REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1619/13

In the matter between:

ABSA BANK LTD	**Applicant**
and	
CCMA	**First Respondent**
COMMISSIONER JOSIAS SELLO MAAKE	**Second Respondent**
MIRANDA NGWENYA	**Third Respondent**

Heard: **20 August 2015**

Delivered: **8 September 2015**

Summary: Review – LRA s 145 – misconduct – gross negligence – *ABSA v Naidu* followed – dismissal fair – award reviewed and set aside.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, ABSA, dismissed the third respondent, Ms Miranda Ngwenya, for gross negligence arising from an incident on 17 August 2012. The employee, a "platinum banker", assisted a client with a loan application. ABSA alleged that she acted outside her mandate; failed to secure his wife's signature on the loan application; misrepresented information; and failed to verify his employment details. ABSA dismissed her after a disciplinary inquiry. She referred an unfair dismissal dispute to the CCMA. Conciliation failed. The arbitrator (the second respondent) found that the employee had misrepresented that she had obtained the signature of the client's spouse. It appears that he found that she did not commit the first act of misconduct complained of, relating to a lack of mandate (although he contradicts himself in the award by saying: "Now having confirmed the convictions on all four charges, the question then arises whether or not the dismissal sanction was substantively unfair.")[1]

[2] The arbitrator nevertheless found that "a sanction short of dismissal would have been in order". He found the employee's dismissal to have been substantively unfair and ordered ABSA to reinstate her, together with a final written warning valid for six months, and to pay her four months' salary as backpay. The limited backpay had the effect that she forfeited six months' salary.

[3] ABSA seeks to have the award on sanction reviewed and set aside. It argues that the dismissal was fair.

Background facts

[4] The employee was a "platinum banker" in Polokwane. She interacted with the bank's clients on various transactions, including the issuing of loans. On 17 August 2012, she processed a loan application for R70 000 for a client, Mr L I Motimele. The bank alleged that she was grossly negligent for the following reasons:

[1] The criminal language of "convictions" on "charges" of misconduct is that of the parties and the arbitrator. By replicating it the Court does not condone the unnecessary and inappropriate use of such language in a workplace context.

4.1 "You acted outside your mandate in that you processed the loan application and the payments thereof of R70 000 outside your mandate and without necessary override and authorisation from the mandated official."

4.2 "You failed to secure the signature of [Mr Motimele's] wife, fully aware that the client is married in community of property and therefore the wife should have signed before the payment of the loan amount of R70 000."

4.3 "You misrepresented information on the ROA[2], in that you annotated that the client's spouse had signed, whereas the client's spouse had not signed on the said date."

4.4 "You failed to verify [Mr Matimele's] employment details."

"Your abovementioned conduct had the potential to expose ABSA to loss, risks and litigation."

[5] At a disciplinary hearing, it was found that the employee had committed the misconduct outlined above. She was dismissed and referred an unfair dismissal dispute to the CCMA. It came before the third respondent for arbitration.

The award

[6] For ABSA, the arbitrator heard evidence from the employee's previous supervisor, Mary Refiloe Maboa, whom ABSA had also dismissed for falsifying information on a ROA document. She did not follow the prescribed procedure when she handled a revolving loan for a client. The Lobokgomo branch manager, Stephinah Modiba, also testified for ABSA. The employee, Ms Ngwenya (represented by her attorney of record and by counsel, Adv MJ Manyelo) led her own evidence and called two further witnesses: the client, Mr Lekgoba Isaac Motimele; and another former employee, Betty Maja, who was a personal banker at the same branch and whom the bank had also dismissed.

[2] Record of Advice.

[7] The arbitrator considered Ms Maboa to be the chief witness for ABSA. Ms Modiba essentially testified on procedural issues, specifically the investigation into the employee's conduct. The arbitrator found the dismissal to have been procedurally fair.

[8] Turning to substantive fairness, the arbitrator found that the bank had not proven that the employee had acted without a mandate; and thus found that dismissal on this ground was not for a fair reason.

[9] On the second allegation of misconduct – that of not obtaining the signature of the client's wife – the arbitrator agreed with the bank. The employee continued to deny that she had committed the misconduct; but the arbitrator found her explanation to be "far-fetched and highly improbable". Her explanation was found to fly in the face of her own clear annotation on the ROA that Mrs Motimele had signed the loan application form. That was blatantly false.

[10] The third element of misconduct was an allegation of misrepresentation as the employee had recorded on the ROA that Mrs Motimele had signed the loan application document on 17 August 2012, when she had not done so. The arbitrator found that the employee's version was untrue and therefore a misrepresentation.

[11] The fourth element was the employee's failure to verify the client's employment details. The employee alleged that it was unnecessary; the arbitrator found the contrary.

[12] Although the arbitrator had found that the bank had proven three of the four allegations of misconduct, he nevertheless recorded:

> "Now having confirmed the convictions on all four charges, the question then arises whether or not the dismissal sanction was substantively unfair".

[13] Nothing much turns on this. Everyone accepted that the arbitrator actually decided on the fairness of the sanction on the basis that three of the allegations had been proven, all arising from the same irregular handling of the loan application. The issue in contention here is the arbitrator's finding on sanction.

[14] The arbitrator found:

> "[I]t appears to me hat to some extent, the charges constitute an undue splitting of charges, for the acts complained of in the charges, constituted a single transaction committed with a single guilty mind, in view of the fact that they are closely connected in terms of time, place and circumstance. In my considered view, a single charge containing all the allegations which were split into several charges, should have been preferred with the result that the said [*sic*] chairperson would have been in a vintage [*sic*] position to evaluation [*sic*] what would have been an appropriate sanction on that single charge. The reality of the matter is that the said chairperson had failed to avert an undue multiplicity of convictions, a fact I consider to have influenced the dismissal sanction and which I accordingly consider a harsh sanction".

