**IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

Reportable

Case no: D1149/14

**In the matter between:**

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| **ABSA BANK LIMITED** | **Applicant** |
| **and** | |
| **JABULANI NGWANE *NO*** | **First Respondent** |
| **THE CCMA** | **Second Respondent** |
| **IVAN CHETTY** | **Third Respondent** |

**Heard:** **8 June 2016**

**Delivered:** **11 October 2016**

**Summary: Review - CCMA - evaluation of evidence- credibility and probabilities – when demeanour and probability bound together - similar fact evidence - meaning of charges cannot mutate from one forum to another – when reinstatement under section 193(2)(b) may be avoided**

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**JUDGMENT**

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**WHITCHER J**

1. This is an application in terms of section 145 of the LRA for an order reviewing and setting aside the arbitration award issued by the First Respondent ('the commissioner') under the auspices of the CCMA.

2. In terms of the award the dismissal of the Third Respondent ("Chetty") by the Applicant ("ABSA") was found to be substantively unfair and it was ordered to reinstate him retrospective to his date of dismissal.

Background

3. On 16 April 2014, Chetty's cellphone beeped while in his pocket in a section of the bank where cellphones were prohibited. He was an active participant in a heated staff meeting about possible outsourcing when this happened. Chetty had, on two previous occasions, been reprimanded for not leaving his cellphone behind when coming to work. After the staff meeting he was summoned to Yvette Canham's office. She and three other managers attended this meeting and proceeded to reprimand Chetty. Chetty told them that he had brought the cellphone with him out of force of habit. He stated that the only way to get rid of this habit was to throw his phone away. He then threw the phone into Canham's bin. Shortly thereafter he left the office.

4. It was common cause that seven months before this incident, Chetty had sworn at and threatened a line manager, Charles Naidoo. Chetty was charged with 'intimidation, bullying and threatening' behaviour and subjected to a disciplinary hearing. At this earlier hearing, Chetty pleaded guilty, apologised for his 'terrible misconduct' while also providing an explanation. This explanation centred on Chetty's sense that Naidoo rudely blamed by him for something not his fault. ABSA decided not to dismiss Chetty but issued him with a final written warning valid for twelve months.

5. The three other managers in Canham's office when Chetty threw his phone into the bin were Naidoo, Vinben Govender and Aavishkar Morar. Shortly after the incident they all submitted written statements recording what happened.

6. Chetty was charged with misconduct. Although the charge mutated over time, Chetty finally faced charges on two grounds: Refusal to obey a reasonable and lawful instruction" in that he had not complied with ABSA's security policy in respect of cell-phones on the cash floor; and Rude and unapproachable behaviour in that Chetty acted in an aggressive and insubordinate manner by

throwing his cellphone into the dustbin of his superior while being reprimanded for his misconduct.

7. At his disciplinary hearing, Chetty eventually pleaded guilty to not complying with ABSA's security policy by bringing his cellphone into a prohibited area. He pleaded not guilty to the second charge of rude and unapproachable behaviour. The outcome of the hearing was that Chetty was found guilty on both charges and dismissed, whereupon he referred an unfair dismissal dispute to the CCMA.

Evidence at the CCMA

8. At the CCMA, Chetty acknowledged breaching a rule against having a cellphone where they were prohibited. The substance of his defense was that he did not deliberately refuse - but rather failed - to comply with the rule. Chetty testified that he did not use his cellphone in the prohibited area and there was indeed no evidence to this effect from ABSA.

9. ABSA's four witnesses - Naidoo, Canham, Govender and Morar – stated that Chetty threw the phone into the bin in an aggressive and insubordinate manner. They all said that he 'charged' in Canham's direction, then threw his phone in an overarm movement. Canham was visibly shocked or scared by his action. The four witnesses admitted that as Chetty threw the phone into the bin he stated that he was doing so because it was the instrument that caused him to 'sin'.

