IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case No: PA02/2020

In the matter between:

FELICITY AUSTIN-DAY **Appellant**

and

ABSA BANK LTD **First Respondent**

THEODORUS POTGIETER **Second Respondent**

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION ("CCMA") **Third Respondent**

Heard: **23 November 2021**

Delivered: **08 March 2022**

Coram: Waglay JP, Coppin JA, and Kubushi AJA

JUDGMENT

KUBUSHI AJA

Introduction

[1] The appellant hereby appeals, with leave of this court, against the whole of the judgment and order of the Labour Court ("the court *a*

quo") handed down on 4 November 2019. The appeal seeks to restore the arbitration award issued by the second respondent (the commissioner who adjudicated the dispute under the auspices of the Commission for Conciliation Mediation and Arbitration ("CCMA")), wherein he found the appellant's dismissal by the first respondent ("the bank") to have been substantively unfair and ordered her reinstatement.

[2] At the time of her dismissal, the appellant was in the employment of the bank as a Branch Manager. The appellant was charged and dismissed for misconduct, which was alleged to involve dishonesty and her alleged failure to comply with the bank's policies and procedures in the execution of her duties as a Branch Manager.

[3] The bank, aggrieved by the award of the commissioner, brought an application in terms of section 145 of the Labour Relations Act,[1] in the court *a quo*, seeking to review and set it aside.

[4] On the date set for the hearing of the review application, the parties' legal representatives approached the judge allocated to hear the matter with a draft consent order, which was curiously made an order of the court, the effect of which was that the matter was remitted to the CCMA for a further hearing before the same commissioner in respect of the "second charge". The review application was otherwise postponed indefinitely. Consequently, the parties returned to arbitration and held a further hearing confined to what was termed the second charge, in the consent order. Subsequent thereto, the commissioner issued a supplementary award, which also formed part of the arbitration award which the bank sought to review and set aside.

[5] When the matter was referred back to the court *a quo*, the judge presiding, correctly refused to entertain the supplementary award on

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[1] Act 66 of 1995.

the ground that the first arbitration award was final and binding and the CCMA could not revisit the process of resolving a dispute which it had already resolved, and had issued an arbitration award, in respect thereof. This aspect is not challenged on appeal and I, in that sense, find it not necessary to deal any further with the said supplementary award, in this judgment.

[6] The court *a quo* found in favour of the bank. It reviewed and set aside the award and replaced it with the order that the dismissal of the appellant was fair. It made no order in respect of costs.

Background

[7] For the appropriate appreciation of the matter, it is prudent to traverse its factual background in some detail. The appellant was employed by the bank as a Branch Manager at its branch, at 6th Avenue, Walmer Park, in Port Elizabeth. It is not in dispute that at the time of the alleged misconduct of the appellant she had been in the employment of the bank for a period of approximately thirty-three years with an unblemished record. She had, however, worked as a Branch Manager, in various branches of the bank, for a period of fifteen years, preceding her dismissal.

[8] The conduct that led to the appellant's dismissal emanates from the following set of facts: during her employment as the Branch Manager at 6th Avenue, Walmer Park, the appellant decided to deposit R100.00 of her own money into ten inactive accounts, opened by ten different customers, that were under her control at her branch. An amount of R10.00 was deposited in each of those accounts. The deposits were made without the knowledge and/or consent of the holders of those accounts. The effect of such deposits was that those accounts, which were inactive, were then recorded as activated accounts in the branch's books, and as such, constituted sales in terms of the branch's

performance. One of these accounts was, subsequently, operated by the account holder who deposited further moneys into the account.

[9] The accounts in question, are referred to as “Transact Accounts” which are said, basically, to be transactional accounts aimed at individuals who are either unemployed, or irregularly employed, and who would make deposits of around R2 000.00, or less, in any given month, into the respective accounts. Thus, the accounts are used predominantly by customers falling within the low income group. Sales people of the bank would get people to open such accounts, which only become operational once a deposit is made into the account. Otherwise they remain inactive. However, after four months if no deposit is made into the account it becomes dormant. Given the basic nature of the accounts, no minimum opening balances are required and no minimum daily balance is required. Customers also do not automatically receive monthly statements in respect of such accounts.