[15] The main reason why the arbitrator considered dismissal to be a harsh sanction clearly stems directly from his criminal law exposition on the "splitting of charges" – hence his use of the word "accordingly".

[16] He goes further to say that, "had the aforegoing not occurred", a sanction short of dismissal "would have been in order", taking into account the following:

> "[The employee's] considerable length of service, her squeaky clean disciplinary record, the rallying homage and tribute heaped upon her by Maja on her top performance for the [bank] and the fact that the [bank] had incurred no financial harm."

[17] The arbitrator found dismissal to have been unfair and ordered the bank to reinstate the employee with a final written warning valid for six months. He ordered backpay for four months instead of the ten months that had elapsed since her dismissal.

Grounds of review

[18] Mr *Jones*, on behalf of ABSA, argued that the commissioner's decision on sanction fell outside of the range of reasonable decisions that a reasonable commissioner could reach on the evidence before him and the accepted fact of the employee's dishonest and gross misconduct. Much of

his argument relied strongly on the recent decision of the LAC, involving the same employer, in *ABSA Bank Ltd v Naidu*.[3]

Evaluation / Analysis

[19] In most cases, the Court would be reluctant to interfere with an arbitrator's decision on sanction in a review, as opposed to an appeal – moreso when the arbitrator had considered a number of factors when deciding that dismissal was too harsh a sanction, and when his substituted award contained a punitive element, comprising a final written warning and, in effect, six months' suspension without pay.

[20] This Court is, however, bound by the authority of the LAC in *Naidu*, and the similarity between the two cases is striking. In that case, the employee performed a transaction without the necessary signature and was charged with dishonesty because she maintained that she had obtained the client's signature when she did not. Even though she had notified her superiors of her intended conduct and had been remorseful when the bank took action against her, the Labour Appeal Court held that the Commissioner's finding that dismissal was not the appropriate sanction was not a decision that fell within the range of decisions which a reasonable decision-maker could have made. The court noted:[4]

> "She was clearly aware that her misconduct involved dishonesty and that, in terms of the appellant's disciplinary code, summary dismissal was the appropriate sanction prescribed for such type of misconduct. Of course, it is accepted that not every misconduct offence involving dishonesty warrants a sanction of dismissal. There are varying degrees of dishonesty and, therefore, each case is to be determined on the basis of its own facts whether a decision to dismiss the offending employee is a reasonable one. Generally, a sanction of dismissal is justifiable and, indeed, warranted where the dishonesty involved is of a gross nature. In *Toyota SA Motors (Pty) Ltd v Radebe & others*[5] this court held as follows:

[3] (2015) 36 *ILJ* 602 (LAC).

[4] At para [52].

[5] (2000) 21 *ILJ* 340 (LAC).

> 'Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point. I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgement the moment dishonesty is accepted in a particular case is being of such a serious degree is to be described as gross, then dismissal is an appropriate and fair sanction.'"

[21] The LAC in *Naidu*[6] went on to cite with approval the dictum in *De Beers Consolidated Mines Ltd v CCMA*[7] that 'the seriousness of dishonesty – i.e. whether it can be stigmatised as gross or not – depends not only, or even mainly, on the act of dishonesty itself but on the way in which it impacts on the employer's business'. Considering the nature of the bank's business, the LAC found that there could be no doubt that the employees dishonesty severely adversely impacted on its business.

[22] Very similar considerations apply in this case. The employee occupied a senior position in the bank. She interacted with clients and was in the position to approve loans for them. She concluded serious financial transactions involving large sums of money on behalf of the bank with those clients. It was obvious that the bank would have placed a high level of trust and confidence in her. Her misrepresentation constituted a breach of their fiduciary duty and a breakdown in her trust relationship with the bank.

[6] Para [53].

[7] (2000) 21 *ILJ* 1051 (LAC) at 1058 I-J.

Conclusion

[23] It was common cause that the employee had to obtain the signature of Mr Motimele's wife before the loan could be approved, as they were married in community of property. The employee did not do so. Yet she falsely claimed on the FAIS record of advice that Mrs Motimele had signed. It was a blatant misrepresentation. It put the bank at risk and was a breach of the employee's fiduciary duties. She showed no remorse and even at the arbitration maintained her false version of events. In those circumstances, the employment relationship had irretrievably broken down. The employer's decision to dismiss her was fair. As was the case in *Naidu*, the arbitrator's award to the contrary in this case is not one that a reasonable commissioner could have made. The award must be set aside and replaced with one that the dismissal of the employee was fair.

[24] With regard to costs, I take into account that the employee had an award in her favour. She had little choice but to incur legal costs of her own in order to defend it. In my view, it would not be fair to order her to pay the bank's costs in the review application.

Order

[25] I therefore order that:

25.1 The arbitration award by the second respondent under case number LP 9033-12 of 6 August 2013 is reviewed and set aside.

25.2 The award is substituted with an award that the dismissal of the employee, Ms Miranda Ngwenya, was substantively and procedurally fair.

25.3 There is no order as to costs.

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Steenkamp J

APPEARANCES

APPLICANT:	Jonathan Jones of Norton Rose Fulbright.
THIRD RESPONDENT:	PMW Botha Instructed by M G Phatudi Inc.