10. Chetty denied that he threw the phone into the bin in an aggressive and insubordinate manner. He claimed that he was frustrated with himself and decided to dispose of the phone as it was getting him into trouble. This is what he told the managers he was doing as he threw it in the bin. This gesture was also meant to convey that he was sorry for failing to abide by the rule.

Analysis of Grounds of Review

*Refusal to Obey a Lawful Instruction*

11. The commissioner was criticized for failing to find that possession of a phone in a prohibited area constituted a *refusal* by Chetty to obey a reasonable instruction warranting dismissal as a sanction.

12. Although ABSA stressed the security risks posed when employees had cellphones in prohibited areas and although Chetty had been reprimanded for failing to adhere to this rule before, the evidence before the commissioner did not establish that he was ripe to be fairly dismissed on this charge. Chetty had been admonished on two occasions in a 26-year career, with only one of these being a recent infraction. The fact that ABSA only reprimanded Chetty (and, incidentally, also Naidoo) on a previous occasion for the same conduct and seemed busy reprimanding Chetty again in Canham's office suggests that progressive discipline short of dismissal would have been the most likely next step had Chetty not also thrown his phone into the bin in a manner that offended the four managers. Indeed, evidence before the commissioner showed that both Canham and Morar's response to the beeping phone was that they did not regard this, on its own strength, to be a dismissible offence.

13. The evidence before the commissioner was that Chetty most likely forgot to leave his phone outside as opposed to deliberately ignoring the rule. Moreover, Chetty did not actually use the phone and immediately conceded his error. It was thus not unreasonable for the commissioner to treat this infraction in substance as one of a *failure* to obey a rule rather than a refusal. When this is seen in light of the level of progressive discipline ABSA had earlier applied to Chetty and Naidoo, a mere reprimand, it is not difficult to understand how the commissioner declined to confirm dismissal as an appropriate sanction for the actual underlying offense.

14. Counsel for Chetty, Mr. Ungerer, pointed out that the ABSA disciplinary code distinguished between the wilful refusal to obey an instruction, for which dismissal was the recommended sanction and a failure to obey for which a final written warning or dismissal were indicated. He speculated that the charge was deliberately escalated to ensure that Chetty was dismissed. It is not necessary for this court to opine on this beyond to agree that, for whatever

reason, Chetty's charge was more severe than its factual basis and that the commissioner quite correctly spotted this fact and ruled accordingly.

15. Review applications are not strengthened by attempts to show that a commissioner got everything wrong. In the present case, it was quite apparent that the real problem ABSA had with the award was the finding that the cellphone was not thrown in anger or defiance. To persist with subsidiary and weaker grounds of review when the record provides scant justification for them, serves little purpose.

16. Another example of this is the argument on sanction, where this court was asked to find that the commissioner's reliance on Chetty's long-service of 26 years as a mitigating factor was an attitude no reasonable decision-maker would have taken. Instead the 26 years' service should have been seen as an aggravating factor, ABSA pleaded. I reject this argument. While seniority, which may be associated with long service, could be an aggravating factor, it would be almost perverse for an employee with years of service behind his name to have his mere length of service increase his chances of dismissal should he or she break a rule.

17. For reasons that follow later, the commissioner's finding that Chetty was sorry for his breach of the rule is also not an unreasonable finding, particularly given the commissioner's assessment of Chetty's bearing and demeanour in the CCMA. It is perhaps not a finding this court would have made but to intervene for this reason is to perforate what remains of the boundary between review and appeal.

18. I therefore reject the ground of review that the commissioner reached unreasonable conclusions on guilt and sanction concerning Chetty's 'refusal' to obey an instruction.

*Aggressive and Insubordinate Behaviour*

19. Although the wording of the second charge changed during the disciplinary process, it is apparent from the pleadings and argument before this court that Chetty obtained his dismissal by throwing his cellphone into the dustbin in a way his employer alleged was aggressive and insubordinate. The allegation

that he refused to remove the phone from the bin or that he slammed the door on the way out were not particulars of the misconduct for which he was charged. Rather, they were cited to establish his aggressive and insubordinate mind-set.

