation within Alternative Investments."⁹³

[80] The record that served before the commissioner is a proper basis for the commissioner's assessment and conclusion that the applicant's response "*indicated opposition to the idea of transformation in Propco*". That real and actual concern informed the allegations of misconduct and that concern is not masked or clouded by the wording of the allegation. The applicant had a proper appreciation of the first respondent's concern on this score. The contentions advanced on behalf of the applicant as to the wording of allegation 2.1 are misguided.

[81] Under our law, in relation to the framing of allegations of misconduct, the test is whether the employee is aware of the nature of the allegations against them. In the matter of *Pailprint (Pty) Ltd v Lyster N.O. & Others* (2019) 40 ILJ 2047 (LAC) the Court held:

*"[18] It has repeatedly been stated by this court that an unduly technical approach to the framing **and consideration** of allegations of employ misconduct should be avoided."*

(emphasis added)

[82] On the record that served before the commissioner it cannot reasonably be contended that the applicant did not have an appreciation of the first respondent's real concern or that the applicant did not have an opportunity to prepare a defence.

⁹³ Arbitration award, paragraph 73

Congratulatory electronic mail (12 July 2018)

[83] In his arbitration award and in relation to the 'Congratulatory email' to the team of 12 July 2018 the commissioner records, *inter alia*, the following:

*"74. This goes with the email to congratulate the team on securing the R700mil from Alexander Forbes. Two hours after having sent that email, the applicant responded. His version is that he was known for being abrupt and straightforward. His response was neither. He clearly indicated to Mr Shanmugham that he would decide whether there would be changes. It was not his decision. His new line manager was responsible for doing so and indicated that changes would happen after consultation with all relevant people. There is no evidence that anyone ever criticised the applicant, Propco or Sanlam Properties of having a bad corporate governance structure. There might well have been ways to strengthen this. The applicant clearly showed to his line-manager not to interfere. Messrs Roux and Naidoo also expressed their view that the applicant was wrong. They were not challenged in their views. That Mr Shanmugam did not immediately take disciplinary action against the applicant does not detract from what happened. There should not be a need for senior people to be constantly admonished or warned."*⁹⁴

[84] The evidence that served before the commissioner includes the following:

84.1 On 12 July 2018, Shanmugam sent an electronic mail to everyone in the Alternatives Business,⁹⁵ including the applicant. In that electronic mail Shanmugam records, *inter alia*, his congratulations to the team. In this electronic mail Shanmugam also records:

⁹⁴ Arbitration Award, paragraph 74

⁹⁵ Record Volume 2, pages 8 and 9

"I want to highlight the importance of building a credible, market leading, 3rd party alternative offering, in my discussions with some of you, it seems like Forbes is impressed with our governance framework and our ability to accommodate a thorough due diligence on such short notice. We will build their confidence further by strengthening our governance structure going forward."

- 84.2 In response and on 12 July 2018, the applicant sent Shanmugam an electronic mail. In his electronic mail the applicant records *inter alia*, the following:

"Hi Mervin,

I am concerned that the mentioning of strengthening the governance process pops up again and again.

I want us to spend a long session and focus on corporate governance for Sanlam Properties in particular. If we understand how we are currently functioning and identify any issues that needs to be addressed then I am willing to change the process immediately to improve. If we cannot justify change based on improvement then there is no reason for change. The introduction of a new corporate governance process that is going to impact on my ability to manage my funds will be difficult to agree to.

We have a thorough investment decision-making process tested over time with external independent representation on investment committees, independent due diligence process rigorously followed, etc. We have a proven long track record on performance and a quality portfolio built up over 20 years plus using the current process.

The asset consultants we have engaged with have all made recommendations to their clients for investment.

They would not have done this if they have not bought into corporate governance process.

I am willing to engage with anybody that has the view that the corporate governance process within Sanlam Properties is not functioning.

Regards”⁹⁶

- 84.3 It was the evidence of Roux that improvements and changes to the governance process are not the decision of the applicant. In this regard the transcript records the following:

“This is not his decision. The decision of governance process of Sanlam Properties cannot lie with the business itself. It lies with the superior of the business, so it is completely inappropriate. Look, we should always have, I would think that, and Mervyn would have said it that one will always have to listen to proposals that comes from the property business and how the governance should work within the business, but it is inappropriate to think that he will decide whether it will be followed or not. Governance doesn't work like that. You are governed by somebody who is above you. You can't govern yourself. So this sounds like I will decide for myself how I will be governed. The superior of a business will decide how you are governed. You can influence it by giving your input, but you know, just the way it is described shows... you know, it shows disrespect. You shouldn't be doing it like this. You should be saying I have got some input into the governance process, can we please discuss it. Rather than I will decide whether I can agree to it. I just don't think

⁹⁶ Record Volume 2, pages 6 and 8

it is the right way of doing it. It is a bit derogatory to the guy that sits above him, to say this to him.”⁹⁷

84.4 The applicant’s evidence includes that:

84.4.1 *“He was slightly concerned, and the concern was correct, when people started asking [him] within the Sanlam Group, probably around the coffee table or something, but wasn’t your corporate governance good enough.”⁹⁸*

84.4.2 The risk was that potential clients of his, if they do not believe that his processes are good and robust, they potentially could not invest.⁹⁹

84.4.3 He was *“quite proud of the corporate governance that we had in place.”¹⁰⁰*

84.4.4 *“I was getting concerned that every time there was communication it was mentioned that the corporate governance had to be looked at. So in my abrupt way, I immediately send a mail to him.”¹⁰¹*

84.4.5 *“It was a response, an opportunity to mention in general that the comment about corporate governance, I disagree with. I am sure, I am allowed to disagree with my manager and if I inform him, there is nothing wrong with that.”¹⁰²*

84.5 Shanmugam sent the applicant a further electronic mail¹⁰³ stating that the applicant was an important member of the team that they were building and further that they would *“would go through the process to determine the best governance structure not only for your portfolio but for the entire Alternatives business”¹⁰⁴.*

⁹⁷ Record Volume 6, pages 33 to 35

⁹⁸ Record, Volume 6, page 29, lines 6 – 9

⁹⁹ Record Volume 6, page 294, lines 10 – 14

¹⁰⁰ Record Volume 6, page 294, lines 9 – 14

¹⁰¹ Record Volume 6, page 295, lines 15 – 17

¹⁰² Record Volume 6, page 295, lines 15 – 21

¹⁰³ Record Volume 2, page 6

¹⁰⁴ Record Volume 2, page 6

84.6 Under cross-examination the applicant's evidence included the following:

*"If the perception is created that if what is there currently then yes you can. If my perception is for example, if Sanlam Properties is really good but word gets out that the new manager thinks its not good enough, that can scare people off."*¹⁰⁵

84.6.1 The tone of his electronic mail to Shanmugam was definitely not subordinate at all.¹⁰⁶

[85] On the evidence that served before the commissioner, Shanmugam sent a Congratulatory electronic mail to the Alternatives business on 12 July 2018. That was 12 days after Shanmugam was appointed as CEO of the Alternatives business. Shanmugam's electronic mail of 12 July 2018 conveys his congratulations and expresses his gratitude to *"the heads of the various building blocks and the many people who supported them."* Shanmugam then references discussions with some of the employees in the Alternatives business and in relation to Forbes specifically records the following:

*"it seems like Forbes is impressed with our governance framework and our ability to accommodate a thorough due diligence on such short notice. We will build their confidence further by strengthening our governance structure going forward."*¹⁰⁷

[86] On the evidence before the commissioner:

86.1 part of Shanmugam's mandate when he was appointed as CEO of the Alternatives Business was to strengthen the governance structure.¹⁰⁸

¹⁰⁵ Record Volume 6, page 350, lines 21 – 24

¹⁰⁶ Record, Volume 6, page 353, lines 28 – 29 and page 354 line 1

¹⁰⁷ Record Volume 2, page 8

¹⁰⁸ Record Volume 6, page 148, line 17 – 24 and page 149, lines 1 - 7

- 86.2 the applicant was aware that Shanmugam's mandate included strengthening corporate governance;¹⁰⁹
- 86.3 the decision of governance of Sanlam Properties does not lie with the business itself but rather with Shanmugam¹¹⁰;
- 86.4 the applicant can influence governance by giving his input¹¹¹ ;
- 86.5 the applicant's electronic mail response (on 12 July 2018) to Shanmugam's electronic mail (12 July 2018) is "*completely inappropriate*"¹¹²;
- 86.6 it is inappropriate to think that applicant will decide whether it will be followed or not, "*governance doesn't work like that*"¹¹³ ;
- 86.7 the applicant's response was "*a bit derogatory*" to Shanmugam¹¹⁴.

[87] On any reasonable assessment, Shanmugam's electronic mail of 12 July 2018 is positive, praises the employees and expresses his gratitude. Shanmugam's comment as to "*strengthening our governance structure going forward*" is no criticism at all. The applicant's explanations for his electronic mail (a risk that clients in the broader Sanlam Group potentially cannot invest going forward as they would question whether his governance was not good enough) are unfounded. On the evidence that served before the commissioner, there is no construction of Shanmugam's electronic mail that could yield a result that he was being critical of the applicant.

[88] The electronic mail exchange between Shanmugam and the applicant is not in dispute. The applicant contends that there is nothing wrong with his electronic mail to Shanmugam of 12 July 2018 and in fact claims that his electronic mail to Shanmugam is "*not insubordinate at all*" ¹¹⁵. Shanmugam takes a different view. Of critical importance, the evidence establishes that

¹⁰⁹ Record Volume 6, page 350, lines 8 - 10

¹¹⁰ Record Volume 6, pages 33 to 35

¹¹¹ Record Volume 6, pages 33 to 35

¹¹² Record Volume 6, pages 33 to 35

¹¹³ Record Volume 6, pages 33 to 35

¹¹⁴ Record Volume 6, pages 33 to 35

¹¹⁵ Record, Volume 6, page 353, lines 28 – 29 and page 354 line 1

Roux, who is senior to both Shanmugam and the applicant, found the applicant's response to be completely inappropriate and "*a bit derogatory*"¹¹⁶. Roux, properly put, was quite strident in his criticism of the applicant's conduct in relation to the Congratulatory electronic mail.

- [89] On a reasonable assessment the tone and tenor of the applicant's electronic mail to Shanmugam of 12 July 2018 does disclose resistance. The commissioner's assessment that the applicant clearly indicated to Shanmugam that "*he [the applicant] would decide whether there would be changes*"¹¹⁷ is a reasonable assessment and firmly rooted in and supported by the evidence that served before him. The same applies to the commissioner's assessment that "*the applicant clearly showed to his line manager not to interfere*"¹¹⁸. The evidence that served before the commissioner was a proper basis for the commissioner's determination that the applicant "*clearly did not wish to subject himself to his newly appointed manager's authority*".¹¹⁹

Nelspruit Development electronic mail

- [90] In relation to the Nelspruit Development the commissioner records, *inter alia*, the following:

"75. *The applicant also ignored Mr Shanguman's request that they discuss the Nelspruit Development before proposals were put to Mr Roux. He went ahead and wrote directly to Mr Roux. Although Mr Roux did not seem to have an issue with this, he did testify that one's superior cannot be bypassed and the applicant should have ensured that he and his superior were on the same page, before approaching him. The applicant did not explain why he did not discuss*

¹¹⁶ Record Volume 6, pages 33 to 35

¹¹⁷ Arbitration Award, paragraph 74

¹¹⁸ Arbitration Award, paragraph 74

¹¹⁹ Arbitration Award, paragraph 74

*the matter with Mr Shanmugam before writing directly to Mr Roux. I agree with the submission that this is an example of the applicant disregarding his manager's authority."*¹²⁰

[91] The evidence that served before the commissioner includes the following:

91.1 On 28 August 2018, the applicant sent an electronic mail to Roux copying Francois Kellerman, Reece Briesies and Shanmugam. The subject of the electronic mail was "*Residential Development Nelspruit*". The electronic mail reads as follows:

"Hi Robert

I refer to our conversation regarding the transfer of the Rest in Sanlam Properties – Nelesco is the company in question. Nelesco owns a farm that is a rezoned and services provided to sell off plots to owners and developers.

This asset is valued at approximately R108m. The asset is recognized in Sanlam Properties (Pty) Ltd owned by SCM and all the impairments flow through to SCM Income statement. My understanding is that this asset has been a drag to the owner due to previous impairments of R15m.

My understanding is that further impairments may be required as Phase 3 (of 4 phases to be developed and sold) is being remeasured and the expectation is that the number of plots available will be less than what is assumed currently. We have not considered Phase 4 yet.

Sanlam Properties (that I manage to avoid confusion) does not have a balance sheet to cover this asset – we do not own anything. We cannot take write downs of R16m through the income statement as this is equal to a large

¹²⁰ Arbitration Award, paragraph 75

proportion of expected profits for a year. We manage the asset (properties) for other owners on a fee basis. In short Sanlam Properties cannot own this property and will have to contract to manage Nelesco with the new owner.

Can we set up some time to discuss this proposed transaction/transfer with the parties included in this mail.

*Regards*¹²¹

91.2 Roux's evidence was in effect that the applicant had acted incorrectly. Roux's evidence includes the following:

91.2.1 You get your superior on side with the proposal that you want to make¹²².

91.2.2 It is actually Shanmugam who should be making the proposal to him [Roux] after Shanmugam had discussed it with the applicant¹²³.

*"But you know, with that I don't have a real issue in the end. If they have agreed, and Mervyn is happy with the proposal it doesn't really matter where it comes from as long as they are on the same page, but it could be, should be, get your superior on the same page before you, you can't bypass him because all I will do is send it back to the superior because he has to be the one that is taking responsibility for that"*¹²⁴.

[92] The evidence that served before the commissioner was rather straightforward:

92.1 Following a board meeting a proposal was to be made in relation to certain assets. The assets ultimately fell under Shanmugam's authority.¹²⁵

¹²¹ Record Volume 2, pages 11 - 12

¹²² Record Volume 6, page 35, lines 13 - 24

¹²³ Record Volume 6, page 35, lines 13 - 24

¹²⁴ Record Volume 6, page 35, lines 13 - 24

¹²⁵ Record Volume 6, page 151 to page 153, line 2

92.2 The applicant was required to develop a proposal, to discuss the proposal with Shanmugam and thereafter Shanmugam and the applicant would approach Roux with a proposal.¹²⁶

92.3 Before discussing the issue with Shanmugam, the applicant went directly to Roux.¹²⁷

92.4 The applicant copied Shanmugam in his electronic mail to Roux.

92.5 The applicant's rationale included "*maybe if Robert understood the ownership structure, he could immediately have made a call on his own and said ok, I understand we can do this or that proposal but at that point the objective was to get everybody in the discussion in line with what the issue is now*".¹²⁸

92.6 The applicant approached Shanmugam after he had sent his electronic mail to Roux.¹²⁹

[93] The commissioner's assessment that the applicant "*ignored Mr Shanmugam's request that they discuss the Nelspruit Development before proposals were put to Mr Roux*"¹³⁰ is supported by the evidence.

[94] The facts as to what transpired are not genuinely in dispute. The commissioner, in the face of those facts, did not accept the applicant's explanation for his conduct in going directly to Roux. The evidence that served before the commissioner is a proper basis for the commissioner's conclusion that "*the applicant did not explain why he did not discuss the matter with Mr Shanmugam before writing directly to Mr Roux. I agree with the submission that this is an example of the applicant disregarding the manager's authority*".¹³¹

¹²⁶ Record Volume 6, page 151 to page 153, line 2

¹²⁷ Record Volume 6, pages 357 - 358

¹²⁸ Record Volume 6, page 356, lines 1 - 4

¹²⁹ Record, Volume 6, page 357, lines 3 – 9

¹³⁰ Arbitration Award, paragraph 75

¹³¹ Arbitration Award, paragraph 75

The Memorandum of Understanding (MOU) electronic mail

[95] In relation to the MOU electronic mail the commissioner records, *inter alia*, the following in his arbitration award:

“76. On 28 August 2018, the applicant also sent an email to Mr Roux about the recently concluded MOU. He did not copy Mr Shanmugham into this. This is clearly a very important document. The applicant’s version is that Mr Shanmugham was kept abreast because he was an invitee on Propco and received all the documents. The point is, as was testified, the changes in the MOU should have been brought to Mr Shanmugham’s attention before the Propco meeting. At that meeting, it would not be possible to debate the document. He should have been kept fully abreast of developments, particularly regarding such an important document. Mr Shanmugham saw this as another example of the applicant ignoring him and disregarding him as his manager. The applicant deflected and failed to explain why his manager was ignored regarding the MOU. I agree that the applicant was not required to send all documents to his manager. He was required to send emails to important issues that could impact on operations to his manager.”¹³²

[96] The evidence that served before the commissioner includes the following:

96.1 On 28 August 2018, the applicant sent Roux an electronic mail. That electronic mail reads, *inter alia*, as follows:

¹³² Arbitration award, paragraph 76

"Hi Robert

Sanlam Properties has recently concluded the signing of a Memorandum of Understanding (MOU) with Sanlam Life (Anton Gildenhuys).

The inclusion of developments has been made in the mandate but with strict requirements as required by SIM Board members.

We include extracts from the MOU and various annexures that deals with developments. I can send you the full MOU to give context if needed.

*Regards"*¹³³

- 96.2 On 29 August 2018, Roux sent Shanmugam an electronic mail in relation to the 28 August 2018 electronic mail from the applicant. Roux's email to Shanmugam reads as follows:

"FYI – in case you are not in the loop.

*RR"*¹³⁴

- 96.3 Roux's evidence was that Shanmugam was not copied on the electronic mail, that he thought that Shanmugam *"wasn't in the loop so therefore I sent it on to him. I was worried he was not in the loop because if he was not in the loop, I am not going to look at it."*¹³⁵

- 96.4 In relation to the proposition that Shanmugam was at Propco and would be aware of all property decisions or property matters taken at Propco and therefore would be *"in the loop"*, Roux's evidence included the following:

"No, incorrect. I said in the loop beforehand. You have to be in the loop beforehand. If he goes to Propco and somebody presents something there on behalf of the

¹³³ Record Volume 3, page 71.1

¹³⁴ Record Volume 3, page 71.1

¹³⁵ Record Volume 6, page 36, lines 12 -17

company and he is not in the loop there it is absolutely the wrong place to have a debate on it. So, for me in the loop means that we are on the same page. And that should happen before you go to Propco. So, that he is at Propco, doesn't say he is in the loop. No.

...

He is only in the loop if he has had a discussion before that. And, he doesn't sound like it out of the emails that I saw.”¹³⁶

- 96.5 The testimony of Nersan Naidoo (Naidoo), the CEO of Sanlam Investments, as to his expectation had he been the applicant's manager includes that he would have expected:

“To discuss the changes with me so that I may take a view whether or not they make sense for the business, whether or not they challenge or pose any risks for what we are doing from a business perspective. And to discuss them with me before discussing them with Mr Roux.

...

