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

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JR2470/23

In the matter between:

MERCY ZIHOVE **Applicant**

and

STANDARD BANK SOUTH AFRICA (PTY) LTD **First Respondent**

COMMISSIONER T SERERO *N.O.* **Second Respondent**

COMMISSION FOR CONCILIATION, **Third Respondent**

MEDIATION AND ARBITRATION

Heard: 19 February 2026

Delivered: 31 July 2026

JUDGMENT

PHAKEDI, AJ

Introduction

[1] The Applicant approached this Court in terms of section 145 (2) (a)(i) of the Labour Relations Act[1] (LRA) seeking to review and set aside an arbitration award dated 1 November 2023 issued by the Second Respondent under case number GAJB 8735-23. The First Respondent, Standard Bank of South Africa (the Bank) is opposing the application and seeks its dismissal with costs. This judgement was unnecessarily delayed due to circumstances outside this Court's control and a sincere apology is extended to both parties for the delay in delivering the judgement.

Brief background facts

[2] The Applicant was employed by the Bank and was part of the Priority Investigations team in the Group Forensic Services business unit from 1 July 2022 until her dismissal on 14 April 2023. She was a senior forensic investigator and a certified fraud examiner with more than ten (10) years' experience. In terms of the internal reporting structure, she reported to Mr Mabuti Radebe (Mr Radebe), who in turn reported to Mr Ajay Rampersadh (Mr Rampersadh), the Head Group Forensic Services.

[3] On or during January 2023, the Bank was contacted by Nedbank enquiring about a transaction of One Hundred Thousand Rand (R100 000.00) transferred from a Standard Bank account held by a certain Ms ED Strydom (Ms Strydom) into a Nedbank account held by one of its clients. Nedbank cautioned the Bank that the transaction could be proceeds of fraud and asked the Bank to investigate the matter further.

[4] During the investigations, the Bank discovered that indeed Ms ED Strydom was its client and on or about 4 January 2023 she had made three transfers of R100 000.00 with one of the amounts being transferred into a Standard Bank account belonging to Mike Angies Workshop (Pty) Ltd, which account belonged to the business owned by the Applicant. It was discovered that on

[1] Act 66 of 1995, as amended.

the day the money was deposited, the Applicant transferred an amount of R80 000.00 into a Standard Bank account and a further R10 000.00 into a First National Bank (FNB) account belonging to Elite Ambitions.

[5] The Bank then invited Ms Strydom in for investigations and she confirmed that she was in a romantic relationship with a certain gentleman who provided her with account numbers to deposit the money into including the Standard Bank and Nedbank accounts. The Bank's investigators concluded that Ms ED Strydom had been a victim of a romance scam, and accordingly advised her to open a criminal case with the South African Police Services (the SAPS). The Bank then looked into the role of the Applicant and invited her to share her side of the story and explain her role in the scam since her account was one of the recipients of the funds.

[6] On or about 6 February 2023 the Applicant submitted her response to the investigators and confirmed that she is the owner of the workshop and the moneys deposited into her account was for the purpose of purchasing a vehicle on behalf of a client who was based in Dubai. She did not take steps to verify the sources of the funds (R100 000.00) as she relied on the information provided by her Workshop Manager, Mr Kuda Govo who indicated that he was going to purchase and repair a vehicle on behalf of his brother. It was Mr Govo who had shared the banking details of her Workshop with his brother.

[7] On or about 13 March 2023, the Applicant was issued with a notice to attend a disciplinary hearing and the following allegations were levelled against her:

> 'Charge 1
>
> Alleged misconduct in that on 4 January 2023, you permitted / authorised for your business current account under the name of Mike Angies Workshop with account number 101xxxxxx293, to be the recipient of R100 000.00. The funds of which were later discovered to be the proceeds of financial crime perpetrated against a bank client, Ms ED Strydom. Your conduct was in contravention of a number of bank policies including but not limited to the

Group Investigations Code of Conduct and has exposed the bank to undue reputational risk and a possible financial loss.

Charge 2

Alleged Gross misconduct in that on 4 January 2023, you performed the transfer of funds received in the account of Mike Angies Workshop, as detailed in charge 1, without applying due diligence and care as the account holder in verifying the source of funds as legitimate. The first payment of R80 000.00 to Elite ambitions was made to Standard Bank account number xxxxxxxx9230 at 12h21. The second payment of R10 000.00 to Elite Ambition was made to First National Bank account number XXXXXXXX3374, also at 12h21. Your conduct was not only in contravention of the bank's values and policies but it has further exposed the bank to undue reputational risk and possible financial loss.'

[8] On or about 22 March 2022 she attended a disciplinary hearing chaired by Mr Pieter Smith one of the panelists on the Bank's database of independent chairpersons. Subsequent to hearing the evidence from both parties, Mr Smith issued an outcome and found the Applicant not guilty of the misconduct. The outcome was not formally communicated to the Applicant but to the senior managers. Mr Rampersadh rejected the verdict and sought intervention from other senior managers who then instructed Mr Smith to change the verdict from not guilty to guilty. The parties were then invited to submit mitigating and aggravating factors. Mr Smith later issued a sanction of dismissal. The Applicant was then dismissed on 14 April 2023.

