**IN THE LABOUR COURT OF SOUTH AFRICA**
**HELD IN JOHANESBURG**

**CASE NO: JR1285/2008**

In the matter between:

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| LUDWIG WILLEM EHRKE | Applicant |
| and | |
| STANDARD BANK OF SOUTH AFRICA | First Respondent |
| COMMISSIONER F J VAN DER MERWE N.O | Second Respondent |
| COMMISSION FOR CONCILLIATION, MEDIATION AND ARBITRATION | Third Respondent |

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**JUDGMENT**

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**P. ZILWA AJ :**

**[1]** The applicant had been employed on a permanent basis by the first respondent from November 2003 as a teller, thereafter at the enquiries section, and later still appointed as a team leader teller. From January 2007 he was appointed as a home mobile consultant at the first respondent's Home Loan Division.

**[2]** During the course of the applicant's appointment at the first respondent Home Loan Division it turned out that the applicant's performance was not, in the view of the first respondent, up to standard. In order to improve his performance the applicant was put on a program known as Performance Improvement Program (PIP) as from July 2007, under the supervision of one Nadia Van Rooyen.

**[3]** Some days before 21 September 2007 the applicant was dealing with an application for an opening of an account of a certain Hannelie Van der Merwe who, at the time, was an ABSA employee and who had obtained employment at the first respondent's bank. She was, as such, required to open a banking account with the first respondent. There were some difficulties that were experienced by the applicant with the opening of Ms Van der Merwe's account, which were caused, amongst other things, by the fact that the payment for Ms Van Der Merwe's credit card was in arrears.

**[4]** Applicant left on a one week training course regarding home loans at the instance of the first respondent. Whilst he was still in that course it appears that some other employee of the first respondent attached to the BFC Division had contacted Ms Van der Merwe directly and informed her that her application had been declined. This was done

at the time that the applicant was still attending the Home Loan training course and the applicant was not informed that another employee of the bank had approached Ms Van Der Merwe personally and conveyed to her the failure of her application.

**[5]** Apparently Ms Van Der Merwe was peeved about the decline of her application and, for some reason, she blamed the applicant for such failure.

**[6]** On the morning of 21 September 2007 Ms Van Der Merwe left a voice message in the applicant's cell phone, indicating her displeasure with the applicant's service and stating that she was going to lay a complaint against him with his superiors.

**[7]** The threat of the complaint apparently alarmed and panicked the applicant, especially since he was already on a program to improve his performance. His fear was that if Van der Merwe did indeed lay a complaint against him with his superiors he would be caused to remain on the improvement program, and if matters did not improve, there was a possibility that he could lose his job. It apparently never occurred to the applicant that since the decline of Ms Van der Merwe's application had been due to no fault on the part of the applicant, even if Van der Merwe had carried out her threat of reporting the applicant, after due investigation the applicant would,

in all probability, have been cleared and the fears that he entertained would not have eventuated.

**[8]** In consequence of his fear of being reported to his superiors, the applicant attempted to resolve the issue by suggesting to Van der Merwe that he would attempt to obtain her a cheque account card which he would give to her (Van der Merwe) at the North Gate Branch of the first respondent on the following Saturday. Van der Merwe did not agree to meet the applicant on the proposed Saturday. In order to suit Van der Merwe, it was arranged that applicant will meet her on that same afternoon of 21 September 2007 at 15h00. This arrangement was made even though the applicant knew that he was due to attend a BFC function at the time that he had agreed to meet Van der Merwe.

**[9]** The applicant then phoned his team leader, Nadia Van Rooyen, and informed her that he would not be able to attend the BFC function that afternoon. In order to conceal the real reason pertaining to Van der Merwe, which he perceived would put him in trouble, he stated an untruthful reason, namely that he was to see a client at 3pm who could not be seen at any other time as she was leaving for the United States of America and, as such, had to be attended to immediately. Van Rooyen expressed her dissatisfaction with the fact that the applicant would not be attending the BFC function.