[10] Each of the bank’s branches has sales targets which are recorded when a newly opened account is activated. Although accounts are opened when sales are registered, each specific account only becomes activated once the customer makes a deposit into the account and starts transacting. Once an account is activated, it then starts attracting costs in the form of a cash deposit fee together with administrative fees. It is at this time that the bank will be able to make a return, based on the fee charges generated for the transactions that take place

[11] During a routine visit to the appellant’s branch by Mr Gareth Sylvester Raynold Vallentyn’s (“Mr Vallentyn”), the area head manager of the bank’, the appellant voluntarily informed him about the deposits in question. Mr Vallentyn thereafter informed the bank’s forensics department, which investigated the matter. In its report, forensics

confirmed that they could not detect any fraudulent conduct and made a recommendation that remedial action be taken.

[12] Further investigations into the policy and procedures of the bank was undertaken by the operations consultant who recommended disciplinary action against the appellant. She was charged with two counts of alleged misconduct, as follows:

Count 1: "It is alleged that you acted dishonestly, in the execution of your duties as a Branch Manager of ABSA, 6th Avenue, Walmer Park, when you made irregular cash deposits into customer accounts;

Count 2: "It is alleged that you failed to adhere to the Group's laid down Policies and Procedures in the executions of your duties as a Branch Manager".

[13] Following a disciplinary enquiry, the appellant was found guilty and dismissed. The reason for the dismissal of the appellant was recorded as follows: *'after considering all the facts the decision is dismissal with contractual notice – Guilty of charge of dishonesty within ABSA ER do not have a lesser sanction that dismissal ZERO-TOLERANCE'*.

[14] As earlier stated, the appellant, aggrieved by the decision, referred an unfair dismissal dispute to the CCMA. The dispute remained unresolved after conciliation and a certificate to that effect was issued. The matter then proceeded to arbitration before the commissioner.

[15] The appellant challenged the substantive fairness of her dismissal on the basis that she was not guilty of the misconduct she was dismissed for. She also challenged the fairness of the sanction of dismissal and sought retrospective reinstatement as relief. The procedural fairness of the dismissal was not disputed.

[16] What, however, became a bone of contention before the arbitrator, in respect of the two counts of misconduct facing the appellant, was whether the appellant had acted dishonestly when she deposited the said amounts in the customers' accounts and whether in so doing, she had contravened any policies of the bank and applicable legislation.

[17] Having considered the evidence before him, and relying on the judgment in *Nedcor Bank v Frank and Others*,[2] the commissioner found against the bank in relation to the central issue of whether or not the appellant had acted dishonestly.

[18] As regards the second charge, the commissioner also made a finding that that charge was irrelevant for purposes of the arbitration because the appellant was dismissed for dishonesty and not because she transgressed the first respondent's policies, procedures and legislation. The commissioner, further made a finding that even if the appellant had transgressed any such policies, dismissal, under such circumstances, had been unfair, and that the appellant deserved to be reinstated.

[19] Based on the afore stated reasons, the commissioner found that the appellant was entitled to the relief she sought. Accordingly, the dismissal was found to be procedurally fair, but substantively unfair, and the bank was ordered to reinstate the appellant in its employ on terms and conditions no less favourable to her than those that governed the employment relationship immediately prior to her dismissal.

[20] The bank was aggrieved by the findings of the commissioner and, thus, filed a review application with the court *a quo* seeking an order to review and set aside the award issued by the commissioner.

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[2] [2002] 7 BLLR 600 (LAC) para 15.

[21] In its review application before the court *a quo*, the bank's contention was that the arbitration award was unreasonable, or not one that a reasonable decision-maker could have arrived at. In particular, the bank contended that, firstly, the commissioner ignored the evidence proving that, on a balance of probabilities, the appellant was guilty of dishonesty and that such misconduct was serious, warranting dismissal; and secondly, that even if the commissioner was of the view that there were insufficient grounds to support a finding of dishonesty, the evidence overwhelmingly shows that the appellant acted in flagrant breach of the accepted conduct expected of a branch manager and was also in breach of the policies and procedures in place at the bank; and lastly, that the commissioner confined the reason for the dismissal of the appellant to only one charge, whilst the appellant was in fact found guilty of two charges, all of which led to her dismissal.

[22] Even though in its papers the bank's grounds of review were based on both charge 1 and charge 2, the court *a quo* in its judgment did not address the grounds of review in respect of charge 2. Thus, the grounds of review that came for determination before the court *a quo* related only to charge 1. The crux being whether the appellant acted dishonestly in depositing her own money into the customers' accounts.