[9] She then referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). The Second Respondent was appointed to arbitrate the dispute and his arbitration award is the subject of these review proceedings.

Arbitration proceedings and the award

[10] The parties concluded a pre-arbitration minute and recorded that the employment term and rank of the Applicant, her gross salary, the charges, her private business and its bank account, the deposit and subsequent

transactions, were common cause. The parties further recorded that there was no evidence that the Applicant was complicit in the fraud scam nor that she had knowledge of such fraud as she was relying on the information she received from the Workshop Manager.

[11] The Bank called Mr McCrudden as its first witness. He testified that he was the team leader within the Internal Group Forensic Investigations and had been employed by the Bank since 2005. He was then appointed as an investigator when the matter was reported to the Bank and he was later appointed to initiate disciplinary proceedings against the Applicant.

[12] On or during January 2023, an elderly client of the bank, Ms Strydom made the three (3) payments of R100 000.00 into the account numbers she had obtained from a certain Charles Carter, whom she met on Facebook and was involved in a romantic relationship with. The business account number of Mike Angies Workshop was given to Ms Strydom by a certain gentleman who was allegedly in a romantic scam with Ms Strydom. The Applicant was the owner of Mike Angies Workshop, and she was responsible for managing the account and handling day-to-day transactions.

[13] During the investigations, the Transactional Fraud Department identified the Applicant's business account as one of the recipients of the funds belonging to Ms Strydom. On 4 January the Applicant's business account (Mike Angies Workshop), received an amount of R100 000.00 from Ms Strydom's account. On the same day, the Applicant, made two payments of R80 000.00 into the Standard Bank account and R10 000.00 into the FNB account belonging to Elite Ambitions. Mr McCrudden found it strange that the R100 000.00 was deposited into the Applicant's Standard Bank account when Elite Ambitions also had an account with Standard Bank. It was his strong view that the Applicant should have flagged the transaction on this basis, but she did not.

[14] The Applicant was subsequently interviewed and confirmed that she received the money and made the transactions as stated above. She was, however, unable to explain why she had not questioned the transaction, given that the funds were received from a Standard Bank account and that she was also

transferring a portion of those funds to another Standard Bank account holder. The Applicant was also unable to explain why she was purchasing vehicles on behalf of third parties when her business involved repairing vehicles. He further testified that the Bank expected its employees to conduct their private and business affairs in a manner that would not adversely affect its reputation or relationship with clients. In the circumstances, the Applicant breached the Bank's policies.

[15] He later interviewed Mr Govo, the Applicant's workshop manager. His evidence was inconsistent and contradictory to the version provided by the Applicant in that, during the investigations he stated that he was buying the vehicle on behalf of his brother, Marvin. However, in the statement he indicated that the name of his brother was ED Strydom. There were also some inconsistencies regarding the purchase price of the vehicle from both the Applicant and Mr Govo. He further confirmed that whilst the applicant failed to independently verify the source of the funds paid into her account, there was no evidence that she knowingly participated in the fraudulent transaction. , however, stated that she ought to have verified the money paid into her account before transacting and paying the money to a third party. By doing so, she failed to act in the best interests of the Bank and to observe its policies.

[16] During cross examination, he was asked to comment about the changing of the outcome of the disciplinary hearing by management, and he stated that he had limited knowledge about the interference with the initial outcome. He further confirmed that Standard Bank itself did not detect the fraudulent transactions and it was alerted by Nedbank. He further confirmed that after the Applicant's account was blocked by the Bank, she approached Mr Koekemoer seeking information about the reasons for the account being blocked but she did not disclose that she was the owner of the said account. Mr Koekemoer then referred her to Ms Shanila Sampersand who referred the Applicant to Mr Keegan Nayger for further assistance. It was only during her interaction with Mr Nayger that she disclosed that she was the owner of the

blocked account and since she was also employed by the Bank, he reported the matter to Mr Rampersadh.

[17] He further confirmed that after the fraudulent transactions the Applicant created a WhatsApp Chat Group between herself, Mr Govo and Marvin and asked Marvin about the source of the funds. The applicant allowed her bank account to be used to facilitate money laundering offences. He further stressed that the charges levelled against the Applicant were serious in nature and led to the breakdown of the trust relationship in that she was a senior investigator and a certified fraud examiner who failed to act in the best interests of the Bank.

[18] The Bank's second witness, Mr Rampersadh confirmed that he was employed as the Head of Group Forensic Services. He corroborated the version of Mr McCrudden on the inconsistent versions given by the Applicant and her witness, Mr Govo. He further indicated that there was no evidence that Mr Govo was an employee of the Applicant nor was he earning any salary as the workshop manager.

[19] He testified that the Applicant was a certified fraud examiner with more than ten years' experience in forensic investigations. As a senior Forensic Investigator, she ought to have scrutinised the source of the funds before transferring them from her business account in the manner she did. Her failure to exercise due diligence in relation to on the transaction contravened the Bank's Code of Conduct, thereby exposing the Bank to serious reputational risk and potential financial loss.