20. In finding Chetty's dismissal substantively unfair, the commissioner preferred his version about how and why the phone was thrown into the bin over the version of the four ABSA witnesses. ABSA argues that the commissioner malfunctioned in exercising this preference. This further had a distorting effect on the outcome of the case, which for any reasonable decision-maker would have been to find that Chetty acted aggressively and disrespectfully and thus to uphold his dismissal.

21. In preferring Chetty's version, the commissioner noted that statements made by ABSA's witnesses directly after the incident made no mention of Chetty's aggression[1] in contrast to their testimony at the CCMA. The commissioner went on to accept Chetty's explanation that he was doing what he declared to the four managers he was doing. This was disposing of the instrument that was getting him into trouble so that he was incapable of transgressing again and could demonstrate how sorry he was.

22. Mr. Myburgh, for ABSA, argued that the commissioner erred in resorting to a credibility finding to resolve the factual dispute about Mr. Chetty's behaviour when the probabilities clearly favoured ABSA's version. This would be a misdirection because, as legal commentators Myburgh and Bosch correctly point out, "the evaluation of a credibility of a witness is never a substitute for the evaluation of the content of his or her evidence"[2]. In support of this the learned authors cite a number of cases.[3]

23. Notwithstanding this, I am not persuaded that the commissioner in this case was in a position to decide the matter on the probabilities alone. The evidence ABSA claimed the commissioner irregularly ignored was either properly

[1] The commissioner makes a factual error here in that one witness, Govender, did mention aggression in his initial statement. The import of this error is discussed below.
[2] Myburgh and Bosch, *Reviews in the Labour Courts*, Lexis Nexis, 2016
[3] *NUM and Another v CCMA and Others (2015) 36 ILJ 2038 (LAC)* at 17, see also *National Employers General Insurance Co Ltd, v Jagers, 1984, (4) 437 (A) at 440 D-H*

ignored or did not so firmly establish the plausibility of the bank's version over Chetty's so as to warrant this court's intervention.

24. In the first instance, ABSA wrongly took the commissioner to task for failing to take into account Chetty's previous run-in with Naidoo. They would have this show Chetty's predisposition to aggression or insubordination towards his supervisors. This is similar fact evidence. The exclusionary rule against similar fact evidence is generally observed because it avoids reliance on unfairly prejudicial information with low probative value when disputes of fact are decided. As such, the rule contributes to a fair outcome (and saves time). While the rules of evidence do not have to be strictly applied in the CCMA, a commissioner must still ensure a fair outcome.

25. The classic exception to the rule is that similar facts may be admitted if they are 'strikingly similar'[4]. Thus, when the commissioner is criticized for not taking Chetty's prior bad acts into consideration, he is in fact criticized for refusing to find that Chetty's prior behavior in Naidoo's office was strikingly similar to his behaviour in Canham's office. I do not understand the court in *Gaga*[5] to have instituted a different exception in labour law to the rule against similar fact evidence than the 'strikingly similar' exception in the rest of our legal system. In *Gaga* the court found that evidence of prior sexual harassment may be admitted as similar fact evidence as it demonstrated a pattern of similar conduct. However, this pattern is not created merely by the common name given to the misconduct but by an established common *modus operandi*. In this case, the commissioner's failure to consider Chetty's prior bad acts was not unreasonable. There are distinct differences in these two instances of misconduct, despite the common label of aggression and insubordination ABSA applied to both. Chief among those is that Chetty conceded fault in Canham's office; he was not reacting to a false accusation. The commissioner therefore cannot be blamed for failing to take the actions of Chetty in Naidoo's office into account as part of the proof that Chetty similarly misconducted himself later in Canham's office seven months later.