[23] The court *a quo* reviewed and set aside the arbitration award, having found that the commissioner ignored evidence and failed to apply his mind to critical issues that were before him when he sought to establish the intention of the appellant. In its judgment, the court *a quo*, made a finding that the commissioner ignored the material that was before him by concentrating on how the misconduct was perpetrated, rather than on the reasons for it. According to the court *a quo*, in so doing, the commissioner failed to arrive at a conclusion that a reasonable decision-maker would have reached, namely, that the appellant was dishonest.

Before this Court

[24] Before this court the issues were the same as those argued at arbitration and in the court *a quo*. The cardinal issue being whether the conduct of the appellant amounted to dishonesty.

[25] The standard of review has been determined in the Constitutional Court decision in *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others*,[3] where the court held, at para 110 thereof, as follows:

> '110. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*:[4] Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'

[26] Therefore, following on the approach enunciated in *Sidumo*, this court has to determine whether based on the material that was before the commissioner, the court *a quo* correctly came to the conclusion that the commissioner's conclusion was one that a reasonable decision-maker could not reach.

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[3] 2008 (2) SA 24 (CC); [2007] 28 ILJ 2405 (CC).

[4] Bato Star Fishing (Pty) Ltd v Minister of Environment Affairs & Others 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[27] The evidence that the commissioner considered when determining whether or not the appellant acted dishonestly, is summarised as follows in the arbitration award:

> '12. The case presented on behalf of the respondent in support of the respondent's contention that the applicant acted dishonestly was that she stood to gain by her actions in that the branch would then meet the target regarding sales and she personally stood to gain as she might face repercussions if she did not meet target. The evidence tendered further on behalf of the respondent was that the applicant accessed the accounts in her personal capacity and thus opened the bank to claims of money laundering. The case was further that the applicant in acting as she did, contravened a number of policies and applicable legislation.
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> 13. The evidence lead, further established that the applicant, of her own accord, whilst Mr Vallentyn was doing a routine inspection, informed him that she had opened accounts. She did this in an acknowledgement seeking manner for her innovationary (sic!) thoughts and actions. The accounts were opened openly over the counter with her name in details as a depositor. The respondent's case from these facts is that the applicant [appellant] acted dishonestly because she stood to gain from depositing the moneys because she was behind on targets. The applicant's version on these facts was that she did not intend to be dishonest. That she in fact was not dishonest and acted openly. She could deposit the moneys at an ATM incognito if she wished to be dishonest.'

Based on this evidence, the commissioner found that the dismissal was unfair.

[28] In coming to such a finding, on this point, the commissioner reasoned as follows:

> '16. The respondent based its case relating to dishonesty on the assumption that the applicant opened the accounts to boost the

performance of the branch to such an extent that the applicant would meet target. The applicant on the other hand stated that she was not short of her target and even if it was so it would only result in a discussion on how her performance could be bettered. Mr Vallentyn was quite adamant that even if the applicant was on target there was pressure on all managers to perform above target *per* month just in case the next month's target would not be reached so that an average over a year could be above target. The argument effectively puts an end to the contention that the applicant having been found guilty of dishonesty, it was for the commissioner to make a finding that the bank had proven dishonesty in order to come to the finding that the dismissal was fair. The applicant acted dishonestly because she wanted to boost her target as Mr Vallentyn testified that she had more than two months to reach her target should she not have met it.

17. The respondent also argued on the one hand, that the applicant's evidence that she acted openly by depositing the moneys over the counter on her name is of no relevance as it does not show that she had no intention to be dishonest because it would be hidden amongst all the other transactions, it is not reconcilable with the argument on the other hand that the applicant informed Mr Vallentyn of her actions because she was scared that she would be caught out. The two contentions are mutually exclusive. The applicant's version that she did not intent to be dishonest and in fact was not dishonest is thus more probable.

18. The respondent had to, in order to be successful in showing that it acted substantively fair in dismissing the applicant based on dishonesty must show that the applicant intended by her actions to be dishonest. The facts of the case before me does not support a finding of dishonesty because the applicant acted openly by depositing the moneys over the counter with her name as depositor and in a manner seeking approval from Mr Vallentyn for her innovative thoughts and actions divulged to him. It cannot be said that a person under these circumstances had the intention to be dishonest. The applicant readily

conceded that in hindsight her actions were foolish. Her foolishness, however, does not make her guilty of dishonesty on all the facts presented to me.