[20] He testified that he was shocked when he learnt of the outcome of the disciplinary hearing, in which the Chairperson found the Applicant not guilty despite what he regarded as compelling evidence of her guilt. He then referred the outcome to the Executive responsible for People and Culture, who escalated the matter to the Employee Relations Department. Mr Lukhele, the Group Head of Employee Relations, also disagreed with the Chairperson's findings and engaged with Mr D Bierman, who is responsible for the panel of external chairpersons, to conduct a further review.

[21] A few days later, received a request from Mr McCrudden to provide aggravating factors. In his submissions, he expressed disappointed that the Applicant had been implicated in a fraud scam perpetuated against an elderly client of the Bank. He further stated that the Applicant's conduct had tarnished the good name and reputation of his team. He indicated that he could no longer retain the applicant as a member of his team or the bank, and the trust relationship had irretrievably broken down.

[22] Under cross examination he conceded that there was no evidence that the Applicant had played a role in the fraud. However, the bank was concerned with the manner in which the money was transferred out of the Applicant's business account and her failure to exercise due diligence.

[23] He further conceded that the Bank could not detect the fraud and it was detected by Nedbank although Ms Strydom had made three deposits of R100 000.00 to one Nedbank account and two to Standard Bank accounts. He maintained that the Applicant ought to have realised that there was something wrong with the transaction because both the depositor and the recipient of the funds were clients of the Bank. She failed to ensure that her personal interests are not in conflict with those of the Bank.

[24] The Applicant testified in her own case and confirmed that she was employed as a Senior Forensic Investigator by the Bank and she was also the Director of Mike-Angies Workshop. She is a certified fraud examiner, and she had dealt with investigations involving fraud, theft, compliance checks and money laundering. Her company was involved in panel beating and repairing vehicles. She had hired Mr Govo, her sister-in-law's brother as the workshop manager and he was responsible for any payments of up to R10 000.00. He specialised in panel beating while her nephew specialised in mechanical work.

[25] She testified that Mr Govo informed her that his brother's friend who lives in Dubai and was on a visit to South Africa wishes to purchase a vehicle. However, he will not be able to purchase it himself as he was travelling back to Dubai. Mr Govo asked if the friend could transfer the money to her

Standard Bank business account for the purposes of this transaction and she agreed because she was aware that Mr Govo had a brother who lived in Dubai and he usually bought cars and resold them. Upon receipt of the R100 000.00 in her business account, she transferred an amount of R80 000.00 into Elite Ambitions' Standard Bank account for the purchase of the vehicle and R10 000.00 into the same account holder's FNB account for the vehicle parts. She, however, stressed that she did not benefit anything from the transaction, and this is evident from the way the money was transferred.

[26] She was not suspicious of the transaction since the money was being deposited from a Standard Bank account into her business account. She only learned about the fraud and scam after engaging with the investigator and learned that Ms Strydom was a victim of romantic scam. She testified that it was unreasonable for the Bank to expect her to detect fraud based on the transaction and the story she was given by Mr Govo as she did not have the resources to do so. She did not use the company's resources to investigation the transaction as it was a personal matter and she was going to be accused of misusing the company's property had she done so. She, however, conceded that she used the Bank's Team Chat to enquire about the suspension of her business account.

[27] She only started investigating the matter after her bank account was blocked. She then requested Mr Govo to create a WhatsApp group so that she could question Marvin. Indeed, the group was created but Marvin could not answer some of her questions. She was later placed on suspension following an interview with the investigator, Mr McCrudden.

[28] She confirmed that she was bound by the bank's policies and disciplinary code. She further conceded that if an employee of the bank does something in his or her personal capacity which has a negative impact on the bank, the bank can take action against such an employee. She further confirmed that as an employee of the bank she had a duty to prevent fraud and she owed a duty of care to the bank and its clients.

[29] She refuted claims that the trust relationship between herself and the bank had irretrievably broken down based on the fact that the Chairperson of the inquiry did not find her guilty but it was her employer who changed the decision. This was further supported by the fact that her line manager, Mr Radebe had confirmed that she was not implicated in fraud and she had no personal knowledge of same.

[30] The Applicant then called Mr Govo as her witness. He testified that he was employed as a manager at Mike-Angies Workshop. He corroborated the evidence of the Applicant in respect of Marvin, his brother's friend who resided in Dubai. He further confirmed that Marvin who wanted to purchase a vehicle in South Africa but could not do so as he had to travel. Prior to joining the Applicant's workshop, he was engaged in the business of selling motor vehicles. Marvin subsequently deposited R100 000.00 into the business account for this purpose of purchasing the vehicle.

[31] The vehicle he was purchasing for Marvin was priced at R80 000.00, R10 000.00 was for the mechanical parts and R10 000.00 was for mechanical work to be done on the vehicle. He further stated that Marvin gave him the banking details of E.D. Strydom. When he wanted to withdraw some money from the ATM using the Applicant's bank card, he realised that the bank account was suspended. He then informed the Applicant who indicated that she would speak to the bank. She later requested him to depose to an affidavit explaining what had transpired and he was also invited to attend an interview with the bank's investigator. He also created a WhatsApp group as requested by the Applicant so that she could question Marvin and he did so.