Certainly, that was the way I would have felt about it, given that I also sat on that Board at the time that I would have wanted to have been aware of what was being escalated to the Board to make sure that it was, it was consistent with discussions that were had previously and that if any questions then were raised about, you know, the changes that were implemented or proposed and the impact that they may have on the business, that I was equipped at Board level to discuss them.”¹³⁷

¹³⁶ Record Volume 6, page 54, lines 9 - 23

¹³⁷ Record Volume 6, page 117, lines 10 – page 188, lines 15 and page 136, lines 1 - 10

96.6 Shanmugam's evidence under cross-examination includes that it was necessary and reasonable for the applicant to discuss changes to the MOU with him before taking it any further and that *"as a subordinate I would have expected him to keep me up to date before it gets to Propco. Not at Propco. Propco is too late for me."*¹³⁸

96.7 Under cross-examination the applicant's evidence included the following:

"ADVOCATE NORTON: *And Mr. Shanmugam's response was that if this was something that you could send and make available to Robert Roux then it is something that he ought to have received as well.*

MR RHEEDER: *I made the call given that he had the full document that was tabled at Propco prior to Mr Neil van Rensburg giving me instructions that he was in the no. I did discuss it with him, he was in, what do you call it, he did have the MOU. My assumption was that he would read the document if he had questions, he could have asked me."*¹³⁹

[97] The evidence that served before the commissioner is rather straightforward and includes the following:

97.1 The Memorandum of Understanding (MOU) documents govern the relationship between Sanlam Life and Sanlam Properties and Sanlam

¹³⁸ Record Volume 6, page 183, lines 4 - 5

¹³⁹ Record Volume 6, page 361, lines 11 - 17

Investment Management. Sanlam Investment and Sanlam Properties manage the assets. The MOU is an important document regulating, *inter alia*, the investment and the related fees between the parties.¹⁴⁰

97.2 The applicant sent an electronic mail to Roux on 28 August 2018 in relation to the MOU.¹⁴¹

97.3 Shanmugam was not one of the recipients of the applicant's electronic mail to Roux on 28 August 2018.¹⁴²

97.4 The applicant's electronic mail to Roux of 28 August 2018 was in relation to business which in the ordinary course fell under Shanmugam's authority.

97.5 On 29 August 2018, Roux sent Shanmugam the electronic mail that the applicant had sent Roux on 28 August 2018¹⁴³.

97.6 Roux was "*worried*" that Shanmugam "*was not in the loop because if he was not in the loop, I am not going to look at it*".¹⁴⁴

97.7 Shanmugam has to be "*in the loop*" beforehand, before it goes to Propco.¹⁴⁵

[98] The facts that served before the commissioner in relation to MOU electronic mails are not genuinely in dispute. It is clear that the commissioner did not find the applicant's explanations for approaching Roux directly, and without involving Shanmugam, acceptable. The commissioner did not accept the applicant's version that he had not acted incorrectly. The commissioner's findings are properly grounded in and supported by the evidence that served before him.

¹⁴⁰ Record Volume 6, page 153, lines 15 - 22

¹⁴¹ Record Volume 3, page 71.1

¹⁴² Record Volume 3, page 71.1

¹⁴³ Record Volume 3, page 71.1

¹⁴⁴ Record, Volume 6, page 36, lines 12 – 17

¹⁴⁵ Record Volume 6, page 54, lines 9 - 23

[99] The commissioner's assessment that Shanmugam "*should have been kept fully abreast of developments particularly regarding such an important document*"¹⁴⁶ is firmly rooted in the evidence that served before him. Similarly, the commissioner's assessment that the applicant "*was required to send emails related to important issues that could impact on operations to his manager*"¹⁴⁷, is firmly rooted in the evidence that served before him. On a reasonable assessment of the evidence that served before the commissioner, the applicant did indeed seek to "*deflect*" and did not offer any reasonable explanation for his conduct in bypassing Shanmugam.

Tender documents

[100] In relation to the Tender documents the commissioner records, *inter alia*, the following in his arbitration award:

"77. JHI, the Sanlam Commercial, Property Manager, requested certain FICA documents from Sanlam Board members. The applicant did not include Mr Shanmugham in his correspondence in this regard. Mr Roux forwarded it to him. This demonstrates that Mr Roux was of opinion that Mr Shanmugham should have been kept in the loop. He testified that he should be kept up to date with anything that might pose a business risk. The applicant gave no reasonable explanation why his immediate manager was not kept in the loop of things and the correspondence not sent to him, regarding this "Braampark" lease."

[101] The evidence before the commissioner includes the following:

101.1 On 29 August 2018 the applicant sent an electronic mail to the Company Secretary of the Sanlam Group. The applicant requested that certain documents "*to be completed, if not received urgently we will be disqualified from this tender*"¹⁴⁸

¹⁴⁶ Arbitration Award, paragraph 76

¹⁴⁷ Arbitration Award, paragraph 76

¹⁴⁸ Record Volume 2, page 15

- 101.2 The applicant's electronic mail records that it is urgent"¹⁴⁹
- 101.3 Shanmugam was not one of the recipients of the electronic mail. The electronic mail was copied to Roux.
- 101.4 On 29 August 2018, Roux forwarded the applicant's electronic mail in relation to the tender documents to Shanmugam.¹⁵⁰
- 101.5 Roux's evidence was that Shanmugam "*should be in the loop with what is going on before we take it any further*" and "*whatever happens after that, it might go back to you or it might go back to your boss. And they must be up to speed with precisely what you have decided, and you can't have differing opinions.*"¹⁵¹
- 101.6 Shanmugam's evidence in relation to Roux forwarding the electronic mail to him includes the following:
- "Yes, so again here Robert is giving me information that I should have already. Because obviously if we don't get this tender it is a business risk, right. So, my responsibility is also to manage the business in the Alternatives cluster. So, here Robert is telling me please be aware of this, that this is going to appear, and Ian calls me on a lot of issues, so if Ian or Robert asked me about this tender, I might have absolutely no idea, and it would be embarrassing as the Head of the Alternatives Business for me not to have known that this was actually happening. And actually, that it was a business risk."*¹⁵²
- 101.7 In Shanmugam's assessment he ought to have been copied in the electronic mail. Shanmugam's assessment includes that if he was subsequently asked about this tender, he "*might have absolutely no idea*

¹⁴⁹ Record Volume 2, page 15

¹⁵⁰ Record Volume 2, pages 14 and 15

¹⁵¹ Record Volume 6, page 37, lines 2 – 28; Record Volume 6, page 108, lines 3 - 7

¹⁵² Record Volume 6, page 155, lines 1 - 11

and it would be embarrassing as the Head of the Alternatives Business"¹⁵³ for him not to have known what was transpiring. Part of Shanmugam's reason for his assessment that he ought to have been copied was that the applicant himself had positioned the matter as a "*business risk*"¹⁵⁴.

101.8 On 29 August 2018, the applicant sent an electronic mail to the Company Secretary requesting that certain documents be completed¹⁵⁵;

101.9 In the applicant's assessment there was no need to copy Shanmugam on the electronic mail as it was "*literally administrative issues in the background*."¹⁵⁶

101.10 The applicant copied Roux on the electronic mail of 29 August 2018 because he was informed that Roux would attend the next board meeting where the matter might arise, that there "*might be a question and that he had to field it*" and he copied Roux as a courtesy.¹⁵⁷

101.11 In Roux's assessment Shanmugam "*should be in the loop with what is going on before we take it any further*"¹⁵⁸;

[102] The material facts are not genuinely in dispute. The applicant's electronic mail of 29 August 2018 does position the issue as a 'business risk' ("*if not received urgently we will be disqualified from this tender*"¹⁵⁹). The applicant's explanation for his conduct, not informing Shanmugam of the developments and not keeping him "*in the loop*" as his line manager is, in summary, that it was "*literally administrative issues in the background*"¹⁶⁰ and that there was no need for Shanmugam to be copied in the electronic mail. The applicant's explanation for copying Roux on the electronic mail of 29 August 2018 is that Roux would attend the next board meeting where the matter might arise, that

¹⁵³ Record Volume 6, page 155, lines 1-11

¹⁵⁴ Record Volume 6, page 220, lines 1-23 and page 221, lines 1-7

¹⁵⁵ Record Volume 2, page 15

¹⁵⁶ Record Volume 6, page 304, lines 5 - 10

¹⁵⁷ Record Volume 6, page 303, lines 21 - 25

¹⁵⁸ Record Volume 6, page 37, lines 2 - 28; Record Volume 6, page 108, lines 3 - 7

¹⁵⁹ Record Volume 2, page 15

¹⁶⁰ Record Volume 6, page 304, lines 5 - 10

there “*might be a question and that he had to field it*” and that he had copied Roux as a courtesy.¹⁶¹

[103] On the evidence that served before the commissioner, Roux was critical of the applicant bypassing Shanmugam. The commissioner did not accept that there was a proper reason for Shanmugam not to be kept abreast of the developments. The commissioner’s assessment is that “*The applicant gave no reasonable explanation why his immediate superior was not kept in the loop of things and the correspondence not sent to him regarding the “Braampark” lease*”.¹⁶² The commissioner’s findings are properly grounded in and supported by the evidence before him.

Wood Transaction electronic mail (13 March 2019)

[104] The commissioner in his arbitration award records, *inter alia*, the following:

“78. Subsequent to the Forensic Report into the wood transaction having been released, Mr Shanmugham sent the report to the applicant. On 12 March 2019 the applicant sent his response to Mr Shanmugham and also to Messrs Naidoo and Roux. In the applicant’s closing submissions, it is submitted that the Forensic Report refers to the false version that the applicant had stolen the wood. The report does not state that the applicant was accused of theft. The applicant had conceded during cross-examination that the report did not accuse him of theft. In his response of 12 March 2019, the applicant also does not refer to theft. The applicant knew at this time that Mr Shanmugham was planning to take disciplinary action against him. Why the applicant copied Messrs Naidoo and Roux in the response, was not explained. The matter had nothing to do with either of them. Here again it is suggested that the applicant breached the known rule by sending correspondence to them. However, why did he do

¹⁶¹ Record Volume 6, page 303, lines 21 - 25

¹⁶² Arbitration Award, paragraph 77

*so? As he proffered no explanation, not even in the closing submissions, it is not unreasonable to infer, as was submitted on behalf of the respondent, that the applicant was trying to bypass his manager, disregarding his authority regarding disciplinary action and trying to influence Messrs Roux and Naidoo to intervene. This is an example of the applicant questioning his manager's authority."*¹⁶³

[105] The evidence that served before the commissioner includes the following:

- 105.1 On 6 March 2019 Shanmugam sent the applicant an electronic mail, copying Brink. The subject matter of the electronic mail is "*Status update – Forensic Investigation*"¹⁶⁴;
- 105.2 Shanmugam's electronic mail to the applicant of 6 March 2019 informs the applicant, *inter alia*, that Shanmugam has received the outcome of the forensic investigation and that he would inform him of the process to be followed;
- 105.3 On 12 March 2019 the applicant sent an electronic mail to Shanmugam, Naidoo and Roux. The applicant records that he has been informed that a "*disciplinary meeting may be arranged*". The applicant further in his electronic mail puts forward a version of the events relevant to the Wood transaction and in the concluding part of his electronic mail the applicant records that "*I believe that I have acted in a responsible manner with regards my involvement in this transaction and by disclosing to related parties have been open about my behaviour*". In the electronic mail the applicant also records that he is "*faced with possible conflict of interest situations on a daily basis*"¹⁶⁵;

¹⁶³ Arbitration Award, paragraph 78

¹⁶⁴ Record, Volume 2, page 94

¹⁶⁵ Record Volume 2, page 93

105.4 On 13 March 2019 at 12:34 AM Shanmugam responded to the applicant's earlier electronic mail of 12 March 2019. Shanmugam in his electronic mail records, *inter alia*, the following:

105.4.1 He informed the applicant that a disciplinary meeting is going to be held;

105.4.2 The applicant should engage with him directly and only him (as his line manager), it is unnecessary to involve Naidoo and Roux in this detail *"and it is an attempt to by-pass or side-step me. I will explore the possible other reasons for this when we engage over this in the disciplinary meeting, as I have told you on numerous occasions to stop doing this, yet you ignore this time and again"*¹⁶⁶;

105.4.3 *"You not only undermine me and show disrespect to my authority as your senior, but you make it uncomfortable for Nersan and Robert, who have had to forward your emails to me when you have failed to inform me or engage with me yourself. This reflects poorly on you. Please refrain from engaging further over the matter below, as this will be the subject of a disciplinary process. The meeting will be scheduled for early next week and you will receive an email about it tomorrow"*.¹⁶⁷

105.5 Roux's evidence was that Shanmugam's approach that the applicant should engage only with him and that it was unnecessary to involve Naidoo and himself (Roux) was *"correct"*, the engagement should be with Shanmugam and *"not putting us in the picture at all"* ¹⁶⁸.

105.6 The applicant's evidence includes the following:

105.6.1 In discussions with Joubert he was informed by Joubert that the version put to Joubert for comment was basically that he (the applicant) had stolen the wood ¹⁶⁹;

¹⁶⁶ Record Volume 2, page 91

¹⁶⁷ Record Volume 2, pages 91 and 92

¹⁶⁸ Record Volume 6, pages 39, lines 10 - 18

¹⁶⁹ Record Volume 6, page 305, lines 2-8

- 105.6.2 He and Joubert thought that *"if everybody understood what had transpired it would be fine"* ¹⁷⁰;
- 105.6.3 The forensic report does not record him (the applicant) being accused of stealing the wood, nor does it conclude that he stole the wood ¹⁷¹ ;
- 105.6.4 The forensic report does record that the applicant should have obtained the necessary permission ¹⁷²;
- 105.6.5 He copied Nesan and Roux, *"just to give them information"* ¹⁷³;

[106] The commissioner's finding that *"it is not unreasonable to infer, as was submitted on behalf of the respondent, that the applicant was trying to bypass his manager, disregarding his authority regarding disciplinary action and trying to influence Messrs Roux and Naidoo to intervene. This is an example of the applicant questioning his manager's authority."*¹⁷⁴ is supported by and grounded in the evidence that served before him.

The Newlands Development electronic mail

[107] In relation to the Newlands Development electronic mail exchange the commissioner records, *inter alia*, the following in his arbitration award:

"79. On 12 December 2018, Mr Shanmugham sent the applicant an email about the Newlands Property Development, asked him not to take hasty decisions in a round robin way and to debate the matter with him. No response was received from the applicant until 8 February 2019 when the applicant accused Mr Shanmugham of giving contradictory instructions and causing an impasse."

¹⁷⁰ Record volume 6, page 305, lines 9-16

¹⁷¹ Record Volume 6, page 366, lines 9-13

¹⁷² Record Volume 6, page 366, lines 9-13

¹⁷³ Record Volume 6, page 367, lines 3 - 8

¹⁷⁴ Arbitration Award, paragraph 78

The applicant says he responded to all the issues raised in the 12 December 2018. No reasonable explanation was given for the long delay in responding. Mr Roux also could not understand the delay in responding. He also confirmed that the applicant had to respect Mr Shanmugham. Mr Shanmugham was clearly unimpressed. This caused him to question himself and his capabilities. The applicant clearly resisted his manager's instructions as per the 12 December 2018 email. He must also have been aware that Mr Shanmugham was sensitive to the possibility of losing money after the loss of funds in Private Equity. Irrespective whether Mr Shanmugham is a property expert, he is a person with many years of experience in Sanlam and was appointed as the applicant's manager. This incident is a further demonstration that the applicant did not want to subject himself to Mr Shanmugham's authority."

[108] The evidence that served before the commissioner includes the following:

108.1 On 12 December 2018 Shanmugam sent an electronic mail to the applicant. Shanmugam's electronic mail was copied to Patrick Kilkenny, Naidoo and Warren Young. The subject of the electronic mail was "Approval process for the Newlands Property Development". In the electronic mail, Shanmugam wrote, *inter alia*, the following:

"Hi Andre,

I refer to our brief discussion last week about the Newlands Property Development when you mentioned this to me in passing.

I am uncomfortable given the size of the transaction for this to be approved on a round robin basis by PropCo. Given the governance and approval standards required by our clients (both Sanlam and third-parties) I am not in support until we have met to debate the transaction with

full information. I am also concerned that this transaction is being rushed. We have had similar experiences in other parts of the business and I would like to consider the transaction only after the due diligence is complete and presented to Propco.

Please would you hold off on this transaction until Propco has met with the full pack of information. I also don't think it would be appropriate to sign any agreements until we have met.

*Kind regards*¹⁷⁵

- 108.2 Some two months later and on 8 February 2019, the applicant sent an electronic mail to Shanmugam, van Rensburg and Joubert, copying others. In the electronic mail the applicant recorded, *inter alia*, the following:

"The instruction in your email not to enter into any agreement with the seller prior to the approval of the proposal to PROPCO is inherently contradictory. It is expected of me to agree to the terms of the transaction prior to submitting the proposal to PROPCO.

This transaction, should the proposal be approved, will be funded entirely by Sanlam Estate; no third-party investor will participate in the development. I have discussed the transaction with Neil van Rensburg (Neil is the Chairman of PROPCO and represent the interest of Sanlam Estate on PROPCO). Neil has reiterated that Sanlam Properties must adhere to the Sanlam Properties approval framework and are comfortable to follow the current decision-making process.

¹⁷⁵ Record Volume 2, page 16C

In light of this we urgently need to resolve the impasse created by your instruction not to enter into any agreement with the seller prior to the approval PROPCO.

*Regards*¹⁷⁶

108.3 Roux's evidence includes the following:

"So, I don't want to respond to the specifics of the thing. What is completely wrong in this process, what I read here, is this happens 12 December, and whether his wording is precisely correct and say this is the process that we need to follow, you can see that he doesn't want to do this strategically until he has got, there is certain things that has happened and therefore he wants a discussion. What should have happened, is that if I am the person, that this is addressed to, I would have set up a meeting for the 13th of December or the 14th, maybe beginning of January if we are on leave to clarify this.

Because, for me, this is a reasonable request that he wants a discussion before it is being taken further. Because, whether it is in agreement with Sanlam Propco, it must be in agreement with the strategy of the business and therefore he has got his right, he has got his full right as Mervyn to want to have a discussion on this and this is what should have been happening.

*If I am, if somebody tells me he wants to have a discussion I have a discussion. I arrange a discussion with him. Not to say to him two months later, we had an impasse. And no reaction in between. Or that is how it looks like, I don't know whether there was. **Because the important thing of this is not whether we can catch each other out in a little point in the process. The importance is Mervyn***

¹⁷⁶ Record Volume 2, pages 16A and 16B

is the superior and you should be respecting and therefore engage with him.

If he has asked for a discussion with him, then you have a discussion with him. You arrange a discussion and talk it through. Don't write an email 2 months later. It just doesn't sound right.

...

You know, something that confirms the way that Mervyn would feel about it is that you are not wanting to engage, you are trying to either bypass me or you disrespect my role. That's sort of what it says, and it is just not acceptable. It is not a very difficult and unreasonable request this, you know. And especially if it is so urgent because it sounds like it is urgent. How can it be urgent 2 months later you come back to this?"¹⁷⁷

(emphasis added)

[109] The rather straightforward evidence that served before the commissioner on this score is that Shanmugam had raised certain concerns in an electronic mail on 12 December 2018 in relation to a proposed transaction. The applicant only responded some two months later and on 8 February 2019.