[4] *S v D 1995 (2) SACR 502 (C)*
[5] *Gaga v Anglo Platinum Ltd* [2012] 3 BLLR 285 (LAC)

26. ABSA also contends that the probabilities favour Chetty having disposed of the phone in an insubordinate and aggressive manner rather than as an act of contrition and frustration at himself. This is because a cellphone is an important personal item containing contacts and information. Throwing it away is such a 'bizarre' act that it seems more an act of defiance and aggression than an acceptance of fault. Therefore, according to ABSA, the commissioner had evidentiary material before him – Chetty's wholly improbable defense – and he should have taken this into account in deciding the factual dispute rather than relying on the prior inconsistent statements of ABSA's witnesses.

27. It seems to me that the items of evidence which would have allowed the commissioner to decide the matter purely on the probabilities did not in fact demonstrably tip them in ABSA's favour. First, there is a distinct, although not overwhelming, improbability that an employee, already on a final warning, would commit a second offense that would almost certainly attract dismissal. Second, the personal value of the cellphone, logically, cuts both ways. If it had too much value to be thrown away and abandoned in an act of contrition and frustration, the same applies to its being thrown away and abandoned in an act of aggression.

28. Third, ABSA expected the commissioner to discount the likelihood that all four witnesses would lie in characterizing Chetty's behaviour as aggressive. However, in this case, assessing the probability that four witnesses would all lie or be mistaken cannot be undertaken without an assessment of the credibility of these witnesses; demonstrating that a neat division between probability and credibility related lines of evidentiary analysis is not always possible[6]. All four ABSA witnesses felt that Chetty should have been dismissed for his earlier intimidation of Naidoo. Morar described Chetty as generally troublesome and prone to incite staff in the way he raised grievances. The commissioner also fixed on the fact that ABSA's witnesses only remembered that Chetty was aggressive at the CCMA. This is not an ordinary prior inconsistent statement. It is the crucially inculpatory one. The commissioner also had evidence before him that suggested embroidery on

[6] See *Moodley v Illovo Gledhow and Others* (2004) 2 BLLR 150 (LC) at para 20

the part of some witnesses in other important respects. For instance, Morar had Chetty walking out of the office in his initial statement whereas at the CCMA he testified that Chetty rushed out and slammed the door. Almost all the witnesses only made mention of Canham's being 'afraid', 'shocked' or her 'eyes popping out' at the CCMA. It seems to me that, taken together, these elements could reasonably suggest a degree of latent bias against Chetty on the part of the witnesses in their testimony at the CCMA. While bias is ordinarily taken into consideration when assessing credibility, when witnesses have a motive to exaggerate their evidence, and there are signs of such exaggeration, this reduces the inherent improbability that these witnesses would all separately lie or be mistaken about Chetty.

29. I also agree with Mr. Ungerer that the distinctive verb ("charge") used at the CCMA by all the ABSA witnesses to describe Chetty's movement contributes to an impression of rehearsed testimony. This further fortifies the impression that the witnesses against Chetty may not have been entirely independent. What the interconnection of bias, (over-) corroboration and probability in this case shows is that it is not always possible to decide the probabilities divorced from issues that normally and separately establish witness credibility.

30. The commissioner also reasonably relied on the words uttered by Chetty as he threw the phone away (he was getting rid of 'the instrument that caused him to sin'), as an indication of his true intention at the time. It would take some cynicism combined with very quick thinking for an angry Chetty to charge towards Canham while at the very same time verbally blaming himself for forgetting to leave his phone in the car.

31. Fifthly, and crucially, we have the commissioner's assessment of Chetty's demeanour and bearing during the hearing. Chetty came across as someone lacking in 'grace' in the way he expressed himself and with an 'abrasive' manner. The commissioner acknowledged that throwing a cellphone into a bin might, in general, indicate an intention to undermine authority. However, for someone like Chetty, it appeared plausible to the commissioner that throwing the phone into the bin could have been an overblown 'show of remorse'. In explaining himself, Chetty said: "I want to say that I was disappointed with

myself. I wanted the managers to see that I wanted to change, I don't want to be caught again with a cellphone. I placed it in the bin so that I could keep my job rather than the cellphone". Reading the transcripts in light of the commissioner's assessment of Chetty's demeanour and bearing, I can see how a reasonable decision-maker might accept Chetty's explanation for why he threw his phone away as not being 'bizarre' at all. Once again, an assessment of credibility (demeanour) is interconnected with an assessment of the probabilities of a case, much as a judge might only understand why a witness acted in an unusual way when he observes his eccentric manner in court. It must be borne in mind that, when evaluating evidence where demeanour and probability are bound together, the commissioner was the one who had the benefit of several hours of observation of Chetty, something this court patently lacks.