[32] During cross examination he stated that at the time of the transaction he did not suspect any fraud but now that he has information he realised that Marvin was a scam artist. He then conceded that had the Applicant posed the questions to Marvin prior the transaction she would have realised that it was a scam.

[33] The Applicant's second witness was Mr Radebe who testified that he was employed as the Head of Priority Investigations and he was the Applicant's

line manager prior to her dismissal. He testified that he had a good relationship with the Applicant and would not mind working with her again if she was to be reinstated. The relationship between himself and the Applicant got broke down when she was found guilty of a serious misconduct. He indicated that his submissions would have been different had the Applicant not been found guilty. Furthermore, he was only contacted after the second report was issued. He had not seen the first finding which had found her not guilty.

[34] At the close of proceedings, the Commissioner found that the Applicant's dismissal was substantively fair but procedurally unfair on the basis that the Employer tampered with the findings of the Chairperson when the disciplinary code did not provide for such. The Commissioner then awarded the Applicant three months' salary as compensation. The Applicant is not happy with the findings and the award of the Commissioner and is challenging the same on the grounds stated hereunder.

[35] The Applicant submitted that she does not challenge the findings of the Commissioner in respect of procedural fairness. However, the Court needs to consider that the bank's interference with the disciplinary outcome had a serious impact on the substantive fairness of the dismissal.

<u>Applicant's grounds for review</u>

[36] Amongst others, the Applicant submitted that the Commissioner failed to apply his mind to the evidence and to deal with each aspect of the dispute. The Applicant further submitted that the Commissioner arrived at an unreasonable conclusion when he stated that she breached numerous policies and failed to act in the best interests of her employer. It was further submitted that in his analysis, the Commissioner failed to take into consideration that it was not in dispute that there was no evidence linking the Applicant to the fraud scam and that the money was transferred to her account by Ms Strydom herself who was acting on the instructions of her lover.

[37] The Applicant further submitted that the Commissioner's findings were not those that a reasonable decision maker could have reached. In particular, the Commissioner ignored the fact that the initial finding of not guilty had been overturned by the bank. It was further submitted that the dismissal was unfair because there was no evidence before the Chairperson to substantiate a finding of guilt and that the Applicant was dismissed only as a result of interference by her superiors. The Applicant contended that the interference with the outcome rendered her dismissal substantively unfair because the decision to dismiss her was effectively taken by individuals who had not presided over the disciplinary hearing.

[38] The Applicant submitted that the Commissioner committed errors of law by failing to take into account that the Disciplinary Code had no provision empowering the bank to overturn the decision or outcome of the independent chairperson. The Disciplinary Code and the General Terms of Employment formed part of her contract of employment, and both parties were bound by the agreement. In this case, these were not just guidelines but binding documents hence the Bank relied on them to charge her. It was submitted that the Commissioner erred in concluding that she was guilty of serious misconduct.

[39] The Applicant submitted further that the Commissioner committed an error of law by relying on the case of *Brandford v Metrorail Services (Durban) and Others (Brandford)*[2] in that she was not subjected to a second disciplinary hearing which could constitute double jeopardy. In her case, the bank unilaterally overturned the initial finding of not guilty to one of guilty rendering the second finding unlawful, invalid and unfair.

[40] The Applicant also contends that the Commissioner ought to have found that her dismissal was both procedurally and substantively unfair as a result of the interference from the bank having regard to *SA Revenue Service v Commission for Conciliation, Mediation & Arbitration & others (Kruger).*[3] She submitted further that the bank contravened its own policies and prescribed

[2] [2004] 3 BLLR 199 (LAC).
[3] (2017) 38 ILJ 97 (CC).

procedure by unilaterally overturning the finding of the independent chairperson as a result the finding in *Kruger* should find application in her dismissal.

[41] The bank opposed the Applicant's submissions on the basis that the Applicant's reliance on *Kruge*r was not pleaded and the facts in *Kruger* are distinguishable from the facts in her matter. Furthermore, it was submitted that there was nothing in the disciplinary procedure which prevented the Chairperson from changing the outcome before it was conveyed to the Applicant. The bank argued that the legal position in *Brandford* should be preferred over *Kruger* and the review application must be dismissed on the basis that the decision of the Commissioner is one which a reasonable decisionmaker in his position could have arrived at.

Review test

[42] When dealing with an application to review and set aside an arbitration award, the ultimate question before the Labour Court is whether the decision reached by the arbitrator is one which a reasonable decision-maker could not reach.[4]

[43] In explaining the review test articulated in the *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)*[5], the Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[6] had, *inter alia*, the following, which is relevant for present purposes:

> 'In a review conducted under s145(2)(a)(c)(ii) of the LRA, the review court is not required to take into account every factor individually, consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to process-related irregularity sufficient to set aside the award. This piecemeal approach of dealing with the arbitrator's award is improper as the review court must necessarily consider the totality of the evidence and then

[4] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC) at para 110.
[5] Ibid at para 110.
[6] (2014) 35 ILJ 943 (LAC) at paras 18 and 19.

decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.