**[10]** The applicant arranged and collected Van der Merwe's bank card in preparation for their 15h00 meeting. At about 14h45 Van der Merwe phoned the applicant, telling him that she would not be able to meet the applicant at the appointed time and requested the applicant to leave the documents with someone else. This was a big problem for the applicant since the meeting with Van der Merwe was his only reason for not being able to attend the BFC meeting. In order to cover the time that he was supposed to be meeting with Van der Merwe the applicant contacted another client, one De Waal, and arranged a meeting for that afternoon regarding the opening of an account for him. This would provide the applicant with an excuse for not being at the BFC function.

**[11]** On 25 September 2007 the applicant was called to the Bedford Centre of the first respondent by Van Rooyen, who informed the applicant that she wanted to see him regarding his six weekly performance meeting. Van Rooyen also informed the applicant to bring along with him the forms that he had filled for the client that he had seen on Friday afternoon and that had caused him not to be able to attend the BFC function. After his meeting with Van Rooyen the applicant was told to wait for a certain Mike Livanos who wanted to speak to him. In the meeting with Livanos the applicant was asked again about the reasons for his failure to attend the BFC function on

the previous Friday. The applicant repeated his story about seeing a client that was leaving for USA as his reason for not being able to attend the function.

**[12]** After leaving the meeting with Livanos, the applicant contends that he realised that persisting with the lie that he had told for not being at the BFC meeting was wrong and he decided to come clean. He phoned Van Rooyen and told her everything as it had really happened. He also attempted to phone Livanos but could not get hold of him. Van Rooyen had undertaken to discuss the matter with Livanos and, according to the applicant, she thanked him for being honest enough to come clean and tell her the real truth.

**[13]** Applicant was then summoned to a disciplinary hearing where he was charged with misconduct relating to dishonesty for misrepresenting the facts pertaining to his non attendance of a BFC meeting on the Friday. The applicant was also suspended from work pending the disciplinary inquiry. A disciplinary inquiry was set down for 12 October 2007, where the applicant pleaded guilty to the charge preferred against him. He was duly convicted as charged and in terms of his plea. Pursuant to the conviction the applicant was dismissed from the first respondent’s employment and his name was also put on the register of employees dismissed for dishonesty (REDDs), which is an interbank blacklist. Banks that are members of

REDDs in practice do not employ a person listed on that list. The listing is for life and it does not expire. The name of a former employee that has been put on that list remains there for good unless the conviction for dishonest conduct is overturned. This effectively means that the former employee that has been put on the list is most unlikely to ever find employment in the financial services or the banking sector for the duration of his life. Indeed the applicant states that after his conviction, listing and dismissal as aforesaid he has applied for work at all major the major banking institutions in the country but he has not been able to secure any employment because of his REDDs listing.

**[14]** Being dissatisfied with the sanction of dismissal and the listing on the REDDs list, the applicant approached the Gauteng Region of the CCMA, challenging the substantive fairness of his dismissal by the first respondent. In due course the matter went for arbitration under the auspices of the third respondent. The second respondent was the arbitrator appointed to deal with the arbitration. After hearing evidence from both sides the second respondent dismissed the applicant’s claim of the alleged substantively unfair dismissal by the first respondent. It is that arbitration award that forms the subject of the present review application.

**[15]** In the founding affidavit in support of his review application the applicant contends that;

I. The actions of the applicant set out above did not warrant the charges that the applicant was charged with, alternatively, did not constitute “dishonesty” as was intended in the first respondent’s codes and procedure, justifying a listing on REDDs or disbarment as a representative in terms of the FAIS Act;

II. In the circumstances of the applicant’s position the “untruth” did not result in any harm suffered by the first respondent or prejudice to the first respondent, but was rather what can be described as a “white lie”;

III. Neither did the applicant obtain any financial benefit from the “untruth” for himself. The only benefit the applicant wished to obtain was good performance during his PIP and a satisfied client for the first respondent;