[110] On the evidence before the commissioner, Shanmugam's request in his electronic mail of 12 December 2018 was a reasonable request. The commissioner's finding that the incident is a "*further demonstration that the applicant did not want to subject himself to Mr Shanmughan's authority*"¹⁷⁸ is properly grounded in and supported by the evidence that served before him.

¹⁷⁷ Record Volume 6, page 41 lines 11 – 28 and page 42, lines 1 - 10

¹⁷⁸ Record Volume 6, page 41, lines 11 – 28 and page 42, lines 1 - 10

Property Portfolio incident (early April 2019)

[111] In relation to the Property Portfolio incident (early April 2019) the commissioner records, *inter alia*, the following in his arbitration award:

"80. It was not in dispute that Todd Misklethwaite was appointed to act as a middleman and that Mr Shanmugham instructed that this be honoured. On 3 April 2019, he informed the applicant of a complaint received from Shaun Ruiters of SMMI. The applicant denied that he had made any presentation to SMMI and had bypassed Mr Micklethwaite. Why would Mr Ruiters have complained if the applicant did nothing wrong? The applicant gave a long explanation of "informal" chats he had that might have been overheard. Mr Shanmugham told the applicant that he would manage the matter. He subsequently apologised to Mr Ruiters. Then the applicant also did so, in conflict with the instruction to leave the matter in his manager's hands. Again, a very long explanation is given but not addressing the pivotal issue of why the applicant ignored his manager's instruction. I agree that this is also an example of the way the applicant regarded Mr Shanmugham."

[112] The evidence before the commissioner includes the following:

112.1 On 3 April 2019, Shanmugam sent an electronic mail to the applicant. In that electronic mail Shanmugam wrote the following:

"Hi Andre,

I received a complaint from SMMI about you presenting them with incomplete information with regard to a potential R4bn property portfolio that you wanted them to invest in.

Can you please explain why you did not follow the process we agreed to coordinate all our discussion efforts via

Todd? And why you went directly to a client, albeit internal?

*Kind regards*¹⁷⁹

112.2 On 4 April 2019 the applicant sent Shanmugam an electronic mail responding to Shanmugam's electronic mail of 3 April 2019. In his electronic mail the applicant writes the following:

"Hi Mervyn,

I did not present SMMI with the opportunity to invest in the potential fund.

I went to Adam Bulkin as previous employee and key player in the decision-making process at Alex Forbes to discuss the appointment of Dawie de Villiers and the impact this may have on investment decisions. Secondly, I wanted to know if Alex Forbes would be interested in a product of high quality properties separate from the current fund, it was my way of testing the waters with knowledgeable and in the know people with Alex Forbes that we have access to. Adam then mentioned that SMMI may be interested too. Some of his colleagues overheard the discussion at his desk.

Soon thereafter on the 5th of March I had a formal meeting with SMMI at their request on potential investment into the Direct Property fund and the potential fund was not discussed at all. Todd and Pawan knew about the meeting with SMMI and Todd attended, Pawan declined. It was not a formal presentation to SMMI on our capabilities but an opportunity for them to ask questions at Adam's request. We provided them with performances figures only.

¹⁷⁹ Record Volume 2, page 24

*Regards*¹⁸⁰

- 112.3 Later on 4 April 2019 Shanmugam sent an electronic mail to the applicant. In this further electronic mail Shanmugam writes the following:

"Hi Andre,

SMMI has asked to treat them as a client and in a professional manner. Something you did must have upset them.

It is critical for us to build these relationships internally for us to stand a chance of getting an allocation to our funds.

We have structured ourselves so that Todd co-ordinates all the client facing activities for us. We had an agreement that all of our funds will go through Todd as Head of our Alternatives distribution. I have communicated this to you and all of our funds on numerous occasions. Please will you follow the agreed process going forward for both internal clients and external clients.

*Kind regards*¹⁸¹

- 112.4 The applicant responded to Shanmugam's further electronic mail stating that

"Hi Mervyn

I am in the dark where we did not treat them professionally. I will engage and apologise if need be.

*I do not understand the comment about Todd. Todd was in the meeting with SMMI.*¹⁸²

¹⁸⁰ Record Volume 2, page 24

¹⁸¹ Record Volume 2, page 23

¹⁸² Record Volume 2, page 23

- 112.5 Shanmugam in a further electronic mail to the applicant wrote, *inter alia*, the following:

"I have apologised already.

It was not the meeting with Todd that they were referring to but another encounter without him.

Please follow our process going forward.

*Kind regards"*¹⁸³

- 112.6 Subsequent to that and on 10 April 2019 the applicant sent an electronic mail to Shanmugam. In that electronic mail the applicant wrote, *inter alia*, the following:

"Hi Mervyn

I had the opportunity to discuss this complaint with Shaun Ruiters informally this morning.

I apologized unreservedly if the impression was created that Sanlam Properties was not following due process in allocations made internally within the Sanlam Group. Given my history with Sanlam Estates and Sanlam Policyholders as Investors I am extremely conscious of treating all as if they are third party Investors.

*..."*¹⁸⁴

- 112.7 Shanmugam's evidence includes that when dealing with clients, they have to *"ensure that Todd is in the loop...because we have to approach clients in a coordinated manner"*.¹⁸⁵ In addition, Shanmugam's electronic mail to the applicant of 4 April 2019 refers to the *"agreed process going forward for both internal clients and external clients"*.

¹⁸³ Record Volume 2, page 22

¹⁸⁴ Record, Volume 2, pages 21 and 22

¹⁸⁵ Record, Volume 6, pages 21 and 22

112.8 The applicant's evidence includes that on his reading, Shanmugam's electronic mail to him does not include an instruction saying that Shanmugam had already apologised and that he (the applicant) "*can't apologise as well*".¹⁸⁶

[113]The evidence that served before the commissioner was rather straightforward. A complaint in relation to a significant issue was raised with Shanmugam. Shanmugam dealt with it and required that the applicant take no further steps in relation to the complaint as raised. Notwithstanding this, the applicant discussed the complaint with Ruiters.

[114]The commissioner's finding that "*this is also an example of the way the applicant regarded Mr Shanmugham*" as well as the commissioner's finding that the applicant acted "*in conflict with the instruction to leave the matter in his manager's hands*" are properly grounded in and supported by the evidence that served before him.

[115]It is readily apparent that the commissioner did not regard the applicant's "*long explanation*" as satisfactory and did not accept the applicant's explanations for his conduct. On the evidence that served before the arbitration proceedings, the commissioner had every proper basis to do so.

The Second Allegation

[116]It is contended on behalf of the applicant that "*It is also common cause that Shanmugam did not take issue with the applicant's conduct or voice his displeasure at any stage prior to issuing the initial disciplinary charges in March 2019 ('first charge sheet'). In the circumstances, the applicant's version that he was unaware of Shanmugam's unhappiness until then cannot be discounted. Similarly there is no evidence to gainsay his version that he would have modified his conduct accordingly if he had been made aware of it*".¹⁸⁷

[117]The Wood transaction has been dealt with above and the contentions at paragraph 42 of the applicant's heads of argument do not relate to that

¹⁸⁶ Record, Volume 6, page 161, lines 19 and page 162, lines 1 - 9

¹⁸⁷ Applicant's Heads of Argument, paragraph 42

serious misconduct. Allegations 3.1 and 3.2 as they relate to the applicant's transformation obligations are dealt with below. The contentions at paragraph 42 of the applicant's heads of argument do not relate to allegations 3,1 and 3,2. These contentions relate to allegation 2 and possibly 3,3.

Contention that applicant not aware of Shanmugam's '*unhappiness*'

[118] In relation to the applicant not being aware of Shanmugam's '*unhappiness*', the applicant's evidence-in-chief includes the following:

- 118.1 Congratulatory electronic mails (12 July 2018), at the time, Shanmugam did not mention that he was unhappy.¹⁸⁸
- 118.2 Nelspruit Development issue (28 August 2018), at the time, Shanmugam did not mention that he was unhappy.¹⁸⁹
- 118.3 MOU electronic mail (28 August 2018), at the time neither Roux nor Shanmugam indicated unhappiness and that he first became aware when the allegations of misconduct were put to him.¹⁹⁰
- 118.4 Tender documents (29 August 2019), the first time that he became aware that Shanmugam took issue with his conduct was when the allegations were put to him¹⁹¹.
- 118.5 Newlands Development Project (12 December 2018 and 9 February 2019), he did not intend any disrespect with his electronic mail.¹⁹²
- 118.6 Property Portfolio incident (SMMI) (April 2019), the applicant's evidence includes that on his reading Shanmugam's electronic mail to him does not include an instruction that he (the applicant) could not "*apologize as well*".¹⁹³

¹⁸⁸ Record, Volume 6, page 296

¹⁸⁹ Record, Volume 6, page 300, lines 3 - 9

¹⁹⁰ Record Volume 6, page 301, lines 27 – 29 and page 302, line 1

¹⁹¹ Record, Volume 6, page 304, lines 15 – 20 and page 305, line 1

¹⁹² Record, Volume 6, page 312

¹⁹³ Record, Volume 6, page 316, lines 17 - 26

[119] The applicant's evidence referred to above does not include evidence to the effect that had he known of Shanmugam's '*unhappiness*' at the time of the various incidents he would have conducted himself differently.

[120] In relation to allegation 2 the applicant's evidence-in-chief does not include any pause for thought, let alone an acknowledgment of wrongdoing. The applicant's evidence on the various incidents and the detail as to his conduct does not include evidence to the effect that in hindsight, he understands the first respondent's concerns, and that on reflection and having heard Shanmugam's evidence earlier in the arbitration proceedings as to his '*unhappiness*', he might have or would have done things differently. In point of fact, the applicant seeks to defend his conduct and excludes any possibility or concession that he might have acted incorrectly. The applicant, having been afforded an opportunity to review the relevant electronic mails and the context in which they were exchanged, persists with his view and assessment that he did nothing wrong. This theme is echoed in the applicant's evidence under cross-examination. By way of example, in relation to the Congratulatory electronic mail (12 July 2018), the applicant's evidence under cross-examination includes that there is nothing wrong with his electronic mail and that it is "*Definitely not insubordinate at all*".¹⁹⁴

[121] The evidence that served before the commissioner does not include evidence by the applicant to the effect that had he known of Shanmugam's '*unhappiness*' at the time of the various incidents he would have conducted himself differently or '*modified his conduct accordingly*'. In addition, in his evidence the applicant sought to defend his conduct. The applicant's evidence excludes any factual matter which indicates that he would have conducted himself differently. In the circumstances, the contention that "*there is no evidence to gainsay his version that he would have modified his conduct accordingly if he had been made aware of it*"¹⁹⁵ is not sustainable. The applicant offered no such version.

¹⁹⁴ Record Volume 6, page 353 lines 28 -29 and page 354 line 1

¹⁹⁵ Applicant's Heads of Argument, page 42

[122]The applicant on his own version had a rationale or stated reason for bypassing Shanmugam.

[123]It is contended that *"It is also common cause that Shanmugam did not take issue with the applicant's conduct or voice his displeasure at any stage prior to issuing the initial disciplinary charges in March 2019..."*.¹⁹⁶ The disciplinary meeting of 18 March 2019 is dealt with more fully later.

[124]On 13 March 2019 Shanmugam sent an electronic mail to the applicant in relation to a disciplinary meeting scheduled for 18 March 2019. That electronic mail also refers to allegations of misconduct.¹⁹⁷ To the extent that it is claimed that prior to Shanmugam's electronic mail to the applicant of 13 March 2019 at 14h54¹⁹⁸ Shanmugam had not taken issue with or expressed unhappiness with the applicant's conduct (of bypassing or disrespecting or undermining him), this is contradicted by the record that served before the commissioner.

[125]Shanmugam's electronic mail of 13 March 2019 at 14h54 includes the following: *"you are expected to show respect and not undermine the authority of your line manager. You have breached this requirement on a number of occasions despite being directed and requested by your line manager to refrain from this conduct."*¹⁹⁹

[126]In Shanmugam's earlier electronic mail to the applicant also of 13 March 2019 sent at 12:34AM²⁰⁰ Shanmugam writes, *inter alia*, the following:

*"It is unnecessary to involve Nersan and Robert, in this detail **and it is an attempt to by-pass or side-step me.** I will explore the possible other reasons for this when we engage over this in the disciplinary meeting, **as I have told you on numerous occasions to stop doing this, yet you ignore this time and again.***

¹⁹⁶ Applicant's Heads of Argument, paragraph 42

¹⁹⁷ Record Volume 2 pages 95 and 96

¹⁹⁸ Record Volume 2 pages 95 and 96

¹⁹⁹ Record Volume 2, page 96

²⁰⁰ Record Volume 2, pages 91 and 92

You not only undermine me and show disrespect to my authority as your senior, but you make it uncomfortable for Nersan and Robert, who have had to forward your emails to me when you have failed to inform me or engage with me yourself. This reflects poorly on you. Please refrain from engaging further over the matter below, as this will be the subject of a disciplinary process. The meeting will be scheduled for early next week and you will receive and email about it tomorrow.²⁰¹

(emphasis added)

[127] Shanmugam's electronic mails to the applicant and particularly the electronic mail of 13 March 2019 sent at 12:34AM record that Shanmugam had on "numerous occasions" told the applicant "**to stop doing this, yet you ignore this time and again**". On a plain reading, and as recorded in his electronic mail of 13 March 2019 sent at 12:34AM, Shanmugam was referring to the applicant's conduct in bypassing or side-stepping him. It is clear that those "numerous occasions" necessarily refer to a period of time before 13 March 2019. This indicates that prior to 13 March 2019 Shanmugam had taken issue with or expressed unhappiness with the applicant's conduct (of bypassing or disrespecting or undermining him) on "numerous occasions".

[128] Shanmugam's evidence under cross-examination also includes the following:

128.1 In relation to the Nelspruit Development incident (August 2018), it was put to Shanmugam that he did not take issue with the applicant's conduct at the time. Shanmugam responded in the following terms: "*But I can't remember what email that I sent to Andre, but I have been having these discussions with him all along, keep me in the loop, tell me what is going on. You know, if you are speaking to Nerson, or Robert or anyone, just keep me in the loop. I can't remember which one it was but it was just keep me in the loop, that is all I would want*".²⁰²

128.2 In relation to the Tender documents issue (March 2019) it was put to Shanmugam that he did not say to the applicant that "*in the future*" the

²⁰¹ Record Volume 2, pages 91 and 92

²⁰² Record Volume 6, page 209, lines 7 – 16

applicant is required to copy him. Shanmugam responded as follows: “So, I had those conversations and one of the emails that I wrote to Andre, I said to him I have had these conversations with you. You know, please keep me in the loop when you are talking to Robert and Nerson... I can’t remember when but it was on a number of occasions”.²⁰³

[129] Shanmugam’s oral evidence on this score is supported by the content of his electronic mail to the applicant of 13 March 2019 sent at 12:34AM.

[130] In the circumstances and on the evidence that served before the commissioner, the contention that it is “*common cause that Shanmugam did not take issue with the applicant’s conduct or voice his displeasure at any stage prior to issuing the initial disciplinary charges in March 2019 (“first charge sheet”)*”, being the electronic mail of 13 March 2019 is not sustainable.

[131] In relation to the contentions as to the lapse of time between some of the incidents and the disciplinary action taken by the first respondent²⁰⁴ the commissioner in his arbitration award deals with this expressly. In this regard, the arbitration award records, *inter alia*, the following:

*“It was submitted that the respondent [acted] unreasonably due to the delay in instituting disciplinary action particularly of the events in July 2018and insofar as the case is relied upon for a case of procedural unfairness, the submissions cannot be upheld because in the pre-arbitration minute it was agreed that procedural fairness was not in dispute or was no longer in dispute.”*²⁰⁵

[132] Further, and in the context of the Congratulatory electronic mail (12 July 2018) the commissioner in the arbitration award records, *inter alia*, the following:

²⁰³ Record Volume 6, page 218, lines 4 – 14

²⁰⁴ Applicant’s Heads of Argument, paragraph 66

²⁰⁵ Arbitration Award, paragraph 71

*"The applicant clearly showed to his line-manager not to interfere. Messrs Roux and Naidoo also expressed their view that the applicant was wrong. They were not challenged in their views. **That Mr Shanmugham did not immediately take disciplinary action against the applicant does not detract from what happened. There should not be a need for senior people to be constantly admonished or warned.**"²⁰⁶*

(emphasis added)

[133] Yet further and at paragraph 81 of the arbitration award the commissioner records, *inter alia*, the following:

*"81. At this level of seniority, it is imperative that people work together to further their employer's interests. They are after all spearheading the activities. I accept that such seniority is also accompanied by years of experience, know-how and institutional knowledge and that there will be differences of opinion, even arguments. **But the reporting lines must still be honoured so that the top structure does not become dysfunctional. There should be no need to remind senior colleagues of this obligation.** The overall impression is that the applicant disregarded Mr Shanmugam's authority over him."²⁰⁷*

(emphasis added)

[134] The arbitration award reflects that the commissioner was alive to the contention that the first respondent did not '*immediately*' at the time of the alleged misconduct take steps and the contention as to a delay in taking the

²⁰⁶ Arbitration Award, paragraph 74

²⁰⁷ Arbitration Award, paragraph 81

disciplinary action in April 2019 in relation to events, some of which occurred in July and August 2018. The commissioner did not simply ignore this issue.²⁰⁸

[135] On the Congratulatory electronic mail exchange of 12 July 2018, the applicant's assessment is that his electronic mail to Shanmugam is "*not insubordinate at all.*"²⁰⁹ In relation to the Newlands Property Development incident, the applicant in effect ignored Shanmugam's request as recorded in his electronic mail of 12 December 2018 and responded some two months later on 8 February 2019. On the Tender documents incident, the applicant in his electronic mail of 29 August 2018 excluded or bypassed Shanmugam. On the applicant's version there was no need to copy Shanmugam in his electronic mail in relation to the Tender documents.²¹⁰ In other words, exclusion of Shanmugam from the applicant's electronic mail in relation to the Tender documents was deliberate. The Tender documents incident happened a day after the MOU incident of 28 August 2018. In relation to the MOU incident the applicant had sent an electronic mail to Roux on 28 August 2018. Shanmugam was not a recipient of that electronic mail. The Nelspruit Development incident involves an electronic mail sent by the applicant on 28 August 2018. Notably, this is on the same day as the applicant's electronic mail in the MOU incident. The applicant's electronic mail in the Nelspruit Development incident involved the applicant approaching Roux directly before discussing the issue with Shanmugam.

[136] The applicant on his own version in relation to the various incidents had a rationale or stated reason for bypassing Shanmugam. Differently put, it is not the case that the applicant's conduct in bypassing and disregarding Shanmugam was the result of an oversight. On the evidence before the commissioner, it cannot reasonably be contended that the applicant as a senior manager with many years of employment at a managerial level needed tutelage in not undermining, bypassing or disregarding his line manager.

²⁰⁸ Arbitration Award, paragraphs 71, 74 and 81

²⁰⁹ Record, Volume 6, page 353, lines 28 – 29 and page 354 line 1

²¹⁰ Record, Volume 6, page 304, lines 15 – 20 and page 305, line 1

[137] The commissioner's reasoning that "[t]here should not be a need for senior people to be constantly admonished or warned."²¹¹ and that "the reporting lines must still be honoured so that the top structure does not become dysfunctional. There should be no need to remind senior colleagues of this obligation"²¹² can hardly be faulted. On a 'fair reading' the arbitration award reflects that the commissioner was alive to the issues, grappled with them and dealt with them.