To do it differently or to evaluate every factor individually and independently is to defeat the very requirement set out in section 138 of the LRA which requires the arbitrator to deal with the substantial merits of the dispute between the parties with the minimum of legal formalities and do so expeditiously and fairly. This is also confirmed in the decision of *CUSA v Tao Ying Metal Industries*.'

[44] The LAC in *Health and Other Services Personnel Trade Union of SA obo Tshambi v Department of Health, KwaZulu- Nata (Tshambi)*[7] held that:

'an arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined...'

[45] The Constitutional Court disposed on the above-mentioned issue in *CUSA v Tao Ying Metal Industries*[8] and held that:

'…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 counter-claims and reach for the real dispute between the parties. In order 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 three considerations. The first is that they must resolve the real dispute between the parties. Second, 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. A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties.'

[7] (2016) 37 ILJ 1839 (LAC) at para 16.
[8] 2009 (2) SA 204 (CC) at paras 64 and 65.

[46] In *Head of the Department of Education v Mofokeng and Others*[9] the LAC held that the failure by the arbitrator to apply her mind to the issue that is relevant would ordinarily constitute an irregularity, but for an award to be susceptible to being set aside, it must, in addition to the irregularity, result in the misconception of the real inquiry to be determined or the ultimate outcome must be unreasonable.

[47] The LAC in *Tshambi* [10] held that:

> 'An arbitrator is required to determine the true dispute between the parties. To that end, it is necessary to establish the relevant facts and construe the category of dispute correctly. An arbitrator must make an objective finding about what is the dispute to be determined…

[48] The Supreme Court of Appeal (SCA) in *Herholdt v Nedbank Ltd and Another (Congress of SA Trade Unions as Amicus Curiae)*[11] held as follows:

> 'A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[49] It is trite that 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.[12] The result will, however, be unreasonable if it is entirely disconnected from the evidence, unsupported by any evidence and involves speculation by the arbitrator.[13]

<u>Evaluation</u>

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[9] (2015) 36 ILJ 2802 (LAC) at para 30 to 33.
[10] Id fn 7 at para 16.
[11] (2013) 34 ILJ 2795 (SCA) at para 25.
[12] *National Union of Mineworkers and Another v Samancor Ltd (Tubatse Ferrochrome) and Others* [2011] 11 BLLR 1041 (SCA).
[13]Id fn 11.

[50] It is the Applicant's contention that the Commissioner ought to have found that her dismissal was both procedurally and substantively unfair as a result of the Bank's failure to demonstrate exceptional circumstances warranting interference with the outcome. The Commissioner ordered the Bank to pay the Applicant three months' compensation having regard to the following considerations: firstly, the bank had followed an unfair procedure, secondly, the disciplinary code did not provide for a unilateral review or amendment of the chairperson's finding, and finally, the Applicant was not afforded an opportunity to make any representations before the outcome was altered. As stated above, the Applicant is not challenging the outcome of the Commissioner on procedural aspects.

[51] The primary question that follows then is whether the Commissioner dealt with the substance of the merits within the perimeters of the LRA? The Applicant contends that he failed to deal with the issues outlined in the signed pre-arbitration minute. The first question according to the parties was whether the Applicant had breached any of the Policies, and the Commissioner found that her conduct was grossly negligent in that she failed to act in the best interest of the bank and breached numerous policies. The second question was whether the Applicant was required to verify the source of the funds deposited into her business account and the information from her workshop manager, and the Commissioner found that she was negligent in failing to do so. These findings of the Commissioner were supported by concessions made by the Applicant that she had a duty to report fraud and act in the interests of the bank.

[52] The other issue which the Commissioner was required to deal with was whether the Applicant's conduct exposed the bank to reputational risk and potential financial loss? He answered this in the affirmative when he concluded that the bank has a duty to protect its interests and those of its clients. Finally, the other issue was whether the Applicant was reasonably expected to be aware that her business account was being used as a conduit for a fraudulent transaction? However, the Commissioner took note of this

evidence, and it was clearly recorded in the minutes where the parties agreed that:

> 'There is no evidence to suggest that the Applicant was complicit in the fraud scam that resulted in a Standard Bank client being defrauded, or that she had knowledge of the scam'.

[53] The final question which the Commissioner was required to deal with was whether the dismissal of the Applicant was procedurally and substantively fair? He concluded that the Applicant had failed to challenge the version of the bank's witnesses and conceded that she owed the bank a duty of care in her position as an employee and as a client of the bank. The Commissioner then rejected her evidence on the basis that the Applicant and her witness, Mr Govo contradicted each other on material aspects and found that based on the evidence presented during arbitration proceedings her dismissal was substantively fair.