IV. The conduct of the applicant was not of a serious nature and should be addressed in terms of progressive discipline by means of a warning and guidance rather than dismissal resulting in the applicant’s permanent expulsion from a working environment which has been the only or most significant permanent working environment that the applicant had been exposed to during his permanent employment history;

V. The finding of guilt for dishonest conduct in the specific circumstances relating to the incident in question did not justify a sanction of dismissal and the resultant REDDs listing and disbarment from FAIS positions in the future;

VI. The second respondent could not, on the evidence led before him, reasonably and justifiably have come to the conclusion that he did.

**[16]** The applicant's review application is opposed by the first respondent, which has filed an affidavit in opposition thereto. In its answering affidavit , deposed to by one Sharon Magdelene Moodley, the first respondent contends that;

I. The applicant acted dishonestly and continuously lied to the first respondent in order avoid continuation of the Performance Improvement Program and possibly dismissal for poor performance;

II. The applicant's lie constitutes dishonesty, more particularly as it was meant to conceal the true circumstances of the applicant's failure to attend the function which was the fact that the applicant had committed another act of poor performance which could have led to an elongated period of performance improvement program and/or dismissal for poor performance.

III. The nature of the applicant's misconduct is of such a serious nature that dismissal was the only reasonable

sanction. The applicant's conduct in this regard had the potential that the first respondent could have taken him out of the performance improvement programme with the understanding that he had improved his performance while in fact he had not, which could have had disastrous consequences for the first respondent;

IV. The commissioner's award accords in each material respect with the evidence which was led at arbitration. His assessment of the evidence of the witnesses and the way he described them is entirely justifiable on an examination of the record.

On the bases set out above the first respondent argued for the dismissal of the applicant's review application.

**[17]** The first respondent has a Disciplinary Code which, amongst other things, lists offences that may result in dismissal without previous warnings. In terms of Part 6 of first respondent's Disciplinary Code, examples of such dismissible actions include:

Dishonesty of any nature, such as:

- Theft, misappropriation or unauthorised possession of property or funds belonging to the bank, or another employee or a customer;
- Deliberately giving untrue, misleading or wrong information or instructing a subordinate to give such information;
- Falsification of the bank's records, including attendance register's call sheets, expense claims, doctor's certificates;
- Bribery or corruption, including giving or accepting money or other items to receive or provide special favours;
- Unauthorised use of bank property or equipment;
- Passing on business or customer information to unauthorised parties;

- Unauthorised setting up or participating in a business in competition with the bank or a business which unfairly benefits from the bank or at the employee's position in the bank;
- Fraud or forgery (signing another person's signature), including assistance to outsiders to defraud the bank or customers.

Serious misconduct against others such as:

- Causing wilful damage to property belonging to the bank, another employee or a customer;
- Assault or fighting;
- Sexual harassment, including sexual advances, suggestions or comments, request for sexual favours and other conducts of a sexual nature which negatively affects the atmosphere or relations in the workplace or other employee's dignity;
- Other harassment which humiliate another person or persons and / or create a hostile or intimidating environment; and
- Intimidation and / or incitement of other employees.
- Causing a loss to the bank by not following rules or procedure;
- Allowing another employee to perform transactions with your password or PIN;
- Failing to disclose important information in, for example application forms;
- Breaking the bank's requirements regarding confidentiality of information;
- Any act which damages the bank's good name or reputation;
- Gross negligence which results or may result in a loss to the bank;
- Refusal to carry out a lawful and reasonable instruction or deliberatelty acting contrary to such instructions;
- Absence from work for six or more working days without notification to management or without a valid reason; and
- Any other act or behaviour which is considered so serious that it destroys the bank's ability to trust the employee or makes the employment relationship intolerable for the bank.