[138] The established facts in the evidence that served before the commissioner (in relation to allegation 2) are in material respects somewhat straightforward. In relation to business matters, the applicant bypassed Shanmugam, his direct superior, and interacted directly with other colleagues in the business and with Shanmugam's superiors including Roux. On the Property Portfolio incident and the complaint received by Shanmugam from SMMI, the applicant, rather than leaving matters in his line manager's hands, met with the CEO of SMMI. The relevant and material facts arise largely from the documentary evidence (including electronic mail communications) that served before the commissioner.

[139] The evidence of the witnesses as recorded in the transcript includes that of the applicant himself, Rutters, Roux, Naidoo and Shanmugam. Whilst it is so that the applicant sought to offer explanations for this conduct in approaching Roux and others directly without involving (bypassing) Shanmugam, and meeting with Ruiters of SMMI, the applicant's conduct in approaching Roux and others directly is not in dispute. The evidence of Ms Manka Sebastian is dealt with below.

[140] The commissioner's findings are properly grounded in and supported by the evidence that served before him. The evidence that served before the commissioner forms a proper basis for such inferences drawn by the commissioner, adverse to the applicant, in relation to the applicant's conduct. The weight of the established facts in the evidence that served before the commissioner is compelling. The critique of the applicant's conduct offered

²¹¹ Arbitration Award, paragraph 74

²¹² Arbitration Award, paragraph 81

by the witnesses called by the first respondent in relation to allegation 2 is consistent with established facts.

[141] In relation to allegation 2 it is not the case that on the evidence that served before the commissioner, there were conflicting versions as to whether or not the applicant did on several occasions and in relation to matters which fell under Shanmugam's authority approach Roux and others without first engaging Shanmugam or that on the Property Portfolio incident the applicant did not leave matters in his line manager's hands.

[142] It cannot reasonably be contended that the facts as to the applicant's conduct are capable of being displaced or disturbed by an assessment as to the demeanour of the witnesses, including the applicant, who gave evidence. It cannot reasonably be contended that Roux and Naidoo were less than candid in giving their evidence when they were critical of the applicant's bypassing of Shanmugam. It is so that the commissioner did not accept the applicant's explanations for his conduct in bypassing Shanmugam. On the evidence that served before the arbitration proceedings, the commissioner had every proper basis to do so.

[143] As noted above, the applicant could not dispute nor deny that during Shanmugam's first meeting as CEO with the whole team, he said words to Shanmugam to the following effect: *"don't try and do what your predecessor tried to do"*.²¹³ The applicant did not meaningfully dispute Shanmugam's evidence that he had uttered those words. Shanmugam testified that *"of course it was disrespectful"*.²¹⁴ On any reasonable assessment, the applicant's comment was not a neutral comment.

[144] The commissioner in the arbitration award records that *"the applicant did not dispute Mr Shanmugam's evidence about his comment during the very first meeting. Mr Shanmugam did not simply laugh off this comment. He*

²¹³ Record Volume 6, page 344, lines 16 - 21

²¹⁴ Record Volume 6, page 144, lines 13 - 16

interpreted this as an aggressive comment."²¹⁵ The commissioner's assessment is consistent with the evidence that served before him.

[145] The commissioner in his arbitration award also records the following:

*"The applicant, basically a single witness because his two witnesses did not necessarily support his version in all respects and could not corroborate his version. He may not have lied or made false statements, but his version amounts to a bald denial of wrongdoing in a case where he should have explained his actions and failed to do so. There were also minor aspects of the applicant's case that were not put to the respondent's witnesses. The applicant's version is therefore evaluated with circumspection."*²¹⁶

[146] This assessment of the commissioner is fair. The evidence given by the witnesses called by the applicant (Rutters and Manka Sebastian) was not exculpatory of the applicant in relation to the allegations of misconduct against him. The evidence of Manka Sebastian is dealt with in further detail below. During the cross-examination of Shanmugam²¹⁷ and Roux²¹⁸, it was indicated that Hilton and Joubert would testify. However, they were not called as witnesses. In addition, as noted above, the evidence given by the witnesses called by the first respondent is consistent with the objective facts. In those circumstances the commissioner was required to assess the version of the applicant. To the extent that the applicant sought to explain his conduct as against the weight of the established facts, the commissioner's assessment that the applicant's version must be evaluated with "*circumspection*" is fair.

[147] The commissioner's finding that the applicant's "*behaviour had a pattern of showing disregard for Mr Shanguman's authority*" and that the applicant "*did*

²¹⁵ Arbitration Award, paragraph 70

²¹⁶ Arbitration Award, paragraph 72

²¹⁷ Record Volume 6, page 194, lines 7 – 10 and page 199, lines 5 – 6

²¹⁸ Record Volume 6, page 71, lines 13 – 16

not challenge [Shanmugam] outright, but clearly did not wish to subject himself to his newly appointed manager's authority"²¹⁹ is properly grounded in the evidence that served before him.

[148] It is contended on behalf of the applicant in argument that:

*"66. The third respondent failed to attach proper weight to the fact that the allegations of insolence and insubordination arise from a handful of emails which were exchanged almost 9 months prior to the applicant being charged. The content of the exchange relate to operational issues and demonstrate a robust exchange of ideas and opinions which is wholly appropriate between two senior executives. It is not misconduct for a senior manager to disagree with his manager on operational issues."*²²⁰

[149] These contentions are not sustainable. The electronic mail exchanges referred to took place over the period July 2018 up to and including March 2019. The timing and content of those electronic mails has been dealt with extensively above. It is correct that the matters dealt with in the electronic mail exchanges relate to matters which in the ordinary course fall under Shanmugam's authority as the CEO of the Alternatives business. However, on the evidence that served before the commissioner, the conduct of the applicant exceeds a *"robust exchange of ideas and opinions... between two senior executives"*.²²¹ The conduct of the applicant, including that as revealed by the electronic mail exchanges, establishes that the applicant had bypassed Shanmugam, disrespected Shanmugam as his line manager and disregarded Shanmugam's authority over him. The fact of approaching Roux and others cannot reasonably be described as an *"exchange of ideas"*. Those electronic mails disclose that the applicant bypassed Shanmugam on operational matters and went directly to Shanmugam's seniors and in the

²¹⁹ Arbitration Award, paragraph 81

²²⁰ Applicant's Heads of Argument, paragraph 66

²²¹ Applicant's Heads of Argument, paragraph 66

business. Those electronic mails are not evidence of the applicant engaging Shanmugam, as his line manager, in an exchange of ideas, whether robust or otherwise.

[150] It is contended on behalf of the applicant in argument that:

*“67. The evidence shows that Shanmugam never informed the applicant that his communication style or reporting practices were problematic or offensive to him. **The third respondent’s finding that the applicant should have known to copy his manager into every email is not supported by any policy or practice and is unreasonable in the context of a senior management role.**”*²²²

(emphasis added)

[151] The contention that Shanmugam did not inform the applicant that is ‘communication style or reporting practices were problematic or offensive’ is dealt with elsewhere. As to the balance of the contentions referred to above, the arbitration award records, *inter alia*, the following:

*“The email correspondence relied on by the respondent, was not disputed, neither the content of the emails, nor the identity of the recipients in those cases where emails, correspondence from the applicant was relied upon. The applicant’s case was that he never acted inappropriately and there was no need to always send correspondence to his manager.”*²²³

[152] The commissioner in the arbitration award further records the following:

“I agree that the applicant was not required to send all documents to his manager. He was required to

²²² Applicant’s Heads of Argument, paragraph 67

²²³ Arbitration Award, paragraph 69

send emails related to important issues that could impact on operations to his manager.²²⁴

(emphasis added)

[153] In addition, and at paragraph 81 of the arbitration award the commissioner records, *inter alia*, the following:

*“81. At this level of seniority, it is imperative that people work together to further their employer’s interests. They are after all spearheading the activities. I accept that such seniority is also accompanied by years of experience, know-how and institutional knowledge and that there will be differences of opinion, even arguments. But the reporting lines must still be honoured so that the top structure does not become dysfunctional. There should be no need to remind senior colleagues of this obligation. The overall impression is that the applicant disregarded Mr Shanmugam’s authority over him.”*²²⁵

(emphasis added)

[154] On a ‘fair reading’ of the arbitration award the commissioner did not find that the applicant “*should have known to copy his manager into every email*”²²⁶. The paragraphs of the arbitration award referred to above do not disclose that the commissioner had made a finding that the applicant was required to copy Shanmugam into every electronic mail or that the applicant should have known to copy Shanmugam into every electronic mail. Rather, the commissioner expressly refers to electronic mails on “*important issues that could impact on operations*”.

[155] It is readily apparent from a reading of the arbitration award that the commissioner had an appreciation that senior colleagues in an enterprise

²²⁴ Arbitration Award, paragraph 76

²²⁵ Arbitration Award, paragraph 81

²²⁶ Applicant’s Heads of Argument, paragraph 67

might hold different views and on occasion might properly disagree. In this regard, the commissioner specifically records that he accepts that “***such seniority is accompanied by years of experience, know-how and institutional knowledge and that there will be differences of opinion, even arguments.***”²²⁷ This discloses an appreciation on the part of the commissioner as to “*a robust exchange of ideas and opinions*”²²⁸ between senior executives. In the circumstances, it cannot reasonably be contended that the commissioner disregarded a “*robust exchange of ideas and opinions which is wholly appropriate between two senior executives*” or that the commissioner was of the view that disagreements ‘or even arguments’ between a senior manager and their manager on operational issues constitute misconduct.

[156] Further, the commissioner’s approach is not one which signals authoritarianism. The commissioner in his arbitration award expressly records that he accepts that “*such seniority is also accompanied by years of experience, know-how and institutional knowledge and that there will be differences of opinion, even arguments.*”²²⁹ Notwithstanding a balanced appreciation as to how senior colleagues might interact with each other, it is the commissioner’s assessment that the applicant’s behaviour as disclosed in the evidence that served before him demonstrates a “*pattern of showing disregard for Mr Shanmugam’s authority*”.²³⁰ The commissioner’s assessment and findings are properly grounded in and supported by the evidence before him.

[157] In relation to allegation 2 there can be no serious or sustainable contention that the commissioner’s reasoning and findings are “*entirely disconnected with the evidence, unsupported by any evidence and involves speculation*” as contemplated in *Securitas*.²³¹

²²⁷ Arbitration Award, paragraph 81

²²⁸ Applicant’s Heads of Argument, paragraph 66

²²⁹ Arbitration Award, paragraph 81

²³⁰ Arbitration Award, paragraph 81

²³¹ *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2021) 42 ILJ 1071 (LAC)

Allegation 3: Transformation

[158] The commissioner's arbitration award records the following:

"82. *The third allegation of misconduct deals with rules and standards of conduct which the applicant should have been aware of. In fact, it relates to issues that are extremely topical. Sanlam's history is known. It was known that many Afrikaner white men ran the institution. It seems even as late as the time of the arbitration hearing, there were still transformation issues plaguing the respondent. One glaring example is the Propco membership. The applicant wished to make out a case that he created an inclusive environment. The witness he called, Manka Sebastian, testified that people were still speaking Afrikaans in the Sanlam Properties section. This was in breach of the clear policy to use to English as the workplace medium of communication. I do not agree with the submission that she corroborated the applicant's version. She did not testify that the department complied fully with the policy, as was submitted. The matter must be viewed against the legacy of Apartheid and the ongoing calls for transformation in business. Ms Brink's evidence about the transformation strategy and the steps being taken to sensitise employees to diversity was not contested.*

83. *in these circumstances where the applicant must have been very aware of pressure regarding transformation and diversity, he and his team attended a one-day workshop diversity training on 25 March 2019. The Exco members had previously done the training to set an example and*

to lead from the top. The applicant left the workshop early, citing as reason an urgent site meeting in Newlands. He was informed that the Stefanutti Stocks MD was highly upset. What about, was not explained, neither during evidence nor in the closing submissions. The applicant's version was that Stefanutti Stocks were threatening to down tools and leave the site. The applicant and one Ralph went to the site at about 14:30. The applicant went to the site and gave certain verbal assurances that satisfied the MD, it was testified. There is no merit in the submission that had the applicant not gone to the site, he would have been disciplined. He was attending a workshop that his employer saw as very necessary and important. Nobody else, but the applicant thinks that he acted correctly by leaving the workshop early.

84. Ms Brink's evidence that the after-lunch session was critical, was not disputed. The applicant testified that the workshop presenter said that the afternoon session would not be critical, cannot be accepted. Had that been the case, the presenter would have been called as a witness or at least some agenda to indicate the sessions of the day, would have been presented as evidence. This behaviour did not demonstrate a commitment to transformation and diversity that his employer was asking from him. This is further confirmed by his attitude about the 'power hour' sessions. Had he been serious to comply, he would have attended such a session.

85. *Ms Brink's evidence of having to deal with the applicant after grievances were laid about transformation issues, was not questioned. Neither was her evidence that the contract of an African graduate was prematurely terminated and the person paid out the balance of the contract due to issues between the graduate employee and the applicant related to inclusivity issues. These incidents were not the reason for the dismissal but were relied on to demonstrate the applicant's pattern of workplace behaviour regarding transformation and diversity. The inference, given the past history, the continued use of Afrikaans and not English as the lingua franca and this recent conduct is that the applicant did not display an attitude that he was serious about transformation and diversity issues within Sanlam. As a very senior employee it was incumbent on him to set an example. He did not."*

[159] The evidence that served before the commissioner includes the following:

- 159.1 Sanlam Investments, as part of the Sanlam Group, has in place various initiatives in relation to transformation. In 2005, the Sanlam Investments Transformation Committee was established.²³²
- 159.2 Ms Inge Brink (Brink) has been the Human Resources Business Partner at Sanlam Investments since 5 September 2016.²³³ One of her responsibilities is to drive and manage transformation in the Sanlam Investments group.²³⁴ Brink's evidence includes the following:

"So, the focus areas of the committee is obviously to drive transformation within the business, which involves a

²³² Record Volume 6, page 240 and 241

²³³ Record Volume 6, page 240

²³⁴ Record Volume 6, page 240

number of areas. It is highlighted in the document there creating a sense of community where we want to create an environment where all our employees feel safe to come to work in a harmonized way. The second part is to attract and retain African black staff, because we obviously know the history of the Sanlam Group and this has been a specifically problematic area of the business, in terms of achieving its employment equity targets and transformation so this committee also serves to address that."²³⁵

- 159.3 As part of the Sanlam Group, Sanlam Investments has in place documented policies on Transformation, Employment Equity, policies dealing with Harassment including Racial Harassment and Unfair Discrimination and a Language policy.²³⁶
- 159.4 A range of interventions in pursuit of Diversity and Inclusion, including the Diversity and Inclusion Workshops to be attended by senior executives and other employees were implemented.
- 159.5 A Diversity and Inclusion workshop was scheduled and was to be rolled out by the Sanlam Investments group. The plan was for the workshop to be rolled out starting with the subcluster of "Exco's", followed by sessions with Line Managers and thereafter all the employees within the business.²³⁷
- 159.6 Brink, as Human Resources Business Partner, is responsible for driving and managing transformation in the Sanlam Investments group, was in direct communication with the applicant in relation to the scheduled workshop. The first respondent regarded the Diversity and Inclusion workshop as important and as part of the broader strategy in pursuit of Diversity and Inclusion.

²³⁵ Record Volume 6, page 241, line 1 - 11

²³⁶ Record Volume 2, pages 25 - 39

²³⁷ Record Volume 6, page 249, lines 1 -5

- 159.7 The rollout of the workshops included a two-pronged approach for 2019: a formal Diversity and Inclusion workshop with the second prong, *"the sixty minute power hour sessions where diversity and inclusion is of such a nature where it is not just that one that just switches on and things change so it was a formal training session but then also the sixty-minute power hour sessions where we spoke about various topics related to diversity and inclusion and those were open to the entire business."*²³⁸
- 159.8 In the recent past the first respondent had dealt with issues in the Sanlam Properties team related to inclusivity and diversity, including language.²³⁹ The outcome of a grievance process was that the applicant was issued with a final written warning dated 5 October 2016. The final written warning²⁴⁰ refers to, *inter alia*, an "exclusionary culture".²⁴¹ That final written warning was issued by Kodisang.
- 159.9 A further outcome of the process was that the Sanlam Properties team went on a diversity training session early in 2017.²⁴²
- 159.10 The applicant confirms that the final written warning was as a result of 'a language issue' and another inclusivity issue and that it was against that background that the Sanlam Properties team was prioritised for the workshop.²⁴³
- 159.11 Another "instance" involved an investment analyst graduate who worked in the Sanlam Properties team. The working relationship between the investment analyst and the applicant had eventually become untenable, part of this was also linked to issues of inclusivity, and the first respondent

²³⁸ Record Volume 6, page 249, lines 1 - 26

²³⁹ Record, Volume 6, page 243, lines 9 – 13, page 244, lines 1-3 and 18 – 22 and page 245, lines 1-18

²⁴⁰ Record, Volume 2, page 52

²⁴¹ Record, Volume 6, page 243, lines 6 – 13 and record Volume 2 pages 51 and 52

²⁴² Record, Volume 6, page 245, lines 8 – 18

²⁴³ Record Volume 6, page 377, lines 9 – 21 and page 378, lines 1 - 6

and the graduate parted ways (her employment contract was terminated early and she was paid for the duration).²⁴⁴

159.12 Against the background of experiences in the recent past in relation to inclusivity and diversity (including a grievance in relation to Inclusivity and Diversity in the applicant's team), the applicant and his team were prioritised in attending the Diversity and Inclusion Workshop²⁴⁵. The Sanlam Properties team was the only team that attended the Diversity and Inclusion Workshop with their line manager.²⁴⁶ The Diversity and Inclusion workshop to be attended by the applicant and his team was held on 25 March 2019²⁴⁷. The applicant did not remain in attendance for the whole of the workshop.

159.13 The applicant was required to attend the Diversity and Inclusion workshop and to remain in attendance throughout, including for the "*critical piece*" during the after lunch session.

159.14 Brink was in communication with the applicant in relation to him leaving the scheduled workshop early. "*The after lunch session was quite a critical piece of work*".²⁴⁸

159.15 Roux and others more senior to the applicant made the time to attend the Diversity and Inclusion workshop for its full duration.²⁴⁹

159.16 It was "*imperative*" for the applicant to attend the Diversity and Inclusion workshop.²⁵⁰

159.17 On 3 April 2019 Brink sent the applicant an electronic mail. The subject matter of the electronic mail was "*Diversity and Inclusion Workshop*". In the electronic mail Brink writes, *inter alia*, the following:

²⁴⁴ Record, Volume 6, page 246, lines 1 - 15

²⁴⁵ Record, Volume 6, page 377, lines 9 – 21 and page 378, lines 1 – 6

²⁴⁶ Record Volume 6, page 250, lines 10 - 19

²⁴⁷ Record Volume 6, page 250, lines 4 - 17

²⁴⁸ Record Volume 6, page 250 lines 20 – 25 and Record Volume 2 pages 63 - 64

²⁴⁹ Record Volume 6, page 251 lines 17 – 23

²⁵⁰ Record Volume 6, page 251 lines 16 – 23

"Hi Andre,

In arranging the follow up session with the team, I was made aware by the organisers that you and Ralph had to leave the session shortly after lunch to attend to something related to the Newlands Development.