32. When reviewing a commissioner's evidential findings a danger exists of straying across the boundary of review into appeal. It is trite that a reviewing court does not have to agree with a commissioner's evaluation of evidence. In this case I must ask whether no reasonable commissioner would have decided the case based on the credibility of witnesses rather than disposing of it by assessing the overall probabilities of the two versions first. This question should be answered having regard to all the evidential material before the commissioner and not bits and pieces looked at in isolation. In my view, it was not unreasonable for the commissioner to have taken the view that the probabilities were evenly balanced. This would then permit the commissioner to make a factual finding by recourse to witness credibility. Indeed, in this case, it was very difficult to separate one class of believability from the other and the commissioner correctly ended up deciding which version to believe with issues of probability intersecting with credibility.

33. On credibility viewed on its own, when the evidence is considered holistically, the commissioner, in my view, had material before him reasonably permitting him to accept that Chetty threw the phone more in a melodramatic act of contrition than in an aggressive and insubordinate manner.

34. The review test formulated recently in *Mofokeng*[7] provides for setting an award aside only if an irregularity or error is deemed to have a distorting effect on the outcome. In this case, ABSA contends that the commissioner failed to explicitly take into account certain ancillary pieces of evidence. One is that Chetty slammed the door on the way out, an action tending to corroborate a version in which Chetty was aggressive and insubordinate. As the case was pleaded, testimony about slamming the door came from one witness only, Morar. Not taking this piece of evidence into serious consideration in deciding the case does not appear to be irregular because this detail was tainted by negative consistency on the part of the single witness who mentioned it.

35. I have already found that the value of ABSA's witnesses corroborating each other on Chetty's aggression is diminished. This is because most of them made prior inconsistent statements on this issue and there are reasonable suggestions of embroidery and rehearsal on the part of all. It is an important discrepancy, bringing up aggression only at the CCMA, and the commissioner was correct in giving it prominence in the award.

36. The commissioner does err in making a factual finding that none of the four witnesses described Chetty's behaviour as aggressive in their initial statements. Three of the four witnesses did not mention aggression at all. However, Govender's statement stated that Chetty's 'body language came across as being very aggressive'. The commissioner may have erred in not specifically considering the import of the dispute of fact between Chetty and Govender. However, since it was a dispute of fact between one witness on either side, the distorting effects of such an error are, to my mind, not decisive.

*Failure to decide whether Chetty was rude and unapproachable*

37. ABSA contends that because the commissioner focused on whether Chetty had been aggressive and insubordinate, he failed to enquire into and decide a principal issue for determination: whether Chetty was rude and unapproachable.

[7] *Head of Department of Education v Mofokeng (2015) 1 BLLR 50 (LAC)*

38. Disciplinary charges do not have to be drafted with the particularity of a criminal indictment. As the Labour Court in *Bissoon* stated, a charge must give an employee "particularity sufficient to put [him] to his defence"[8]. This information usually includes the name of the offense, its date and approximate time, the venue at which it took place and a brief description of the facts underlying the charge. Having said that, an employer cannot dismiss an employee for breaching a particular rule and then defend the fairness of that dismissal at the CCMA by showing that the employee contravened another rule altogether. The relative informality of disciplinary hearing charges does not cancel the requirement that charges should denote something specific and semantically stable. In this case, ABSA, a sophisticated employer, took some time to settle on what exactly it was unhappy with the employee for having done. The final charge explained Chetty's rudeness and unapproachability as *consisting* of his aggressive and insubordinate throwing of the phone into Canham's bin.