**[18]** It is common cause that the applicant lied to his supervisor, Van Rooyen, and to Livanos with regard to his reasons for not attending

the BFC function that he was scheduled to attend on the Friday in issue. It was argued on behalf of the first respondent that such lie fell within the category of dismissible actions without previous warning that is envisaged in the first respondent's Disciplinary Code in that it was dishonesty by deliberately giving untrue, misleading or wrong information, which is listed in the Code as a dismissible offence. On the other hand it was argued on behalf of the applicant that the lie that was told by the applicant as aforesaid was merely "a white lie" which does not fall in the category of dishonesty envisaged in Part Six of the first respondent Disciplinary Code set out above. It is clear from the list of dismissible charges relating to dishonesty, argued the applicant's counsel, that virtually all of these charges relate to matter so serious that criminal charges will also ensue when an employee is found to be guilty of such charges. It could never had been the intention of the complier of the Code that, viewed against the seriousness of the charges listed in Part 6, an employee telling his or her superior that a client is going overseas when he is not in order to avoid his or her PIP being reviewed in a negative light would constitute the type of dishonesty that is envisaged in the Code, justifying dismissal, proceeded the argument in favour of the applicant. The disastrous effect of the charge, the conviction and the sanction imposed on the applicant is such that a reasonable decision maker in the position of the second respondent would never have given the award that the second respondent gave in the applicant's submission. As already stated, the first respondent's counsel argued to the contrary and submitted that the award is perfectly in order and it brooks of no interference by this court.

**[19]** The proper approach to be adopted by this court in dealing with arbitration reviews is trite and it has been clearly set out in a number of decided cases, chief amongst which is *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24( CC) Also reported at (2007) 28 ILJ 2405 (CC) and [2007] 12 BLLR 1097 (CC).* In a nutshell, the test is whether a reasonable decision maker may reasonably arrive at the same conclusion that the decision maker whose decision is under review, has arrived at. In *Sidumo's* case the manner in which a commissioner, such as the second respondent herein, should approach the dismissal dispute before him is also clearly expostulated. Summarily, a commissioner should determine the dispute as an impartial adjudicator, taking into account the totality of the circumstances. He/she will necessarily take into account the importance of the rule that had been breached, the reason the employer imposed the sanction of dismissal, the basis of the employee's challenge to the dismissal, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, etc. A commissioner is not given the power to consider afresh what he or she would do but simply to decide whether what the employer did was fair. In essence, in this review application I have to determine whether the decision reached by the second respondent in the award that forms the basis of this review is one that a reasonable decision maker could not reach. If the answer is in the affirmative, the application has to succeed. Conversely, if the answer is in the negative, the application has to founder. The *Sidumo* test has recently been reconfirmed in *Edcon Ltd v Pillemer NO (2009) 30 ILJ 2642 (SCA)*, where it was further held that the focal point of enquiry in arbitration award review applications is the reasonableness of the

award and that the court should focus not only on the conclusion arrived at but also on the material before the commissioner when making the award.

**[20]** In the arbitration award the second respondent, in his survey and analysis of evidence and argument presented before him at the arbitration, correctly found that the applicant had admitted lying to his supervisor in order to prevent a complaint against him reaching management's ears since he was already on a performance management program. The second respondent then expresses the view that the reason for the applicant telling the lie is an aggravating instead of a mitigating factor if he knew that his performance was being monitored and he wanted to ensure that management did not become aware of a further complaint about his performance. This, reasoned the second respondent, shows that the applicant had a clear and deliberate intention to mislead management and to prevent certain information from getting to management's attention, which increases his blameworthiness.