The after lunch session was quite a critical piece of work especially for building the forward.

Please may you provide me with some context as to why you had to leave the session before it was concluded as well as when you became aware that you and Ralph would need to leave the session early.

Looking forward to your soonest response.

*Regards"*²⁵¹.

159.18 Brink's testimony in relation to the applicant leaving the workshop early includes the following:

*"I found it quite absurd and problematic in the sense that we were on a transformation journey with the broader business, in terms of what we needed to achieve but specific to the Properties team because this is an intervention which was agreed. So, with Andre as the line manager of the team to leave early, I was quite shocked."*²⁵²

159.19 Later on the afternoon of 3 April 2019, the applicant sent Brink an electronic mail, copying Ralph Wellhoner. In that electronic mail the applicant writes the following:

"Hi Inge

²⁵¹ Record Volume 2, pages 63 and 64

²⁵² Record Volume 6, page 251, lines 1 - 5

We have a R750m development of the Newlands Cricket stadium. The project manager urgently required us to attend a session with Stefanutti's, the construction company, to discuss Sanlam's involvement. The construction company is currently developing on risk, in other words they are not getting paid, and wanted certainty of the commitment from Sanlam otherwise they would have downed tools. We are on a tight schedule to complete the development on time and a delay will be disastrous.

*We are in general invited to the Monday managers meeting but normally do not attend, therefore I accepted the invite to the workshop. It was a late request from the project manager to address the concerns from Stefanutti. I made a call to attend the session with Ralph given it's importance."*²⁵³

159.20 Brink's testimony in relation to the applicant's electronic mail to her of 3 April 2019 was the following:

*"I didn't feel that it was acceptable, because, by the sheer nature that it was a cascaded approach. I can understand that obviously there is a business imperative, something has happened in the business. If Robert Roux and his Exco, as the most senior members in this business, take the time out to attend a full day workshop on Diversity and Inclusion, and that very same process is rolled out to the rest of the business, I felt that it was imperative for Andre to attend the workshop and I didn't feel that this explanation was acceptable."*²⁵⁴

²⁵³ Record Volume 2, page 63

²⁵⁴ Record Volume 6, page 251, lines 17 - 23

159.21 Brink spoke to Shanmugam and Shanmugam informed her that it was not acceptable.²⁵⁵

159.22 Part of the approach of the intervention of the workshop was a power hour session;

159.23 The applicant and other employees were invited to attend the power hour session;

159.24 The power hour session was linked to the Diversity and Inclusion Workshop;

159.25 In Brink's assessment, the applicant as a senior leader in the business should have attended the power hour session to set an example²⁵⁶; and

159.26 The applicant did not attend the power hour session.

159.27 In relation to the "*power hour*" session Brink's evidence includes the following:

159.27.1 On 7 May 2019 she received an electronic mail from the applicant.²⁵⁷

159.27.2 In his electronic mail to Brink of 7 May 2019 the applicant writes the following: "*If you have gone to the Diversity Workshop is it necessary to attend this session? I assume not.*"²⁵⁸

159.27.3 The applicant's electronic mail of 7 May 2019 was in relation to the "*power hour*" sessions.²⁵⁹

159.27.4 In her response Brink reiterated that the process rolled out in the business was two-pronged approach, that the power hour sessions "*are linked to the second prong approach. And, that the invitation is out to all staff within the business, whether you attend the diversity an inclusion workshop or not, because as I said, Diversity and Inclusion is not just*

²⁵⁵ Record Volume 6, page 261, lines 9 - 16

²⁵⁶ Record Volume 6, page 252 lines 19 – 25

²⁵⁷ Record Volume 6, page 251, lines 24 – 27; Record Volume 2, page 64A and 64B

²⁵⁸ Record Volume 2, page 64B

²⁵⁹ Record Volume 6, page 252, lines 1 – 4

*something you turn the switch on, it is a series of events that needs to occur".*²⁶⁰

159.27.5 *"The power-hour sessions were addressing specific topics related to diversity and inclusion, so it was all lined".*²⁶¹

159.27.6 In her electronic mail to the applicant of 7 May 2019 dealing with his earlier electronic mail of the same day in relation to the power hour session Brink also records *"The invitation is open to all staff in the business, whether you have attended the Diversity and Inclusion Workshop or not, as the invitation reads: this Power Hour is open to all and we encourage full participation. This decision would therefore be up to you."*²⁶²

159.27.7 If the applicant did not attend the power hour session, Brink would find it problematic. ***"It is the role of the Senior leader to manager diversity in a particular way. We have got a role to play to drive this agenda within the business, together with myself and so by Andre not attending the workshop it makes for a difficult example that is set for the team."***²⁶³

(emphasis added)

159.28 The applicant's evidence under cross-examination in relation to the power-hour session includes the following:

159.28.1 He and others were informed that there would be a follow up to the Diversity and Inclusion Workshop²⁶⁴;

159.28.2 His question was *"is this just a repeat that is just sent to everybody or is this something new, in other words if you had attended the diversity workshop, is it required that you attend this and is this something different. My assumption was that because it was mentioned that this*

²⁶⁰ Record Volume 6, page 252, lines 5 – 15; Record Volume 2, page 64A

²⁶¹ Record Volume 6, page 252, lines 5 – 15

²⁶² Record Volume 2, page 64A

²⁶³ Record Volume 6, page 252, lines 19 – 25

²⁶⁴ Record Volume 6, page 383, lines 20 – 27

*diversity workshop is rolled out to the rest of the staff, my assumption was that once you get to, I won't say nonexecutives but maybe they water it down and it becomes an hour so I didn't know so I asked her if you have attended the previous one is this a watered down version of that one or not"*²⁶⁵; and

159.28.3 He did not attend the power hour session, one of the reasons was that there was a conflict, he could not remember the exact issue²⁶⁶.

[160] The evidence before the commissioner includes that the first respondent regarded attendance of the Diversity and Inclusion workshop by the applicant and other employees, including senior executive employees, as important and in fact imperative.

[161] One of the issues that the commissioner was required to consider was whether the applicant had a valid reason to leave the workshop early.

[162] The applicant's version for leaving the workshop early was that he was informed that the Stefanutti Stocks MD was "*highly upset*", that he was required to attend a meeting on site, that he had a discussion with Stefanutti Stocks, that he verbally informed Stefanutti Stocks that "*given these couple of steps that we still need to do, final Propco approval, that we are committed, so he was comfortable to continue. I also had to give him a timeframe*"²⁶⁷.

[163] The commissioner in his arbitration award engages with the applicant's explanation for leaving the workshop early. In this regard the commissioner specifically records the following:

"The applicant left the workshop early, citing as reason an urgent site meeting in Newlands. He was informed that the Stefanutti Stocks MD was highly upset. What about was not explained, neither during the evidence nor in the closing submissions. The applicant's version was that Steffanuti Stocks were threatening to down

²⁶⁵ Record Volume 6, page 383, lines 20 – 25 and page 384, lines 1 – 2

²⁶⁶ Record Volume 6, page 384, lines 5 – 9

²⁶⁷ Record, Volume 6, page 380, lines 13 – 20

tools and leave the site. The applicant and one Ralph went to the site at about 14:30. The applicant went to the site and gave certain verbal assurances that satisfied the MD, it was testified. There is no merit in the submission that had the applicant not gone to the site, he would have been disciplined. He was attending a workshop that his employer saw as very necessary and important. Nobody else but the applicant thinks that he acted correctly by leaving the workshop early."²⁶⁸

[164] The applicant, in his electronic mail to Brink of 3 April 2019²⁶⁹ records that Steffanuti Stocks "*wanted certainty of the commitment from Sanlam*". The applicant's oral evidence included that Steffanuti Stocks sought a verbal commitment.²⁷⁰ The improbability of this version was put to the applicant during cross-examination. It was specifically put to the applicant that his version is highly improbable, that he could have arranged for a written commitment from Ian Kirk, a senior person in the business and in those circumstances "*why would your going and giving them this verbal commitment... solve this crisis of immense proportions.*"²⁷¹

[165] During the cross-examination of the applicant, his version as to "*why the Stefanutti Stocks MD was highly upset*" was probed and tested²⁷². The record that served before the commissioner reveals that on the applicant's version, the Stefanutti Stocks MD required a "*verbal commitment*". The improbability of the applicant's version was expressly canvassed on the record that served before the commissioner. The record that served before the commissioner is a proper basis for a determination that the applicant's version was improbable. On a reasonable assessment a written commitment from a senior person in the business would carry significant weight, more so than a verbal commitment from the applicant. The contention that the applicant's

²⁶⁸ Arbitration award, paragraph 83

²⁶⁹ Record, Volume 2, page 63

²⁷⁰ Record, Volume 6, page 380, lines 6 – 31 and page 381, lines 1 – 4

²⁷¹ Record, Volume 6, page 380, lines 24 – 30

²⁷² Record, Volume 6, page 380, lines 24 – 30 and page 381, lines 1 – 3

evidence on this score was “*rejected as improbable in the absence of any evidence to gainsay his version*” is unsustainable. On the evidence that served before the commissioner, no such ‘*gainsaying*’ was reasonably required. On the evidence that served before the commissioner it cannot reasonably be contended that the applicant had established a factual basis “*sufficiently compelling to warrant the early departure*”.²⁷³

[166] The commissioner in his arbitration award did not find that the applicant had a valid reason for leaving the workshop early. The commissioner’s assessment is supported by the evidence that served before him. Similarly, the commissioner’s finding that the applicant’s contention that he would have faced disciplinary action as being unmeritorious is grounded in the evidence that served before him.

[167] In relation to the applicant leaving the workshop early and the applicant not attending the power hour session, the commissioner records, *inter alia*, the following in the arbitration award:

“83. *In these circumstances where the applicant must have been very aware of pressure regarding transformation and diversity, he and his team attended a one-day workshop diversity training on 25 March 2019. **The Exco members had previously done the training to set an example and to lead from the top.** The applicant left the workshop early, citing as reason an urgent site meeting in Newlands. He was informed that the Stefanutti stocks MD was highly upset. What about, was not explained, neither during evidence nor in the closing submissions. The applicant’s version was that Stefanutti stocks were threatening to down tools and leave the site. The applicant and one Ralph went to the site at about 14h30. The applicant went to the site and gave*

²⁷³ Applicant’s Heads of Argument, paragraph 55

certain verbal assurances that satisfied the MD, it was testified. There is no merit in the submission that had the applicant not gone to the site, he would have been disciplined. He was attending a workshop that his employer saw as very necessary and important. Nobody else, but the applicant thinks that he acted correctly by leaving the workshop early.

- 84 Ms Brink's evidence that the after-lunch session was critical, was not disputed. The applicant testified that the workshop presenter said that the afternoon session would not be critical, cannot be accepted. Had that been the case, the presenter would have been called as witness or at least some agenda to indicate the sessions of the day would have been presented as evidence. **This behaviour did not demonstrate a commitment to transformation and diversity that the employer was asking from him. This is further confirmed by his attitude about the "power hour" sessions. Had he been serious to comply, he could have attended such a session.**²⁷⁴

(emphasis added)

[168] The commissioner's determination that the applicant's behaviour "*did not demonstrate a commitment to transformation and diversity that the employer was asking from him*"²⁷⁵ is grounded in the applicant leaving the Workshop early (without a valid reason) and the applicant's failure to attend the power hour session. On the evidence that served before the commissioner, which

²⁷⁴ Arbitration Award, paragraphs 83 and 84

²⁷⁵ Arbitration Award, paragraphs 83 and 84

includes a range of interventions by the first respondent in pursuit of Inclusivity and Diversity, that the first respondent regarded attendance of the Diversity and Inclusion workshop by the applicant and other employees, including senior executive employees, as important and in fact imperative, that the power hour session was linked to the Diversity and Inclusion Workshop, Brink's assessment that as a senior leader the applicant should have attended the power hour session to set an example and the applicant not attending the power hour session on the basis of a 'conflict' or reason that he could not recall, the commissioner had a proper basis for his finding that the applicant's behaviour "*did not demonstrate a commitment to transformation and diversity that his employer was asking from him*"²⁷⁶.

The Evidence of Manka Sebastian

[169] Ms Manka Sebastian (**Sebastian**) was called as a witness by the applicant.

[170] Sebastian was referred to the Language Policy.²⁷⁷ The Language Policy includes the following:

- *"The internal business language within South African operations is English. To this end, the language of emails, meetings, business discussions, presentations, policies, internal broadcasts and the Intranet is English. Social talk between colleagues will be in the language of their choice. However, when joined by colleagues who do not share their language fluency, in the interests of courtesy and inclusivity, English will be reverted to.*

...

6. Legacy issues pertinent to South African Business

²⁷⁶ Arbitration Award, paragraph 84

²⁷⁷ Record, Volume 2, pages 52A – 52D and Record, Volume 6, page 399, lines 1- 15

Given Sanlam's Afrikaans heritage and legacy, it is understood that the Afrikaans language is embedded in certain internal systems and processes. Business are required to ensure plans are in place to mitigate the risk this presents from a diversity and inclusion perspective.

...

8. Enforcement

Leaders are required to both role model and ensure adherence to the language policy. It is a strategically important policy which underpins our diversity and inclusion goals, both of which are key drivers talent acquisition and retention. Employees who do not adhere to the policy despite sensitization and support, will be disciplined in line with the disciplinary codes of the businesses they form part of.”²⁷⁸

[171] It is contended on behalf of the applicant that in relation to allegation 3.1 which dealt with the continued use of Afrikaans in the Sanlam Properties team, that “*there was no admissible evidence by the first respondent to sustain the charge. In the absence of evidence to discharge this onus, the third respondent misconstrued Sebastian’s evidence regarding the use of Afrikaans in the department. Sebastian testified that when Afrikaans was spoken on the office floor, it was socially and had nothing to do with her role*”.²⁷⁹ On the evidence that served before the commissioner, this contention is unsustainable.

[172] Sebastian’s evidence indicates that Afrikaans was used as a language of communication in the Sanlam Properties team, especially during the first

²⁷⁸ Record, Volume 2, pages 52C – 52D

²⁷⁹ Applicant’s Heads of Argument, paragraph 50

three months of her employment (January 2019 to March 2019).²⁸⁰ This includes an electronic mail in “*Afrikaans on instructions that [Sebastian] was eventually responsible for carrying out*”.²⁸¹ Further, Sebastian’s evidence includes that Afrikaans was spoken “*on the office floor*” socially and that whenever it had to do with her role and if she heard her name, then she would go to the person and ask whether there was anything that she needed to know about.²⁸² Self-evidently, Sebastian’s evidence went further than “*when Afrikaans was spoken on the office floor “it was socially and had nothing to do with her role”*”.²⁸³ On Sebastian’s evidence, the use of Afrikaans included matters dealing with her role. Even the ‘*social*’ use of Afrikaans in Sebastian’s presence is conduct inconsistent with the Language Policy as it relates to ‘*Social Talk*’ and having to revert to English in the interests of inclusivity.²⁸⁴ The import of Sebastian’s evidence as to Afrikaans being used as a language of communication is conduct in the Sanlam Properties team inconsistent with and in breach of the Language Policy. Properly construed, Sebastian’s evidence does not demonstrate compliance with the Language Policy.

[173] In the arbitration award the commissioner records, *inter alia*, the following:

“The applicant wished to make out a case that he created an inclusive environment. The witness he called, Manka Sebastian, testified that people were still speaking Afrikaans in the Sanlam Properties section. This was in breach of the clear policy to use English as the workplace medium of communication. I do not agree with the submission that she corroborated the applicant’s version. She did not testify that the department complied fully with the policy as was submitted. The matter must

²⁸⁰ Record, Volume 6, page 398, lines 12 – 17 and page 403, lines 10 - 17

²⁸¹ Record, Volume 6, page 398, lines 12 – 17 and page 403, lines 8 - 16

²⁸² Record Volume 6, page 403, lines 12-17

²⁸³ Applicant’s Heads of Argument, paragraph 50

²⁸⁴ Record Volume 2, pages 52A – 52D

be viewed against the legacy of Apartheid and the ongoing calls for transformation in business. Ms Brink's evidence about the transformation strategy and the steps being taken to sensitise employees to diversity was not contested."²⁸⁵

[174] It is contended on behalf of the applicant in argument, *inter alia*, that the "third respondent failed to attach appropriate weight to Sebastian's evidence ostensibly because she was the applicant's junior and "had to yield to his authority""²⁸⁶ It is further contended on behalf of the applicant in argument that the commissioner's "mischaracterization of Sebastian's evidence as well as the dismissive attitude towards the veracity of her evidence had a distorting effect on the third respondent's assessment of her credibility and his ultimate findings".²⁸⁷

[175] The contentions on advanced on behalf of the applicant are not sustainable. It is indeed so that Sebastian was the applicant's junior. The evidence that served before the commissioner, including the evidence of Sebastian herself, establishes that Afrikaans was still being used as a language of communication in the Sanlam Properties team. The commissioner could hardly ignore or dismiss that evidence. In the circumstances, it cannot reasonably be contended that in relation to non-compliance with the Language Policy the commissioner "failed to attach appropriate weight to Sebastian's evidence", had a "dismissive attitude towards the veracity of" Sebastian's evidence or that he 'mischaracterised' Sebastian's evidence.

[176] The issue is not whether in Sebastian's view there was compliance with the Language Policy. The commissioner's assessment as to a breach of the Language Policy and that the Language Policy was not fully complied with is grounded in and supported by the evidence that served before him.

²⁸⁵ Arbitration Award, paragraph 82

²⁸⁶ Applicant's Heads of Argument, paragraph 52

²⁸⁷ Applicant's Heads of Argument, paragraph 53

[177] Sebastian's evidence as to her positive experience with the applicant as a member of the Sanlam Properties team is dealt with more fully below.

[178] The evidence that served before the commissioner included that of Brink and her dealing with issues and a grievance related to "*an environment that wasn't conducive in terms of inclusivity*".²⁸⁸ The final written warning²⁸⁹ refers to, *inter alia*, an "*exclusionary culture*".²⁹⁰ On the evidence that served before the commissioner, Brink's concerns in relation to Inclusivity and Diversity in the Sanlam Properties team were real and documented. Shortly after her appointment Brink dealt with concerns and a grievance related to Inclusivity and Diversity. Brink was directly involved in those processes.

[179] The evidence in relation to an '*instance*' involving a parting of the ways with an investment analyst graduate²⁹¹ did not include evidence that the first respondent had taken disciplinary steps or action against the applicant. On the evidence before the commissioner, the first respondent's legal representative notes expressly that it was part of the "*background to the steps*" later taken by Brink in respect of the applicant and his team and the diversity training workshops²⁹².

[180] The record that served before the commissioner reveals that when these issues were canvassed, the applicant's legal representative objected.²⁹³ The first respondent's legal representative expressly stated, *inter alia*, that the purpose was not to present the issues as similar fact evidence.²⁹⁴ That approach was cautious and fair.