[54] As indicated earlier, it is the Applicant's contention that the Commissioner's failure to interrogate the procedure followed by the Employer was a misdirection in law and a flagrant disregard of multiple authorities on this aspect. She submitted that the bank acted unfairly towards her by unilaterally changing the outcome from not guilty to guilty without affording her an opportunity to participate in this second process. The Commissioner dealt with this issue by first accepting that the disciplinary procedure of the bank did not authorise interference and unilateral changing of the outcome of an independent chairperson and stated the following:

> '150. With regard to procedural fairness, the respondent has submitted that it is unclear what the procedural defects are as the applicant did not lead any evidence in this regard. The respondent submits that the process followed was fair and there was nothing that prevented it from assessing the circumstances it was faced with and responding accordingly. Additionally, there was nothing wrong with the chairperson's reconsideration of his earlier decision and issuing a new decision based on the merits of the case. The respondent's policies

are silent on this matter, but they constitute a mere guideline. The respondent has a duty to protect its interests and those of its clients and hence its decision to raise concerns about the initial finding cannot be faulted. As it was apparent during the arbitration the applicant's conduct was grossly negligent and she failed to act in the best interest of the respondent and breached numerous policies.

151. On the other hand, the thrust of the applicant's case is that the chairperson of the disciplinary enquiry did not find her guilty. The respondent changed the outcome and that this constitutes a violation of its disciplinary code. In his closing argument the applicant's representative, Adv. Mohlala made reference to some legal authorities to buttress her case that the dismissal was both substantively and procedurally unfair. The employer can only change the decision if there are exceptional circumstances and is permitted by its disciplinary code to conduct a second enquiry'

152. The respondent's disciplinary code provides that once the employee is not found guilty there are no further processes. The review was an unlawful conduct by the respondent. They merely instructed the chairperson of the hearing to amend his initial findings. The employee was not afforded any opportunity to put her own side of the story. The respondent has failed to deal with this aspect during the arbitration process to demonstrate that there were exceptional circumstances which warranted its decision.

…

161. I now turn to deal with the issue of procedural fairness, as correctly submitted by the respondent the applicant did not place any evidence challenging the procedure that was followed during her disciplinary enquiry. The applicant's gripe mainly pertains to the respondent's decision to change the initial findings.'

<u>Can the employer unilaterally substitute or overturn the decision of the chairperson?</u>

[55] The Applicant relies on the decision of *Kruger* to argue that the disciplinary procedure read with the General Terms of Employment policy formed part of

her contract of employment and they do not have a provision empowering the Employer to interfere in the outcome. She is relying on Part 7 of the Code outlining the stages of the hearing as follows:-

> ".... After both the bank and the employee and/or his/her representative have stated and presented what they wish to, the chairperson will arrive at a decision regarding the employee's guilty or innocence. This decision will be conveyed to the employee, and where the employee is found not guilty, the hearing will be closed."

[56] It was further submitted that the bank acted *ultra vires*, and the Commissioner ought to have concluded that the process followed by the bank was fundamentally flawed and unlawful. It was submitted that based on *Kruger*, the LAC found that:

> 'where the process leading to dismissal is itself unlawful or ultra vires, the resultant award upholding such dismissal is reviewable for gross irregularity and excess of powers.'

[57] It was submitted further that in terms of the Code, the Chairperson ought to have shared the initial outcome with the Applicant and not defer such to any other employee of the bank and he ceased to be independent the moment he allowed the bank to interfere with the outcome.

[58] According to the Applicant, the Chairperson ought to have communicated the outcome and ensure that the hearing is closed. However, even if the Chairperson can be blamed for not communicating the outcome earlier to both parties, the fact of the matter is that when the outcome was brought to the Applicant, she had been found guilty hence she submitted mitigating factors.

[59] The second factor which needs to be considered is that the CCMA does not have powers to review the findings of the Chairperson. If the Applicant was adamant that the bank acted unlawfully as opposed to unfairly, the CCMA was not the correct forum to deal with such a claim. However, in her case, she referred a dispute of unfair dismissal to the CCMA for arbitration of an alleged unfair dismissal. The Applicant, cannot, in the review proceedings claim that

the Commissioner exceeded his powers when he arbitrated her dispute of unfair dismissal. An employee who is relying on the LRA is entitled to the relief mechanisms available in the LRA.

[60] The Applicant further stressed that in her case and that of *Kruger*, there was only a single disciplinary hearing. As such, the Commissioner erred by relying on *Brandford* in that *Brandford* was only concerned with fairness while *Kruger* offered fairness and authority to act. It was submitted further that the Commissioner misdirected himself by failing to acknowledge that the bank had no authority to substitute or overturn the decision of the chairperson as such he exceeded his powers. As stated above, the Commissioner took this into account and awarded the Applicant compensation for the violation of her rights not to be dismissed unfairly.

[61] Furthermore, the bank conceded that the process it followed was not in the policy nor in the disciplinary code. It was, however, stressed that the outcome was overturned before it was conveyed to the Applicant to protect the bank's reputation and minimise financial risk for its clients. It was further submitted on behalf of the bank that the LAC decision in *Kruger* is not good law in that it failed to appreciate that the LRA is concerned with unfair as opposed to invalid dismissals. In the present matter, the Commissioner was required to determine the fairness of the dismissal not whether the dismissal was valid or invalid. Furthermore, it was submitted that in *Kruger*, there were two decisions while in this matter there was just one outcome by Mr Smith who later issued an independent sanction of dismissal without any interference from the bank.