**[21]** I am of the view that the reasoning of the second respondent set out above is not sound and that the decision on the basis thereof is one that a reasonable decision maker could not reach. In my view the lie told by the applicant was merely occasioned by baseless fear and panic on his part. It should be remembered that on the ungainsaid evidence of the applicant there was no fault on his part whatsoever with regard to the problems encountered in the opening of Van der Merwe's account. There is no suggestion that there was anything that he should have done but incompetently failed to do with regard to that transaction. That he was sent on a week's course and another employee of the first respondent took over and informed Van der

Merwe that her account had been declined, without any reference to the applicant, can hardly be blamed on the applicant. Accordingly, had applicant clearly thought through the threat by Van der Merwe to lay a complaint against him and report him to his superiors he would have realised that after due investigation by his employer he would have been exonerated from any blame. It was merely blind panic and irrational fear on the part of the applicant that caused him to tell the lie in my view. In the circumstances the lie and the other conduct on the part of the applicant did not prejudice the first respondent in any way in real terms. The report by Van der Merwe would also not have affected his performance programme.

**[22]** The second respondent himself acknowledges in his award that not every lie would constitute the type of dismissible dishonesty that is envisaged in the first respondent's Code of conduct set out above. He recognises that there are situations where, for example a young employee finds himself in a position where he has to tell a "white lie" to a supervisor for being a few minutes late, or where during business hours he dashes to a girlfriend's office for a cup of coffee. Such lies are not too serious and they may well be for an understandable or forgivable motive where the "misleading" does not really go to the heart of the trust relationship. In my view, and taking into account all the circumstances surrounding the telling of the lie in issue herein, a reasonable decision maker would conclude that the lie falls in the category of such "white lies". It is very significant that on the ungainsaid evidence that was led before the second respondent, it was the applicant himself, on his own, who was pricked by his own conscience to realise that it was wrong to perpetrate the lie that he had told and that he, on his own, called his

superiors, confessed to earlier lying and set the record straight by telling the true story as it was. Those are hardly the actions of a compulsive liar actuated by dishonesty of such a nature that the trust relationship between him and his employer may be said to be destroyed in consequence of the lie.

**[23]** Considering the disastrous effect of the guilt finding for dishonesty and the sanction that was imposed with its disastrous effect of putting a complete and permanent stop to the applicant's career in the financial services field, I am of the view that a reasonable decision maker could not reach the decision that has been reached by the second respondent herein. As pointed out in *Sidumo's* case one of the considerations that should be taken into account by the commissioner is the effect of the dismissal on the employee and his service record. To have the applicant's career permanently destroyed through the REDDs listing for the type of the lie in issue herein, is, in my view, totally unjustifiable and a decision which no reasonable decision maker, with the material placed before the second respondent, could reach. It is but cold comfort that in the last paragraph of his award that the second respondent has recommended, without ruling, that the first respondent should consider removing the applicant's name from the REDDs register. The unrefuted evidence by the applicant is that this recommendation has not been followed by the first respondent and that it has proved totally impossible for him to obtain employment in the financial services sector in consequence of the decision and the REDDs listing. It is also worth mentioning that the arbitrator's finding that the applicant's behaviour must have had a detrimental effect on the relationship of confidence and trust between the parties is devoid of

basis. Since the first respondent elected to lead no evidence at the arbitration hearing there was no evidence adduced to show that the confidence and trust relationship had been destroyed between the parties, thus warranting the sanction of dismissal of the applicant *(See Edcon Ltd) (supra).* Moreover, even on first respondent's Code, a dismissal is not an inevitable sanction even if the applicant's conduct were to fall within the purview of the list of dismissible offences.

**[24]** In the premises I am of the view that the review application should succeed. I am, however, satisfied that the first respondent was not without justification in opposing the application, hence I see no reason to mulct it with a costs order.

**[25]** In the result, I make the following order :

1. The second respondent's arbitration award dated 30 April 2007 under the Case Number GAJB37956/07 be and is hereby reviewed and set aside.
2. There will be no order as to costs.

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P ZILWA

ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant: Adv. H.E Marx

Instructed by: Smit Sewgoolam Inc

For the Respondent: Mr E. Matyolo

Instructed by: Perrot, Van Niekerk & Woodhouse Inc

Date of Hearing: 14 January 2010

Date of Judgment: 22 January 2010