[181] As noted above, the evidence of the applicant confirms that the final written warning was as a result of '*a language issue*' and another inclusivity issue

²⁸⁸ Record Volume 6, lines 90 - 13

²⁸⁹ Record, Volume 2, page 52

²⁹⁰ Record, Volume 6, page 243, lines 6 – 13 and record Volume 2 pages 51 and 52

²⁹¹ Record, Volume 6, page 246, lines 1 - 15

²⁹² Record, Volume 6, page 238, lines 13 – 24 and page 247, lines 1 - 12

²⁹³ Record, Volume 6, page 244, lines 8 – 11

²⁹⁴ Record Volume 6, 238, lines 13 – 24, page 243, lines 21 – 25 and page 244, lines 12 – 15

and that it was against that background that the Sanlam Properties team was prioritised for the workshop.²⁹⁵

[182] On the evidence that served before the commissioner, the fact that the applicant was issued with a final written warning in October 2016 valid for 12 months does not have the consequence that the first respondent did not have ongoing concerns. Whilst it is so that the final written warning was valid for 12 months and in a technical legal sense was not operative during 2019, the first respondent had ongoing concerns in relation to inclusivity and diversity in the Sanlam Properties team. Brink's evidence includes that during November 2018 she took certain steps and engaged the applicant in an attempt to avoid a "*repeat of what previously transpired in the team*"²⁹⁶. In addition to those steps, the first respondent's ongoing concerns informed the Sanlam Properties team being prioritised for interventions related to transformation.²⁹⁷ Brink's evidence on this score and past incidents related to inclusivity and diversity issues do not fall into the category of inadmissible evidence. The contention as to a '*poisoning of the well*' is not sustainable.

[183] There is no room for any contention that the commissioner had not engaged with the record that served before him. This is further underscored by the commissioner in his process ruling of 23 August 2023 in which he records, inter alia, "*I have listened to the entire recording and controlled the transcript in doing so. I also made my own notes from the recordings I encountered occasional mistakes in the transcript.*"²⁹⁸

[184] Part of Sebastian's evidence was to the effect that in her assessment as an employee in the Sanlam Properties team, she had a positive experience. Sebastian's evidence included that "*we are a unit. We have mutual respect for each other's capabilities and what we bring to the team*".²⁹⁹

²⁹⁵ Record Volume 6, page 377, lines 9 – 21 and page 378, lines 1 - 6

²⁹⁶ Record Volume 6, page 247, lines 1 - 14

²⁹⁷ Record, Volume 6, page 247, lines 17 – 23 and page 248, lines 15 – 18

²⁹⁸ Record Volume 7, page 58

²⁹⁹ Record, Volume 6, page 400, lines 1 – 8

[185] The commissioner's assessment that the "*dynamics*" in the relationships between the applicant and Sebastian on the one hand and the applicant and Shanmugam on the other hand "*were completely different*" is properly grounded in the evidence that served before him. The applicant reported to Shanmugam and was subject to Shanmugam's authority. That is indeed a different dynamic to the applicant as line manager of the Sanlam Properties team.

[186] The fact of Sebastian's evidence as to her positive experience in the team, including her evidence as to the applicant's positive contribution during the workshop³⁰⁰ is hardly an insurmountable hurdle to a conclusion that the applicant "*excluded, bypassed or sidelined Mr Shanmugham as a person of colour*"³⁰¹ or a determination by the commissioner that the applicant's behaviour "*did not demonstrate a commitment to transformation and diversity that his employer was asking from him*"³⁰² and that the applicant "*did not display an attitude that he was serious about transformation and diversity issues within Sanlam. As a very senior employee it was incumbent on him to set an example. He did not.*"³⁰³.

[187] Sebastian's evidence does not address the applicant leaving Diversity and Inclusion Workshop early without a valid explanation or the applicant's failure to attend the power hour session. Sebastian's evidence does not include a factual version addressing those aspects (early departure and failure to attend the power hour session). Absent such a version from Sebastian, it cannot reasonably be contended that the commissioner had a '*dismissive attitude*' to Sebastian's evidence on those aspects. On the evidence before the commissioner, Sebastian's evidence as to the applicant's participation in the workshop³⁰⁴ for the limited period of his attendance is no substitute for full duration attendance (including the critical piece after lunch) which his employer regarded as important and imperative or the applicant's failure to

³⁰⁰ Record Volume 6, page 400, lines 18 – 24

³⁰¹ Record Volume 2, page 3 and Arbitration Award, paragraphs 87 and 88

³⁰² Arbitration Award, paragraph 84

³⁰³ Arbitration Award, paragraph 85

³⁰⁴ Record Volume 6, page 400, lines 9 – 24

attend the power hour session. To the extent that it is contended that Sebastian's evidence impacts the evidence in relation to the applicant leaving the workshop early or his failure to attend the power hour session, this is unsustainable. Sebastian's evidence does not displace the weight of the evidence in relation to Diversity Workshop and power hour session which properly supports the commissioner's findings.

[188] Earlier in the arbitration award, at paragraph 84, and in relation to the applicant leaving the Workshop (without a valid reason) and the applicant's failure to attend the power session, the commissioner determined that the applicant's *"behaviour did not demonstrate a commitment to transformation and diversity that his employer was asking from him"*³⁰⁵.

[189] In the arbitration award at paragraph 85 the commissioner records, *inter alia*, *"The inference, given the past history, the continued use of Afrikaans and not English as the lingua franca and this recent conduct is that the applicant did not display an attitude that he was serious about transformation and diversity issues within Sanlam. As a very senior employee it was incumbent on him to set an example. He did not."*

[190] The past history (being related to diversity and inclusivity issues including a grievance), the first respondent's ongoing concerns with inclusivity and diversity in the Sanlam Properties team, the continued use of Afrikaans as established in the evidence, and the recent conduct which includes leaving the Diversity and Inclusion Workshop early (without a valid reason) in circumstances where it was important and imperative that he remained in attendance throughout and the applicant's failure to attend the power hour session, formed part of the evidence that served before the commissioner. In relation to the past, the commissioner specifically records that *"These were not the reason for the dismissal"*. The inference drawn by the commissioner, that the applicant *"did not display an attitude that he was serious about transformation and diversity issues within Sanlam"*³⁰⁶ is grounded in and supported by the evidence that served before him. On a 'fair reading' of the

³⁰⁵ Arbitration Award, paragraph 84

³⁰⁶ Arbitration Award, paragraph 85

award, it is readily apparent that the commissioner's finding is based on the full spectrum of the evidence that served before him rather than simply latching onto one aspect. The broader context was the applicant's 'transformation obligations'.³⁰⁷ The commissioner's findings must be assessed in context, *"on the totality of the evidence not on a fragmented piece meal analysis."*³⁰⁸

[191] In the result, the contention that the commissioner *"improperly relied on that inadmissible evidence to draw an inference about the applicant's pattern of workplace behaviour regarding transformation and diversity in order to conclude that "he did not display an attitude that he was serious about transformation and diversity within Sanlam"*³⁰⁹ is not sustainable.

[192] It is contended on behalf of the applicant:

*"Save for one instance in which she received an email in Afrikaans from a colleague and which was corrected immediately, Sebastian's evidence demonstrated that there was compliance with the Language policy as well as undisputed evidence regarding the applicant's inclusive management style and commitment to diversity within his department. The third respondent failed to attach appropriate weight to Sebastian's evidence ostensibly because she was the applicant's junior and "had to yield to his authority"."*³¹⁰

[193] As dealt with extensively above, Sebastian's evidence properly construed does not demonstrate that there was compliance with the Language Policy. Of no small significance, the evidence before the commissioner establishes that Afrikaans was still being used as a language of communication in the Sanlam properties team during the period January to March 2019. Whilst it

³⁰⁷ Record Volume 2, page 3

³⁰⁸ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mining) v CCMA and Others* [2014] 1 BLLR 20 (LAC) and at paragraph 21

³⁰⁹ Applicant's Heads of Argument, paragraph 54

³¹⁰ Applicant's Heads of Argument, paragraph 52

is so that Sebastian's evidence includes a positive experience that she had with the applicant, it cannot reasonably be contended that Sebastian's evidence establishes *"undisputed evidence regarding the applicant's commitment to diversity within his department"*.

[194] It is contended on behalf of the applicant that:

*"Once again Sebastian's evidence regarding the applicant's participation in and contribution to the Diversity and Inclusion workshop was discounted out of hand. Similarly, the applicant's evidence regarding his reason for leaving the workshop early was rejected as improbable in the absence of any evidence to gainsay his version. Other than labelling the reason as "unacceptable" the first respondent failed to adduce any evidence to refute that the applicant was called to an urgent meeting with a developer, that he considered it necessary to attend to protect the first respondent's interests and that the reason for the meeting was sufficiently compelling to warrant the early departure."*³¹¹

[195] The fact of Sebastian's views as to the applicant's participation in the workshop is not evidence to address the first respondent's concern that the applicant had left the workshop early (without a valid explanation) in circumstances where it was important and in fact imperative that he attend the workshop for its full duration. The applicant's evidence in seeking to explain why he left the Diversity and Inclusion workshop early, including the improbability of that version has been dealt with extensively above. In addition, the commissioner's arbitration award includes the following: *"Ms Brinks's evidence that the after-lunch was critical, was not disputed. The applicant testified that the workshop presenter said that the afternoon session would not be critical, cannot be accepted. Had that been the case, the*

³¹¹ Applicant's Heads of Argument, paragraph 55

*presenter would have been called as a witness or at least some agenda to indicate the sessions of the day, would have been presented as evidence”.*³¹²

[196] This demonstrates that the commissioner did consider and reflect upon the applicant's evidence.

[197] The contention that Sebastian's evidence was “*discounted out of hand*” is not sustainable.

[198] At paragraph 58 of the arbitration award the commissioner self-evidently reflected on the evidence of Sebastian. Later in the arbitration award and at paragraph 87, the commissioner considers and analyses that evidence. As dealt with above, the commissioner engaged with the evidence of Sebastian and his analysis includes the dynamics of the relationship between Sebastian and the applicant on the one hand and Shanmugam and the applicant on the other hand. That analysis can hardly be faulted. The commissioner also records that Sebastian “*could not comment on the applicant's relationship with Mr Shanmugham*”³¹³. Such an engagement with the evidence of Sebastian as is recorded in the arbitration award cannot reasonably be described as Sebastian's evidence being “*discounted out of hand*”. On a proper analysis, Sebastian's evidence as dealt with by the commissioner, including at paragraph 58 of the arbitration award, does not displace the weight of the evidence as to the applicant's conduct in relation to Shanmugam (allegation 2), the applicant leaving the Diversity and Inclusivity workshop without a valid reason and the applicant's failure to attend the power hour session (allegation 3.2). Sebastian's evidence must be considered against the weight of the other evidence. In the circumstances, it cannot reasonably be contended that the commissioner “*discounted*” Sebastian's evidence “*out of hand*”. It is the commissioner's duty to consider the evidence. It is readily apparent that the commissioner considered the evidence of Sebastian and did not regard that evidence as displacing the other evidence that served before him. This does not disclose misconduct in

³¹² Arbitration Award, paragraph 84

³¹³ Arbitration Award, paragraph 87

relation to his duties as a commissioner, gross irregularity in the conduct of the proceedings or that the commissioner exceeded his powers.

'Race Based allegations as an Afterthought'

[199] It is contended on behalf of the applicant in argument that "*the only plausible inference to be drawn from the proven facts is that the race-based allegations were contrived as an afterthought to bolster the disciplinary charges against the Applicant in order to secure a dismissal*".³¹⁴ This is a serious contention. In effect it attributes malice to Shanmugam and the first respondent.

[200] It is further contended that the commissioner failed to consider the context in which the applicant was dismissed. Under this heading it is contended that when first the applicant faced allegations of misconduct, during March 2019 it was communicated to him that the most serious sanction he would face was a final warning.³¹⁵

Disciplinary Meeting

[201] Brink gave evidence in relation to a disciplinary meeting scheduled for 18 March 2019. Brink was specifically referred to an electronic mail from Shanmugam dated 13 March 2019 to the applicant and copied to Brink.³¹⁶ Brink's evidence on this score includes the following:

- 201.1 A disciplinary meeting was scheduled for 18 March 2019. She attended the meeting.³¹⁷
- 201.2 The purpose of the meeting was a disciplinary discussion based on the electronic mails in which Shanmugam had "*laid out acts of misconduct, acts of serious misconduct*"³¹⁸. The applicant attended the meeting in

³¹⁴ Applicant's Heads of Argument, para 47

³¹⁵ Applicant's Heads of Argument, paragraph 43

³¹⁶ Record, Volume 2, page 95 – 96

³¹⁷ Record, Volume 6, page 254, lines 15 – 19

³¹⁸ Record, Volume 6, page 255, lines 1 – 2

Johannesburg.³¹⁹ The outcome of a disciplinary meeting is that a sanction will be awarded.³²⁰

201.3 The disciplinary meeting was not concluded. On 20 March 2019 the applicant sent an electronic mail to Brink.³²¹ In that email the applicant records, *inter alia*, that he has considered the allegations at the disciplinary meeting and the additional information, that he did not believe that Shanmugam is independent and can give a fair assessment on proof of the allegations, nor be fair on determining the sanction and the applicant proposed that an independent person be appointed to determine if the allegations are found to have substance.³²²

201.4 At the time of the disciplinary meeting "*there is no talk of dismissal*" and that was because this was a disciplinary meeting.³²³

201.5 The process of the disciplinary meeting was stopped. The first respondent subsequently decided to embark on a disciplinary hearing. For that purpose it appointed a firm of attorneys and an independent person to act as chairperson. The applicant was also afforded the right to legal representation in the disciplinary hearing.³²⁴

[202] On the evidence that served before the commissioner, the first respondent convened a disciplinary hearing on written notice to the applicant. The notice is dated 16 April 2019.³²⁵

[203] It is contended on behalf of the applicant that the notice of allegations of misconduct of 16 April 2019 included the "*added sting of racial discrimination*

³¹⁹ Record, Volume 6, page 255, lines 3 – 8

³²⁰ Record, Volume 6, page 255, lines 9 – 10

³²¹ Record, Volume 2, page 97

³²² Record, Volume 6, page 255, lines 16 – 23

³²³ Record, Volume 6, page 260, lines 16 – 22

³²⁴ Record, Volume 6, page 256, lines 1 – 11

³²⁵ Record, Volume 2, pages 1 – 4 and 119; Record Volume 6, page 171, lines 21 - 23

and anti-transformation allegations and the possibility of a sanction of dismissal".³²⁶

[204] On the evidence that served before the commissioner the applicant was dismissed after being found guilty of several allegations of misconduct³²⁷ as recorded in the disciplinary enquiry notice dated 16 April 2019.

[205] The dispute before the commissioner, as recorded in the 6 June 2023 pre-arbitration minute was the alleged unfair dismissal of the applicant. The applicant contends that his dismissal was substantively unfair. The applicant did not challenge the procedure followed by the first respondent. In challenging the substantive fairness, the applicant contended that his dismissal was substantively unfair "*as the allegations against him were not proven*".³²⁸ The pre-arbitration minute of 6 June 2023 specifically records that the commissioner needs to decide whether the applicant "*is guilty of the charges against him including discriminatory conduct on the basis of colour*".³²⁹ It is necessarily so, that the allegations which the applicant contends were not proven, are those in the notice dated 16 April 2019.

[206] It is contended on behalf of the applicant in argument that: "*the amplified charge sheet issued to the applicant on 16 April 2019 was premised on the same allegations which formed part of the first charge sheet, save for the added sting of racial discrimination and anti-transformation allegations and the possibility of a sanction of dismissal. The amplified charge sheet did not contain any new facts that were not within the knowledge of Shanmugam or Brink at the time that they issued the first charge sheet.*"³³⁰

[207] The fact of the disciplinary meeting of 18 March 2019 and the subsequent notice to attend the disciplinary enquiry of 16 April 2019 does not disclose any unfairness on the part of the first respondent. On the evidence that served before the commissioner, following the disciplinary meeting of 18

³²⁶ Applicant's Heads of Argument, paragraph 45

³²⁷ Record, Volume 2, pages 1 – 4 and page 119 and Record Volume 6, page 173, lines 14 - 22

³²⁸ Record, Volume 1, page 57, paragraphs 14 – 16

³²⁹ Record, Volume 1, page 66, paragraph 42

³³⁰ Applicant's Heads of Argument, paragraph 45

March 2019 the first respondent was not precluded from issuing the notice of 16 April 2019 when it did and in the terms that it did.

[208] There is nothing extraordinary or unusual or unfair about the fact that an employer might take disciplinary action against an employee in relation to events that transpired several months before the notice to attend a disciplinary enquiry is issued.

[209] The events and circumstances which informed allegation 2, took place over a period of time: Propco (July 2018); Congratulatory electronic mail (12 July 2018); Nelspruit Development (28 August 2018); MOU electronic mail (28 August 2018); Tender documents (29 August 2018); Newlands Development (12 December 2018 and 8 February 2019); Wood transaction electronic mail (13 March 2019); Property Portfolio incident (SMMI) April 2019. It cannot reasonably be contended that there was any undue delay between the dates of these events and the notice to attend the disciplinary hearing dated 16 April 2019. Similarly, it cannot reasonably be contended that there was any undue delay on the part of the first respondent in taking disciplinary action in relation to allegation three.

[210] Further, the events and circumstances extend beyond August 2018 and include 'incidents' during April 2019. In the circumstances it is not common cause that the *"incidents which underpin the allegations of racial discrimination under Allegation 2 occurred primarily during certain email exchanges between Shanmugam and the applicant during July and August 2018"*.³³¹

[211] It is further contended that the allegations in support of allegation 3 *"were within the knowledge of the first respondent at the time of the first charge sheet but were inexplicably not included. The third respondent erroneously fails to draw any adverse inference from the absence of an explanation for this omission especially given the gravity of the allegations and their impact on the sanction."*³³²

³³¹ Applicant's Heads of Argument, paragraph 41

³³² Applicant's Heads of Argument, paragraph 48

[212] As noted above, the allegations of misconduct recorded in Shanmugam's electronic mail to the applicant of 13 March 2019 were the subject of a disciplinary meeting which took place on 18 March 2019. The process of the disciplinary meeting was not concluded. The first respondent decided to embark on a formal disciplinary hearing and for that purpose it appointed a firm of attorneys and an independent person to act as chairperson of the disciplinary hearing.³³³ The fact that the notice of the disciplinary hearing (16 April 2019) is different to Shanmugam's electronic mail to the applicant of 13 March 2019 does not disclose any unfairness. The fact that Shanmugam's electronic mail to the applicant of 13 March 2019, which formed the subject of the scheduled disciplinary meeting of 18 March 2019, does not include allegations of "*discriminatory conduct on the basis of race*" or matters referred to in allegation 3 of the disciplinary hearing notice of 16 April 2019 does not disclose any unfairness and does not amount to an '*omission*' requiring explanation by the first respondent. The factual matter which informed allegation 3 is recorded in the 16 April 2019 notice. On the evidence before the commissioner, self-evidently, the first respondent decided to convene a formal disciplinary hearing and for that purpose was required to and did record allegations of misconduct. In doing so, the first respondent was not bound by the content of Shanmugam's electronic mail to the applicant of 13 March 2019.