39. It would undermine the process of adjudication of factual disputes to dismiss an employee for being rude and unapproachable *in that* he did X, but when it is shown that he did not do X, to still obtain his dismissal for being rude and unapproachable in some other, unstated or diffuse way. By alleging that the employee was rude "in that" he was aggressive and insubordinate, an employer is alleging that the rudeness consisted of acts of aggression and insubordination. The employer hitched its wagon to a particular type of rudeness and unapproachability in its charge; the aggressive and insubordinate type. When the commissioner found that an act of aggression and insubordination did not occur, it was perfectly reasonable for him to have considered the underlying factual dispute and principal issue to have been disposed of adequately.

40. It would nullify the concept of a hearing *de novo*, if ABSA's expectations of how dismissal disputes are decided were to take hold. Employees dismissed for being rude *in that* they disobeyed an instruction could thereby have the substantive fairness of their dismissal confirmed even if it were disproven that

[8] *Bissoon v Lever Ponds (Pty) Ltd & another (2003) 12 LC 1.8.1*

they disobeyed any instruction. All an employer had to do was present evidence at the CCMA of another instance of contemporaneous rudeness. This cannot be fair. Avoiding the over-complication of disciplinary charge sheets is a laudable goal. However, achieving this should not come at the price that the meaning of charges should be allowed to mutate from one forum to another.

*Misconstruing the refusal to obey an instruction*

41. ABSA argued that the commissioner misconstrued the portion of the allegation about a refusal to obey an instruction as if this had to do with Chetty's refusal to remove the phone from the bin when requested to do so. In a section of the CCMA award setting out the disputed issues, the commissioner did appear to misconstrue the factual basis of the charge of refusal to obey a lawful instruction. However, this had no distorting effect on the outcome. This is because, later, in his analysis of the evidence, the commissioner pertinently considered and decided the true factual issue underlying the refusal-to-obey charge. This was whether Chetty intentionally defied the employer in bringing the phone onto the floor. The commissioner accepted Chetty's explanation about 'force of habit' for reasons set out above.

*Sanction*

36. The test for whether the employment relationship has irretrievably broken down is not satisfied merely because employer witnesses assert their subjective view to this effect. The proven facts must establish an objective basis for the breach of the relationship. It is thus not particularly meaningful to assert, in and of itself, that a commissioner erred in reinstating an employee despite undisputed evidence that the relationship had broken down coming from the employer's witnesses. This is not the type of assertion that, to my mind, needs to be challenged in cross-examination lest it be taken as proven. It expresses a subjective view and does not claim the existence of a fact that can be specifically contradicted.

37. The award was also challenged on the basis that the commissioner failed to take into account evidence that a continued employment relationship was

intolerable in terms of section 193(2)(b) of the LRA. Were ABSA to have wished to avoid Chetty's reinstatement by operation of section 193(2)(b) of the LRA, it needed to establish that a continued employment relationship was intolerable because of a reason other than the guilt of the employee or the appropriateness of the sanction on the charge for which the employee was dismissed. It is trite that the primary relief for a finding of substantive unfairness in dismissal is reinstatement. If the employee's dismissal was found to be substantively unfair, it is taken that a finding was made that, as far as the reasons for which he was dismissed are concerned, the employment relationship was found to still be intact. This is either because the employee was not guilty or the sanction was deemed too harsh. Reinstatement under section 193(2)(b) may only be avoided if 'circumstances surrounding the dismissal' indicate that the employment relationship is intolerable. In evidence, ABSA presented no serious evidence of this nature. Consequently, the commissioner did not go wrong in reinstating Chetty in the face of section 193(2)(b).

Order

The application is dismissed with costs.

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**Whitcher J**

Judge of the Labour Court of South Africa

APPEARANCES:

For Applicant: Adv A Myburgh, SC, instructed by Norton Rose Fulbright South Africa Inc

For Third Respondent: Adv R Ungerer, instructed by Randles Attorneys