[62] Finally, the bank made compelling submissions on why *Kruger* should not be followed on the basis that it suggests that an employer who has not complied with a disciplinary code or a collective agreement should be deprived of the right to have its dispute resolved through the courts as envisaged in section 34 of the Constitution. It is the bank's contention that it only interfered with the verdict and not the sanction of the hearing. Mr Smith, the Chairperson of the hearing determined the appropriate sanction on paper without the involvement of the bank having considered submissions by both parties.

[63] Furthermore, this Court did not follow *Brandford*[14] on the basis that the facts in these two matters are distinguishable. In *Brandford,* the employee was issued with an oral warning by his line manager and he was also formally charged at a later stage in respect of the same misconduct. During the hearing, the employee protested that he was being disciplined twice for the same misconduct. The chairperson of the disciplinary hearing rejected his contention and concluded that he was not disciplined twice. The majority concluded that fairness alone is to be the decisive factor in determining whether or not the second enquiry is justified and held:

> 'As a result of the arbitrator's misconception of the law relating to the propriety of holding second disciplinary enquiry, the employer in the present matter was denied the opportunity of having the issue of fairness of the dismissal considered in a fair public hearing and by means of applying the relevant law. The arbitrator failed to consider whether or not in the circumstances of the present matter the employer was entitled to hold the enquiry that led to the appellant's dismissal and if so whether the sanction of a dismissal was fair.'

[64] In *County Fair Foods (Pty) Ltd Commissioner for Conciliation Mediation and Arbitration and Others,*[15] the arbitrator had found that the dismissal was procedurally unfair for reasons that an employer had altered the earlier lesser sanction to one of dismissal. Before the LAC, the dispute concerned the unfairness of interfering with the decision of the disciplinary tribunal when there was no express provision contained in the disciplinary code justifying such interference. It was then decided that it is procedurally unfair for an employer to interfere with an imposed sanction in the absence of express provisions in the disciplinary code to do so. It is therefore an accepted principle that an employer who substitutes a sanction without being authorised by the disciplinary code acts *ultra vires* and, on that basis, alone the dismissal becomes unfair.

[65] It is trite that arbitration proceedings are a hearing *de novo* and the Commissioner is expected to decide for himself or herself whether an

[14] Id fn 2 at para 21.
[15] (2003) 24 ILJ 355 (LAC).

employee was dismissed for a fair reason based on all this evidence presented in the arbitration and not necessarily before the chairperson of the disciplinary enquiry. In *County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[16] it was held that:

> '… It remains part of our law that it lies in the first place within the province of the employer to set the standard of conduct to be observed by its employees and determine the sanction with which non-compliance with the standard will be visited, interference therewith is only justified in the case of unreasonableness and unfairness. However, the decision of the arbitrator as to the fairness or unfairness of the employer's decision is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing *de novo.*'

[66] In the present matter, the Commissioner concluded that the bank failed to demonstrate exceptional circumstances which warranted its decision to reject the initial outcome of the chairperson and demand an adverse one. He, however, made a U-turn by stating that the Applicant had failed to place any evidence challenging the procedure that was followed during her disciplinary enquiry and this is incorrect. The Applicant had succeeded at forcing the bank's witnesses and representative to concede that they had followed a foreign process which was not regulated in any of the internal policies. With this concession in mind, the Commissioner was placed in a position to now determine whether the bank's interference influenced the decision of the chairperson to dismiss the Applicant. Section 185(a) of the LRA provides that every employee has the right not to be unfairly dismissed.

[67] Section 188(1)(a) of the LRA provides that a dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's capacity and (b) that the dismissal was effected in accordance with a fair procedure.

[16] (1999) 20 ILJ 1701 (LAC) at 1707G-I. See also *Wasteman Group v SA Municipal Workers Union and Others*, 2012) 33 ILJ 2054 (LAC) at 2057I where it was said; *'… The commissioner is required to come to an independent decision as to whether the employer's decision was fair in the circumstances, these circumstances being established by the factual matrix confronting the commissioner …'*.

[68] In undertaking the enquiry into the fairness of the dismissal and the procedure followed, the Commissioner has to follow the spirit and letter of the LRA. The LRA is concerned with the fairness not lawfulness of a dismissal. The CCMA does not have jurisdiction to deal with any dispute where an employee is challenging the validity or lawfulness of his or her dismissal, the Commissioner is only empowered to determine the fairness of the dismissal. This view is supported by the majority in *Steenkamp and Others v Edcon Ltd*[17]*.*

[69] Based on the above authority, this Court did not follow *Kruger*. In *Kruger*, the Commissioner of SARS had rejected the decision and sanction of the Chairperson and issued his own independent sanction. In the present matter, the Bank influenced the Chairperson to change his finding of not guilty to one of guilty and only one outcome was communicated to the Applicant. This was done despite the disciplinary procedure empowering the Chairperson to make a decision and not the bank. He subsequently issued a sanction of dismissal despite his earlier independent outcome that the Applicant was not guilty of misconduct. It is undeniable that the conduct of the bank influenced the decision of the Chairperson to dismiss her. However, this does not mean that she was dismissed unlawfully or that the dismissal was invalid. The Commissioner, having regard to the evidence in an independent hearing concluded that the Applicant was dismissed for a fair reason but not in accordance with a fair procedure and awarded her compensation.