[213] In relation to developments leading to the 16 April 2019 notice the rather straight forward evidence that served before the commissioner includes Shanmugam's evidence:

- 213.1 at the time of the disciplinary meeting, he was considering a final written warning as a sanction;³³⁴
- 213.2 after the termination of the disciplinary meeting the business had more time to consider the allegations against the applicant;³³⁵

³³³ Record Volume 6, page 265, line 1 – 11

³³⁴ Record Volume 6, page 179 lines 6 – 24 and page 180 line 1 - 13

³³⁵ Record Volume 6, page 179 line 6 – 24 and page 180 line 1 - 13

213.3 he considered "*all of these*" matters and thought about why the applicant was treating him in this manner;³³⁶

213.4 he thought about "*what could have been the possible reasons, you know, for Andre not respecting me and having disregard for my position as his superior*";³³⁷

213.5 having thought about it in the context of his qualifications and experience, he concluded that "*perhaps it is race*".³³⁸

[214] Brink's evidence on developments leading to the 16 April 2019 notice includes "*consultation with the business*".³³⁹

[215] Shanmugam did not when first the applicant bypassed him come to the conclusion that "*perhaps it is race*". During his cross-examination Shanmugam's evidence includes the following:

215.1 It was put to Shanmugam that at the time of the Congratulatory email incident (12 July 2018), Shanmugam took issue some eight or nine months later. Shanmugam's response was that: "*So, at the time, you know, I felt that it was disappointing, but I didn't respond to it, I don't think any reasonable manager would have done this if he is trying to build his relationship*"³⁴⁰.

215.2 in relation to the MOU incident of 29 August 2018, it was put to Shanmugam that he did not take exception to that incident until March 2019. Shanmugam's response included that "*I was trying to build this relationship*".³⁴¹

[216] After 18 March 2019 Shanmugam considered "*all of these*" matters and thought about why the applicant was treating him in this manner.³⁴² On the

³³⁶ Record Volume 6, page 179 line 6 – 24 and page 180 line 1 - 13

³³⁷ Record Volume 6, page 168 – line 7 to page 169, line 17

³³⁸ Record Volume 6, page 168 line 7 to page 169 line 17

³³⁹ Record Volume 6, page 26, line 18

³⁴⁰ Record Volume 6, page 208, lines 1 – 4

³⁴¹ Record Volume 6, page 213, lines 10 – 12

³⁴² Record Volume 6, page 179, lines 6 – 24 and page 180, 1 – 13

evidence before the commissioner, considered reflection and “*consultation with the business*” do not evince an improper motive and can hardly be penalised.

[217] The Diversity and Inclusion Workshop took place on 25 March 2019, after the electronic mail of 13 March 2019 and the 18 March 2019 meeting.

[218] On the evidence before the commissioner the fact that the electronic mail of 13 March 2019 did not include allegations of discrimination based on race was dealt with. In the circumstances, there was no factual or other basis for the commissioner to draw an adverse inference as contended for. There was no “*omission*” which required explanation.

[219] It is readily apparent from a reading of the arbitration award that the commissioner grappled with the evidence that served before him. The commissioner’s observations include the following: “*If understand his argument, it is that Mr Shanmugam fabricated the race issue to bolster the respondent’s case*”³⁴³. Self-evidently, the commissioner was alive to the contention that the “*race-based allegations were contrived as an afterthought to bolster the disciplinary charges against the applicant in order to secure a dismissal*”.³⁴⁴

[220] It cannot reasonably be contended that considered reflection and “*consultation with the business*” amount to an afterthought to bolster the first respondent’s case to secure a dismissal.

[221] On the evidence that served before the commissioner, following the disciplinary meeting of 18 March 2019, the first respondent was not precluded from issuing the subsequent 16 April 2019 notice to attend the disciplinary enquiry. The 16 April 2019 notice records, at some length, the allegations of misconduct.³⁴⁵

[222] In relation to the “*race-based allegations*”, so called, it is contended on behalf of the applicant in argument that “*Additionally, and in its haste to dismiss the*

³⁴³ Arbitration Award, paragraph 87

³⁴⁴ Applicant’s Heads of Argument, paragraph 47

³⁴⁵ Record Volume 2, pages 3-4

applicant, the first respondent failed to comply with the process prescribed in its Racial Harassment and Unfair Discrimination Policy".³⁴⁶

[223] This contention is unsustainable. As noted above, in referring an alleged unfair dismissal dispute to the CCMA and in the binding pre-arbitration minute, the applicant does not take issue with the procedure adopted by the first respondent. The pre-arbitration minute specifically records that the arbitrator is required to determine whether the applicant "*is guilty of the charges against him including discriminatory conduct on the basis of colour*".³⁴⁷

[224] The first respondent does indeed have in place a number of policies including the Racial, Harassment and Unfair Discrimination Policy (the Policy). The Policy and at paragraph 7 records, *inter alia*, "*The following complaints process may be followed or where applicable the business cluster's existing grievance procedure*".³⁴⁸ Paragraph 8 of the Policy is a guideline for managers.³⁴⁹ It is trite that the provisions of policies of this nature are a guide. There can be no serious or sustainable suggestion or contention that the first respondent did not have concerns as to possible discriminatory conduct by the applicant.

[225] The allegations of misconduct, including those related to discriminatory conduct, are recorded in the notice of the disciplinary enquiry dated 16 April 2019.³⁵⁰ On the record that served before the commissioner, the applicant knew and understood the allegations of misconduct against him and had a reasonable opportunity to prepare and to state a case in his defence. On the record before the commissioner, the applicant did not at any material time contend that the first respondent's allegations of misconduct in relation to discriminatory conduct are flawed for want of compliance with its internal policies.

³⁴⁶ Applicant's Heads of Argument, paragraph 47

³⁴⁷ Record, Volume 1, page 66, paragraph 42

³⁴⁸ Record, Volume 2, pages 33 - 39

³⁴⁹ Record, Volume 1, page 66, paragraph 42

³⁵⁰ Record, Volume 2, pages 1 – 4

[226] During the cross-examination of Brink, no contentions were made as to non-compliance by the first respondent with its applicable policies.

[227] In addition, the applicant in his evidence in relation to the issue of "race" in the allegations of misconduct does not give evidence to the effect that the first respondent did not comply with its policies. The applicant's evidence does include the following: *"I was never aware up to that point that race was an issue. It was never brought to my attention. So it was interesting to me that it was added to the term sheet."*³⁵¹

Allegation 3.3

[228] In the arbitration award the commissioner records the following:

"86. The last issue to determine regarding the allegations of misconduct is the reason why Mr Shanmugham was disrespected or bypassed. I had already found that the applicant disrespected his authority over him. Mr Shanmugham's evidence was that he did not know what motivated the applicant. He did some introspection and thought that he is competent otherwise he would not have been appointed as the CEO. He then thought that perhaps it was his race.

87. Much reliance was placed on Ms Sebastian's evidence about her relationship with the applicant. She was junior to him. She testified about her relationship with the applicant. She could not comment on the applicant's relationship with Mr Shanmugham. The dynamics in these two relationships were completely different. In the one the applicant was the senior, in the other, he was the junior and had to yield to authority. The applicant's evidence was that he did not disrespect

³⁵¹ Transcript, page 278, lines 9 – 11

his manager. His manager though felt he was disrespected. After reflection, he thought that the only reason could be his race. The applicant's submissions are that the race allegation was an afterthought, that the allegation is defamatory and has no rational basis. Mr Shanmugham did not testify that the applicant is a racist. During his cross-examination, it was pointed out to him that he might be mistaken in his perception. The applicant also did not testify that. His version based on the denial that he did not disrespect Mr Shanmugham's authority. The accusation is that the applicant "... excluded, by-passed or sidelined Mr Shanmugham as a person of colour". This is specifically in reference to the allegations set out in the second allegation related to insubordination/insolence/disrespect etc. As stated above, the applicant gave no reasonable explanation for his actions. **If I understand his argument, it is that Mr Shanmugam fabricated the race issue to bolster the respondent's case. He is a liar, it is submitted.** Many of my findings were based on inference and the impressions left by the evidence presented. I already commented above on questions posed during cross-examination, in which the applicant's case was shown to be that, it is Mr Shanmugham who is wrong and that he is not a reasonable manager. This might mean many things. The applicant clearly portrays Mr Shanmugham as the problem. The fact is, the applicant's conduct impacted on Mr Shanmugham and made him question his worth and ability. **Given my findings above about the applicant's demonstrated attitude about**

transformation, inclusivity and diversity in the workplace, coupled with the bare denial and the fact that Mr Shanmugham's impressions are his valid impressions, and it must be accepted that his impression of the pattern of behaviour was not a knee-jerk reaction or fabrication to somehow "get" the applicant, I hold that the respondent's version in this regard is accepted as more probable.

88. *I hold therefore that the commission of the misconduct complained of was proven. Was dismissal the appropriate sanction? I bear in mind that the applicant has throughout the proceedings portrayed himself as the only one who was correct. He was given ample opportunity to reflect, yet never conceded that somehow he might have been wrong. According to him, his three managers have their own views, particularly Mr Shanmugham, as he stated during cross-examination. He thinks that Mr Shanmugham, is/was not a reasonable manager as was stated to him during his cross-examination. This was repeated in the closing submissions. There is no reliable evidence that Mr Shanmugam is not a good manager. As he testified, he was appointed in the position because his superiors were of the opinion that he was up to the challenge. This was not challenged. He also stated that it was a difficult decision, especially considering the applicant's years of service."* ³⁵²

(emphasis added)

³⁵² Pleadings, pages 34 – 35; Arbitration Award paragraphs 86 – 88

[229] The evidence of Shanmugam includes the following:

"When I sat back and thought about exactly what was going on here, I was trying to search within myself, you know, what kind, what could have been the possible reasons, you know, for Andre not respecting me and having disregard for my position as his superior. And I thought about could it be because of my education, or, my qualifications or my experience or my competence, you know, but I went through each, you know, each of them, I have got a University degree, Post Graduate I have got two degrees, and I have got 21 years of experience in financial services.

I have experience in all of those assets you know, under my control, under my responsibility, private equity, business equity, credit markets, infrastructure, derivatives, hedge funds, you know, I have been in the group for a long time and Nerson and Robert would not have given me the job if they didn't think I have the technical competence you know to manage these businesses.

And, then I mean, the only other thing, you know, that I could think of was, you know, perhaps it is race. I was convinced that Andre does not respect me because he doesn't think I am able to do it, he wasn't ready to bring me into discussions or even, I wasn't expecting you know, to be treated in this manner but I wasn't particularly welcomed into his business. You know, I never interacted with his teams, he took the teams away from me and I must tell you that this is not the Sanlam that I know. I first joined Sanlam in 1999.

And at the time I had an opportunity to present at the, what do they call it, (words inaudible) chaired by the Chief

Actuary, Chris Swanepoel and Chris Swanepoel, I was 26 years old at the time and Chris Swanepoel was such a gentleman and he made me feel so welcomed that he changed the language of that meeting to English and I have only had good experiences in Sanlam given what they stand for, in the last 14 years.

And this is the first incidence where I have ever experienced anything like this.”³⁵³

- 229.1 The applicant's evidence in cross-examination and in direct response to Shanmugam's evidence as to his conclusion that “perhaps it is race” includes the following:

“ADVOCATE NORTON: *Now you have heard Mr. Shanmugam testify first of all that he experienced your conduct towards him and we have canvassed much of that as being insulting in some respects, as undermining him in other respects, and that when he tried to work out why you would be undermining him and by-passing him it couldn't be because of his qualifications or his experience because he is highly qualified and highly experienced and because of your propensity to go directly to people like Robert Roux and Neil van Rensburg who were white men, he was left*

³⁵³ Record Volume 6, page 168, line 7 to page 169 line 17

drawing the inference that your behaviour towards him was driven by racial prejudice. Would you like to comment on that?

RHEEDER:

*It wasn't. I can't decide for Mr. Shanmugam what his inference or conclusions are. It wasn't.*³⁵⁴

[230] Part of Sebastian's evidence was to the effect that in her assessment as an employee in the Sanlam Properties team, she had a positive experience. Sebastian's evidence included that *"we are a unit. We have mutual respect for each other's capabilities and what we bring to the team"*.³⁵⁵ This part of Sebastian's evidence as it relates to allegation 3.1 and 3.2 has been dealt with above. However, importantly and in relation to Shanmugam's evidence and his experience with the applicant, Sebastian's evidence under cross-examination includes the following:

"ADVOCATE NORTON: *Miss Sebastian, Mr. Shanmugam testified in this hearing that over a long period of eight to nine months he experienced conduct by Mr Rheeder towards him as his superior as he regarded as racially prejudiced. Now, you have described that as a new employee in Mr. Rheeder's team, you had a different experience and I think you would accept,*

³⁵⁴ Record Volume 6, page 384 lines 9 - 18

³⁵⁵ Record, Volume 6, page 400, lines 1 – 8

because I think you already have, the fact that you had this experience with Mr. Rheeder that his conduct towards Mr. Shanmugam wasn't racially prejudiced.

MS MANKA SEBASTIAN: *Yes, I can't speak to that. I can't.*³⁵⁶

[231] Sebastian's evidence includes that she could not speak to the evidence given by Shanmugam³⁵⁷ and specifically his experience of the conduct of the applicant and his assessment after reflection that "*perhaps it is race*".³⁵⁸

[232] The applicant's evidence – in - chief includes the following: he had good working relationships with his previous line managers "*who were persons of colour*"³⁵⁹, he explained the reasons for "*some misunderstandings etc that he might have had*"³⁶⁰ and given the "*explanations that [he] had for some of the allegations*" he could not see that "*it could have been a question about race*"³⁶¹.

[233] The evidence that served before the commissioner includes the applicant's behaviour and pattern of behaviour in bypassing Shanmugam. It includes the evidence of Shanmugam as to how he experienced the applicant's conduct in relation to him and the process by which he arrived at the conclusion as to the "*possible reasons*" for the applicant disregarding him as his superior. Having thought about it Shanmugam arrived at the conclusion "*perhaps it is race*". On any reasonable assessment, Shanmugam's evidence is considered and discloses careful self-reflection in relation to his professional career with the first respondent.

³⁵⁶ Record, Volume 6, page 403, lines 2 – 8

³⁵⁷ Record Volume 6, page 403, lines 1 – 8

³⁵⁸ Record, Volume 6, page 168, line 7 to page 169 line 17

³⁵⁹ Record Volume 6, page 318, lines 1 – 12

³⁶⁰ Record Volume 6, page 318, lines 1 – 12

³⁶¹ Record Volume 6, page 318, lines 1 – 12

[234] The evidence in relation to the applicant's behaviour towards Shanmugam, bypassing, disregarding and disrespecting Shanmugam (allegation 2), has been dealt with extensively above. The commissioner's determination as to misconduct in relation to allegation 2 is firmly established in the evidence that served before him. In relation to Shanmugam's conclusion that "*perhaps it is race*", the applicant's evidence includes that he does not understand "*why that is such*"³⁶². Further, in cross - examination and in direct response to Shanmugam's evidence as to his conclusion that "*perhaps it is race*" and how he arrived at that conclusion the applicant's evidence is "*It wasn't. I can't decide for Mr Shanmugam what his inference or conclusions are, it wasn't.*"³⁶³

[235] The commissioner's characterisation that the applicant's evidence on this score was a "*bare denial*" is supported by the evidence that served before him. Similarly, the commissioner's assessment that "*Mr Shanmugham's impressions are his valid impressions and it must be accepted that his impression of the pattern of behaviour was not a knee-jerk reaction or a fabrication to somehow 'get' the applicant*"³⁶⁴ is supported by the evidence that served before him.

[236] It is contended on behalf of the applicant in argument, *inter alia*, that the "*third respondent failed to attach appropriate weight to Sebastian's evidence ostensibly because she was the applicant's junior and 'had to yield to his authority'*"³⁶⁵. It is further contended on behalf of the applicant in argument that the "*mischaracterisation of Sebastian's evidence as well as the dismissive attitude towards the veracity of her evidence had a distorting effect on the third respondent's assessment of her credibility and his ultimate findings*".³⁶⁶

[237] It cannot reasonably be contended that the detailed evidence as to the applicant's conduct in relation to allegation 2 (the bypassing and disregard of Shanmugam), as dealt with extensively above, is displaced or undone by the

³⁶² Record Volume 6, page 318, lines 1 – 12

³⁶³ Record Volume 6, page 384, lines 9 – 18

³⁶⁴ Arbitration Award, paragraph 87

³⁶⁵ Applicant's heads of argument, paragraph 52

³⁶⁶ Applicant's heads of argument, paragraph 53

evidence of Sebastian as to her experience. On a reasonable assessment, the weight of the evidence that served before the commissioner as to the applicant's conduct towards Shanmugam and on eight occasions, is compelling and is not displaced by the experience of Sebastian.

[238] The weight of the established facts in relation to allegation 2, allegation 3.1 and 3.2 as they relate to the applicant's 'transformation obligations', Shanmugam's considered reflections which led him to his conclusion ("*perhaps it is race*") and the applicant's response to that evidence, "*It wasn't*"³⁶⁷, form a proper basis the commissioner's determination that "*the respondent's version in this regard is accepted as more probable*" and that the misconduct was proven. Such a determination does not mean or imply that the commissioner did not accept Sebastian's '*credibility*' or that the commissioner was dismissive in relation to the '*veracity*' of Sebastian's evidence. It simply and significantly means that Sebastian's evidence as to her experience does not displace the compelling weight of the other evidence that served before the commissioner.

[239] There is no proper basis for the contention advanced on behalf of the applicant that the commissioner '*mischaracterised*' Sebastian's evidence or the contention as to a "*dismissive attitude towards the veracity of her evidence had a distorting effect on the third respondent's assessment of her credibility and his ultimate findings.*"³⁶⁸

[240] The commissioner's analysis does not disclose a "*distorting effect*" as contended on behalf of the applicant in argument. Rather, on a reasonable assessment, the commissioner's ultimate findings give effect to the compelling weight of the evidence as to the applicant's conduct towards Shanmugam (allegation 2) and Shanmugam's considered reflections as to the reason for that conduct.

[241] It is contended on behalf of the applicant that the evidence of Sebastian "*is either completely ignored or dismissed*".³⁶⁹ This contention is not sustainable.

³⁶⁷ Record, Volume 6, page 384, lines 9 – 18

³⁶⁸ Applicant's heads of argument, page 53

³⁶⁹ Applicant's Heads of Argument, paragraph 35

As demonstrated above, the commissioner engaged with the evidence of Sebastian. The evidence of Sebastian was not exculpatory of the applicant.

[242] It is further contended that “*the applicant had a good relationship with both his previous managers who happened to be persons of colour*”.³⁷⁰ Kodisang was the applicant’s immediate past manager.

[243] The evidence that served before the commissioner establishes that Kodisang took disciplinary action against the applicant and issued him with a final written warning. That written warning related to diversity and inclusion issues.

[244] The evidence that served before the commissioner includes an electronic mail exchange between the applicant and Kodisang on 15 January 2018.³⁷¹ On 15 January 2018 the applicant had sent an electronic mail to Roux, copying Kodisang and Naidoo. The electronic mail relates, *inter alia*, to the proposed establishment of “*two new direct property funds namely a Healthcare Property Fund and a Residential Property Fund*”.³⁷² Kodisang responded to the applicant’s electronic mail on the same day, 15 January 2018. Kodisang’s electronic mail records, *inter alia*, the following:

“Andre,

I think we have processes in the Alternatives business that need to be followed before we seek Robert’s approval.

You can present your proposal at next Exco for approval. Post approval Nersan and I will position with Robert for his final approval.

Please present papers and agenda item to Terusha as our company secretariat.”³⁷³

³⁷⁰ Applicant’s Heads of Argument, paragraph 58.1

³⁷¹ Record Volume 2, pages 24A and 24B

³⁷² Record Volume 2, page 24

³⁷³ Record Volume 2, page 24A

[245] During the applicant's evidence it was put to him in cross-examination that Kodisang took issue with him and that the applicant had to follow processes. The applicant claimed to be unaware that Kodisang's electronic mail was in effect a form of Kodisang "*admonishing*" him.³⁷⁴ On the evidence that served before the commissioner, the applicant had sent an electronic mail directly to Roux, copying Kodisang, in relation to significant business matters (the establishment of two new direct property funds). Kodisang's electronic mail in response draws the applicant's attention to "*processes in the Alternatives business that need to be followed before we seek Robert's approval*" and specifically records that after approval of the proposal at the level of the Alternatives business, Naidoo and Kodisang "*will position with Robert for his final approval*".

[246] On a plain reading Kodisang did indeed take issue with the applicant not following processes in the Alternatives business and approaching Roux directly with a significant business proposal. In point of fact, Kodisang records that he and Naidoo (not the applicant) would '*position*' the proposal with Roux after approval at the level of the Alternatives business. On the evidence before the commissioner, the applicant had disregarded "*processes*" and bypassed Kodisang.

[247] It is contended on behalf of the applicant that "*Any reliance placed on the singular incident with his previous manager, Ben Kodisang, is misplaced and unreasonable.*"³⁷⁵ There is no factual or other basis for the contention that the commissioner relied on the "*singular*" incident. As noted above, the commissioner made no finding or determination that the applicant should have known to copy his manager into every email. The 15 January 2018 incident demonstrates that in relation to a significant business matter (the proposed establishment of two new funds) the applicant had gone directly to Roux, bypassing Kodisang. The arbitration award does not, on a reasonable assessment, reflect any reliance on a "*singular incident*" (January 2018) in relation to a determination that the applicant had bypassed Shanmugam.

³⁷⁴ Record Volume 6, page 343, lines 12 – 18

³⁷⁵ Applicant's Heads of Argument, paragraph 68

Further, and in relation to allegation 3.3 the arbitration award does not reflect any reliance on a *“singular incident”* or *“discord between the applicant and Kodisang”*.

[248] The applicant’s assessment that he had a good working relationship with his previous managers who were *“persons of colour”*, does not displace the compelling weight of the applicant’s conduct in bypassing and disregarding Shanmugam *“as a person of colour”* or the weight of the evidence on which the commissioner based his determination that the applicant’s *“behaviour did not demonstrate a commitment to transformation and diversity that his employer was asking from him”*³⁷⁶ and that the applicant *“did not display an attitude that he was serious about transformation and diversity issues within Sanlam”*.³⁷⁷

[249] It is further contended on behalf of the applicant that:

“It had to concede that in the year since the applicant’s dismissal:

59.1. *There was very little change in diversity in relation to Propco;*

59.2. *Shanmugam was still an attendee of Propco and not a member; and 59.3. Thando Seshuba, a Black African male who was appointed to the applicant’s position was not a member of Propco.*

60. *The only plausible inference is that the applicant was not the hurdle to transformation. The first respondent’s efforts to drive transformation were largely unsuccessful despite the applicant’s absence from the workplace.”*³⁷⁸

³⁷⁶ Arbitration Award, paragraph 84

³⁷⁷ Arbitration Award, paragraph 85

³⁷⁸ Applicant’s Heads of Argument, paragraphs 59 and 60

[250] These contentions on behalf of the applicant do not displace the evidence that served before the commissioner. The issue is not whether the applicant was a hurdle to the first respondent's transformation efforts. Rather, one of the first respondent's principal concerns was whether the applicant had complied with the transformation obligations as a senior manager. In the commissioner's determination the applicant did not. It might well be the case that the first respondent has ongoing concerns or issues that need to be addressed. That would hardly be unusual. However, that does not displace the commissioner's findings that the allegations of misconduct against the applicant have been proven.

[251] The commissioner did not simply disregard the applicant's version. The commissioner found, in his own words, "*I hold that the respondent's version in this regard is accepted as the more probable*".³⁷⁹ It is indeed the commissioner's duty to consider the evidence before him and, where necessary, to decide which version is more probable. The commissioner did precisely that.

[252] The commissioner, as is recorded by him, drew inferences from the evidence before him. As demonstrated above, those inferences are properly supported by the evidence that served before the arbitration proceedings. It cannot reasonably be contended that the commissioner's inferences and his findings are untethered from the evidence that served before the arbitration proceedings.

[253] Further, it cannot reasonably be contended that the weight of the evidence and the established facts relation to allegation 3, as dealt with extensively and analysed above, can be undone or disturbed by observations as to candour or demeanour of the witnesses who gave that evidence as captured in the transcript that served before the commissioner. An observation, for example, as to the applicant's candour or demeanour would not undo the established facts that arise from his own evidence. This applies with equal force to the evidence Sebastian. In addition, the weight of the established

³⁷⁹ Arbitration Award, paragraph 87

facts is not diminished by an absence of the commissioner observing the witnesses personally and taking a view as to their candour and demeanour.

[254] In relation to allegation 3 there can be no serious or sustainable contention that the commissioner's reasoning and findings are "*entirely disconnected with the evidence, unsupported by any evidence and involves speculation*" as contemplated in *Securitas*.³⁸⁰

[255] Further, as alluded to above, the broader context was the applicant's '*transformation obligations*'.³⁸¹ The commissioner's findings must be assessed in context, "*on the totality of the evidence not on a fragmented piece meal analysis.*"³⁸² On a proper assessment, the commissioner's reasoning and determination in relation to allegation 3 are grounded in and supported by the evidence that served before him. The commissioner's reasoning and findings do not disclose misconduct in relation to his duties as a commissioner, gross irregularity in the conduct of the proceedings or that the commissioner exceeded his powers

Dismissal as appropriate sanction

[256] In relation to the Wood transaction it is contended, *inter alia*, on behalf of the applicant that "*The investigators found the applicant to be honest in his dealings and recommended that he be given a final written warning and that the first respondent consider amending its policies to include a rule covering this scenario.*"³⁸³

[257] The forensic report itself concludes that it does not agree with the applicant's contention that "*declaring his interest and actions should have been sufficient. We are of the opinion that he should have asked his manager, Mr. Shanmugam, permission before proceeding with the salvaging of the*

³⁸⁰ *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2021) 42 ILJ 1071 (LAC)

³⁸¹ Record Volume 2, page 3

³⁸² *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mining) v CCMA and Others* [2014] 1 BLLR 20 (LAC) and at paragraph 21

³⁸³ Applicant's Heads of Argument, paragraph 74

wood.”³⁸⁴ The first respondent decided to take disciplinary against the applicant in relation to the Wood transaction. It cannot seriously be contended that the first respondent as employer was bound by “recommendations” of the forensic investigation. As is dealt with extensively above, on the evidence that served before the commissioner, the applicant’s serious misconduct in relation to the Wood transaction is firmly established.

[258] It is further contended on behalf of the applicant that “an important consideration was that the applicant had not previously committed a similar transgression and that he was transparent in his conduct. There was no evidence of personal gain at the expense of the first respondent or prejudice to the first respondent” and “there is no further evidence introduced in the amplified charge sheet that would warrant a dismissal on this charge or which suggests that the employment relationship had broken down as a result”.³⁸⁵ These contentions are not sustainable.

[259] The evidence that served before the commissioner included that of Roux: the value of the wood is not the principal concern, the first respondent deals with “client’s money and therefore utmost care in the way that you do it and the way you handle conflict.”³⁸⁶ The applicant under cross-examination accepted that:

- 259.1 he knew that in his position, managing property, conflicts of interest would arise ³⁸⁷;
- 259.2 the first respondent needed to trust him to make the right judgment calls when conflicts of interest arose ³⁸⁸;

³⁸⁴ Record, Volume2, page 89, paragraph 5.2

³⁸⁵ Applicant’s Heads of Argument, paragraphs 75 and 76

³⁸⁶ Record Volume 6, page 29, lines 1 – 7 and lines 27 – 29

³⁸⁷ Record Volume 6, page 324, lines 10 - 11

³⁸⁸ Record Volume 6, page 325, lines 1 - 10

- 259.3 whenever he is attending to the first respondent's business and an opportunity arises to obtain a personal benefit that is a potential conflict of interest ³⁸⁹;
- 259.4 the first respondent has an interest in not having its employees acquiring benefits from situations in which they are acting on behalf of the first respondent ³⁹⁰;
- 259.5 when in doubt an employee has to disclose a circumstance involving a potential conflict of interest to the first respondent ³⁹¹.

[260]As noted above, the evidence that served before the commissioner establishes that the applicant is a senior managerial employee of the first respondent. In the ordinary course of his duties the applicant is required to avoid a conflict of interest. When a potential conflict of interest does arise the applicant is required to put the interests of the employer first. The applicant knew of a conflict of interest in relation to the Wood transaction. The applicant was required to inform Shanmugam, his direct superior, of the proposed transaction and to seek his prior permission. The applicant did not do so and only informed Shanmugam after the Wood transaction and some three months later. The breach of the applicant's obligations to the first respondent as his employer in relation to the Wood transaction is firmly established in the evidence.

[261]On the evidence that served before the commissioner, the applicant's established misconduct in relation to the Wood transaction is serious misconduct. The applicant as a senior managerial employee in the financial services industry was obliged to avoid conflicts of interest and the first respondent as his employer needs to trust that the applicant would make the right judgment calls when conflicts of interest arise. The applicant as a senior managerial employee did not put the interests of the employer first.

³⁸⁹ Record Volume 6, page 325, lines 11 -12

³⁹⁰ Record Volume 6, page 325, lines 19 - 21

³⁹¹ Record Volume 6, page 326, lines 14 - 22

[262] During the course of the arbitration proceedings the applicant had an opportunity to reflect on his conduct and to consider his position in relation to the Wood transaction. Notwithstanding being given such an opportunity, the applicant was steadfast in his stance that he did not do anything wrong. The fact of applicant's serious misconduct is compounded by his steadfast refusal to acknowledge any wrongdoing. This, properly put, must impact the employment relationship between the applicant and the first respondent.

[263] In the arbitration award the commissioner also records the following

*[90] Given the pattern of behavior that points to undermining Mr Shanmugham's authority, that could ultimately impact on the operations and which gave the impression of incompatibility, though this is not a reason for dismissal, and also given the fact that the applicant steadfastly refused to concede to even the smallest act of wrongdoing, I hold that the decision to dismiss was a fair decision. The applicant was then and at the time of submitting the closing submissions, not willing to concede any wrongdoing or tender any apology. It cannot be that these four senior employees would testify for the respondent were all wrong and that only the applicant was right. The applicant's conduct caused a breakdown in the employment relationship, to the extent that it could not reasonably be expected of the respondent to have continued with the employment relationship."*³⁹²

[264] It is contended on behalf of the applicant that: *"The third respondent's finding that the employment relationship had broken down was largely based on the applicant's alleged lack of remorse. This finding is not consistent with the applicant's evidence that he would have amended his conduct if Shanmugam*

³⁹² Arbitration Award, paragraph 90

had expressed his concerns. There was simply no way that the applicant could have known of Shanmugam's subjective opinions and inferences."³⁹³

These contentions are unsustainable.

[265] The contention as to *"the applicant's evidence that he would have amended his conduct if Shanmugam had expressed his concerns"* has been dealt with extensively above. The applicant's evidence that served before the commissioner does not include any factual matter which indicates that he would have conducted himself differently. The issue of proper reflection when dealing with the detail of his conduct formed no part of the applicant's evidence. A contention in argument *"that he would have amended his conduct"* is no substitute for genuine reflection.

[266] Importantly, on the evidence that served before the commissioner the applicant was afforded an opportunity to reflect on his conduct. This opportunity was offered to him also in relation to allegation 2. In this regard the applicant's evidence under cross-examination includes the following:

"ADVOCATE NORTON: *Mr Rheeder, would it be fair to say that in all of these issues after a long time, a long opportunity to reflect on all of these aspects of your conduct over the six-to-eight month period, you simply don't see anything wrong with anything that you did?*

MR RHEEDER: *My interactions with Mervyn on an eight-month period was probably 1000 interactions. There was a lot of what has happened here, what is going to happen here, much more*

³⁹³ Applicant's Heads of Argument, paragraph 78

mails than you see here. Here is an abstract of a couple of mails that I think have given you sufficient information to realise that this is normal, this is, there is nothing wrong with this and to choose three or four of them and say that they are disobedient, insolent, I think what about the other 1000 that was there. Why wasn't that put on the table.

ADVOCATE NORTON: *But Mr Rheeder I don't think you are answering my question. It is, is it fair to say that after reflecting on all of these issues, you still think that nothing was wrong in any of your conduct during this period?*

MR RHEEDER: *Exactly.”*³⁹⁴

[267] The applicant had an opportunity to reflect on his conduct and persisted that he did nothing wrong. The passage of evidence referred to above is in the applicant's cross-examination. By that stage in the arbitration proceedings the applicant had a full appreciation of the first respondent's serious concerns with his conduct. He had heard the evidence of Roux, Naidoo and Shanmugam in relation to allegation 2. Even then, on the record that served before the commissioner, the applicant had no pause for thought and persisted with his view that he did nothing wrong and did so in what appears to be rather emphatic terms, “*Exactly*”. The record that served before the

³⁹⁴ Record Volume 6, page 375, lines 10 - 22

commissioner reveals no reflection on the part of the applicant and no hint that with the benefit of hindsight, he might have done things differently or approached matters differently.

[268] It is contended on behalf of the applicant that in disciplinary proceedings “*an employee’s insistence on their innocence or their right to defend themselves does not constitute insubordination or justify dismissal*”³⁹⁵. It is trite that in disciplinary and arbitration proceedings the rights of employees include stating a case in their defence, maintaining their innocence and challenging the allegations against them. It is the facts that served before the commissioner which ultimately led him to conclude that the misconduct in relation to the Wood transaction, allegation 2 and allegation 3, was proven. The contention that there was an “*absence of credible evidence from the first respondent*”³⁹⁶ is simply not sustainable. The weight of the established facts does indeed constitute a proper basis for the commissioner to conclude that the allegations of misconduct, including insubordination, were proven. It is the weight of the evidence and not the applicant’s “*insistence on their innocence or their right to defend themselves*” which establishes the applicant’s serious misconduct as contemplated in the notice dated 16 April 2019.

[269] The effect of applicant’s persistent failure to acknowledge wrongdoing is a discrete inquiry which in appropriate circumstances would impact the employment relationship. The contention in argument advanced on behalf of the applicant that the commissioner misdirected himself “*on the facts and the law in relation to alleged lack of remorse which in turn, led to an unreasonable finding that the applicant caused the breakdown in the employment relationship*”³⁹⁷ is unsustainable

[270] On the record that served before the commissioner, at no material or relevant time does the applicant acknowledge any wrongdoing on his part. That lack of reflection and remorse persisted in by the applicant does necessarily

³⁹⁵ Applicant’s Heads of Argument, paragraph 79

³⁹⁶ Applicant’s Heads of Argument, paragraph 80

³⁹⁷ Applicant’s Heads of Argument, paragraph 81

impact the employment relationship adversely and in the context of his established serious misconduct, does constitute an insurmountable hurdle to his continued employment by the first respondent.

[271] In the matter of **De Beers Consolidated Mines Ltd v CCMA & Others** [2000] 9 BLLR 995 (LAC) the Court at paragraph 22 held that:

"...Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it.

...

*Long service is not mitigatory as such. Mitigation as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage: much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise."*³⁹⁸

[272] Further, in **De Beers** it was held that:

*"It would in my view be difficult for an employer to re-employ an employee who had shown no remorse. Acknowledgement of wrong-doing is the first step to 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 broken."*³⁹⁹

[273] In **Theewaterskloof Municipality v SALGBC (Western Cape Division) & Others** [2010] 11 BLLR 1216 (LC), the Court noted that whilst item 3 (2) of the Code of Good Practice: Dismissal, contained at Schedule 8 of the LRA endorsed the concept of corrective discipline:

*"...progressive discipline is premised on a corrective purpose and outcome. If no correction is likely to be obtained or if the employment relationship is in any event irretrievably broken down, the scope of graduated discipline will likewise fall away."*⁴⁰⁰

[274] The Court in **Theewaterskloof** found in this instance that because the employee had:

³⁹⁸ [2000] 9 BLLR 995 (LAC) at [22].

³⁹⁹ [2000] 9 BLLR 995 (LAC) at [25].

⁴⁰⁰ [2010] 11 BLLR 1216 (LC) at [17] – [19]

“elected to hold himself on a confrontational course [t] here can be very little room for the notion of corrective discipline in this situation. Where an employee refuses to demonstrate any acceptance of wrongdoing, indicates no degree whatsoever of remorse, makes no move to correct what he has done, stands firm with an attitude of opposition towards his employer, then such employee through his own conduct undercuts the applicability of corrective or progressive discipline.”⁴⁰¹

[275] The commissioner's determination that the first respondent could not reasonably be required to continue with the employment relationship and that the dismissal was fair is consistent with the principles of our law

[276] Arbitration awards are final and binding and not subject to appeal.⁴⁰²

[277] The commissioner did not misconceive the nature of the enquiry, nor did he arrive at an unreasonable result.⁴⁰³ The commissioner had regard to the material facts before him.⁴⁰⁴ The review test is not whether on analysis another perspective is plausible and reasonable, rather the review test as restated in **Makuleni** is that the award “*has to be so egregious*” that no reasonable person could have reached the result.⁴⁰⁵

[278] On a ‘*fair reading*’ of the award, the commissioner's conclusions are supported by the body of evidence that served before the arbitration proceedings.⁴⁰⁶ An assessment or ‘*fair reading*’ of the commissioner's award against the backdrop of the evidence that served before him, as contemplated in **Makuleni**, does not yield the result that the commissioner's conclusions are ‘*untenable*’.

⁴⁰¹ [2010] 11 BLLR 1216 (LC) at [20]

⁴⁰² Section 143(1) of the LRA

⁴⁰³ *Herholdt v Nedbank Ltd* (Congress of South African Trade Unions as amicus curiae) [2013] 11 BLLR 1074 (SCA)

⁴⁰⁴ *Nyathikazi v Public Health & Social Development Sectoral Bargaining Council & others* (2021) 42 ILJ 1686 (LAC)

⁴⁰⁵ *Makuleni v Standard Bank of SA (Pty) Ltd & others* (2023) 44 ILJ 1005 (LAC)

⁴⁰⁶ *Ibid*, 405

The Order

1. The application is dismissed.
2. There is no order as to costs.


VAN VOORE AJ
ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant: Adv LR Naidoo SC
Instructed by: Macgregor Erasmus Attorneys

For the Respondent: Adv C Kahanowitz
Instructed by: Bradley Conradie Halton Cheadle Attorneys