[70] Despite the acknowledgement and concession from the bank that the Applicant was not complicit in the scam, she allowed her bank account held with her employer to be used as a vehicle to commit fraud against a client of the bank. She was employed as a senior investigator who was a certified fraud examiner. This means, she ought to have exercised some caution with regards the instructions for her to transfer the money in the manner which she did. The Bank relies on its employees such as the Applicant to ensure that its

[17] [2016] 4 BLLR 335 (CC).

clients' monies are safeguarded and internal controls are strengthened to attract confidence of new clients and business partners.

[71] In *ABSA Bank Ltd v Naidu*[18] the LAC confirmed that employees must at all material times act in the best interests of their employers and held as follows:

> '... it followed that she owed a fiduciary responsibility to the appellant to ensure that, at all times, she acted and performed her duties in a manner that was in the best interests of both the appellant and its clients...'

<u>Conclusion</u>

[72] Having regard to the nature of the allegations levelled against the Applicant, the magnitude and seriousness thereof justify her dismissal especially considering her position as a senior forensic investigator and a certified fraud examiner. In *Sappi Novoboard (Pty) Ltd v Bolleurs*[19] the LAC held as follows:

> 'It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honesty and faithfully... The duty which an employee owes his employer is a fiduciary one '"which involves an obligation not to work against his master's interests" ... If an employee does "anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him" ...'

[73] In his conclusions the Commissioner considered that the Applicant had been in the Bank's employment for a period of eight months and awarded her compensation for a period of three months. Compensation has been found to be an appropriate remedy in *Kruger*[20] where the Constitutional Court held as follows:

> 'In terms of our law compensation is not automatic. It is a discretionary matter. A whole range of factors must be taken in to account to determine whether compensation has to be paid and if so, for how many months. In this

[18] (2015) 36 ILJ 602 (LAC) at para 54.
[19] (1998) 19 ILJ 784 (LAC) at para 7.
[20] Id fn 3 at para 52.

regard one of the key factors is the need to ensure that employers are not inadvertently encouraged by the non-payment of compensation to adopt a shotgun approach of dismissing employees without affording them the opportunity to be heard. Employees are ordinarily vulnerable because, unlike employers, they do not often have the resources necessary to vindicate their rights by prosecuting cases all the way up to this Court. Condoning the flouting of laws that govern the fate of people's livelihood is a matter so serious that it always requires greater sensitivity and care...'

[74] The Applicant conceded to having breached the Bank's policies in the manner in which she handled her private business affairs. Although the Bank was not authorised to influence the Chairperson to overturn the outcome in the manner in did, the Commissioner has awarded the Applicant a handsome compensation and this Court does not wish to interfere with the award.

[75] Based on the authorities referred to above and on the principle of *stare decisis*, this court comes to a conclusion that the award falls within the band of reasonableness and warrants no interference. The review application therefore stands to be dismissed.

<u>Costs</u>

[76] It is trite that the awarding of costs in the Labour Court is discretionary as envisaged in section 162 of the LRA. The Constitutional Court in *Booi v Amathole District Municipality and Others*[21], dealt with the issue of costs in the Labour Court and held as follows:

'However, this is a labour matter and this Court's jurisprudence is settled: the ordinary rule that costs follow the result does not apply in labour matters. Rather, what emerges from the provisions of the LRA and the jurisprudence is that courts, when awarding costs in labour disputes, must consider what fairness demands and err on the side of not discouraging parties from approaching the courts for the peaceful resolution of labour disputes. Further, if costs are to be awarded in labour matters, there must be reasons that justify

[21] (2022) 43 ILJ 91 (CC) at para 60.

a court's decision to depart from the position that a losing party should not be mulcted in costs in labour disputes.'

[77] The above-mentioned principle was clearly espoused in *Member of the Executive Council for Finance, KwaZulu-Natal v Dorkin N.O and another*[22] where the Court held:

> 'In making decisions on cost orders this Court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes. In that way these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.'

[78] This Court has considered that there is an existing working relationship between the Applicant and the Third Respondent. It is therefore in the interests of the law and fairness that each party be burdened with its own costs.

[79] Accordingly, the following order is made:

<u>Order</u>

1. The review application is dismissed.
2. There is no order as to costs.

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G C Phakedi

[22] 2008 (29) ILJ 1707 (LAC) at para 19.

Acting Judge of the Labour Court of South Africa.

Appearances:

For the Applicant : Aziz Kathrada of A Kathrada Inc.

For the Respondent : Adv Anton Myburgh SC

Instructed by : Bowman Gilfillan Inc.