19. I find that the applicant was not guilty of dishonesty. She was dismissed for dishonesty. My duty is to decide whether the respondent acted substantively fair in dismissing the applicant (procedure was not challenged) based on the reasons given for her dismissal. . .'

[29] The Bank's submission that the appellant wanted to deceive the bank by boosting her branches sales and that she was in trouble with her performance, holds no water. I am more inclined to be supportive of the argument raised by the appellant in the heads of argument.

[30] As, correctly argued by the appellant, the record indicates that on the common cause evidence before the commissioner, the appellant's performance target, or "bucket" for transaction accounts, already stood at 103% on year-to date basis, at the time of the incident. At best she stood to boost that figure to 105%. Therefore, she was not in trouble as suggested by the bank, as far as her performance was concerned.

[31] Mr Vallentyn conceded that the transactional accounts "buckets" were seen as a whole; when it comes to formal performance evaluation, the time for assessing the year's performance was still some two months away, and that the appellant was already at 103% of her performance target for this bucket on a year to year-to-date basis. Thus, at worst for the appellant, even if the performance was reduced by the 10 accounts in question, her performance for savings accounts would have stood at 91% - which is a figure which would not have put her in trouble. Mr Vallentyn conceded, readily so under cross-examination, that faced with a figure of 91% for savings accounts he would have done nothing

more that have a discussion with the appellant about how that figure could be boosted to a figure of 100% or more.

[32] There is nothing on record that indicates that the appellant stood to gain any kind of reward on account of adding ten accounts. There was no performance bonus or other kind of incentive that was within reach at the time that could be achieved by the artificial addition of the ten savings account.

[33] Without any shred of evidence that suggest that the appellant was dishonest in her conduct, as I have already indicated here above, the acceptance of the appellant's explanation, in my view, was reasonable.

[34] The bank's contention that the appellant disclosed her conduct when it was on the verge of being discovered, is without merit. There is no evidence on record that indicates as such. However, the common cause evidence is that the bank did not routinely audit accounts that had become activated. There is also no dispute that the appellant voluntarily and freely mentioned her conduct to Mr Vallentyn and to her staff, in the excitement of having thought of something which, to her, appeared like a good idea and innovative with the hope of motivating their performance. If anything it appears that the appellant thought this was a good way of trying to motivate the account holders to use the accounts. In fact, one of the 10 accounts opened did get the result the appellant had hoped for, the account was then utilised. The findings of the commissioner in this regard is thus patently reasonable. it would have been inconceivable that she would have voluntarily made the disclosures to Mr Vallentyn if the intention was to deceive.

[35] She, in addition, left, freely so, a paper trail in respect of the deposits by entering her name and identity number on the deposit slips. She had an alternative means of depositing the amounts anonymously at the ATM, but she opted not to do so; she could still have entered a

false name and identity number on the deposit slips, this also she did not do.

[36] There is undisputed evidence that she wanted to motivate her staff. This is indicated by her undisputed evidence that she voluntarily shared what she had done, freely with her staff. The evidence is further that the list of accounts into which she deposited the R10.00's was supplied to her by one of her staff members. She thus acted openly and to the knowledge of the staff at the branch.

[37] Even though, the commissioner made an error in finding that the appellant conceded in hindsight that her actions were foolish, it is quite clear from the record that the evidence of the appellant is that she acted with lack of judgment. This error by the commissioner cannot come to the assistance of the bank in any way. It cannot be said that due to such error the dismissal of the appellant was fair. To the contrary, the concession by the appellant as correctly captured in the record, goes to show contrition on the part of the appellant which is a further indication that she did not act with the intention to be dishonest.

[38] Moreover, even if it were to be accepted that the appellant breached any one of the policies, procedures and applicable legislation of the bank by her conduct, this does not justify a sanction of dismissal under the particular circumstances of this matter. Besides, on the evidence as it stands, there is no specific clause of any specific policy and procedure that could be convincingly pointed out that was breached by the appellant.

[39] There is no evidence that the appellant acted in bad faith or that by her actions, she exposed the bank to any material risk.

[40] On the other hand, as the commissioner found, the bank, as the custodian of its own policies and the legislation relied upon, should have contacted the nine clients, who did not operate the accounts,

stating that their accounts had been accessed by a private person and activated and for that reason had to be de-activated, or that they may open new accounts, or something to that effect. This it did not do. Similarly, the tenth person, who as I have stated earlier, after his or her account was activated, started operating on the account, should have been informed that the account had been irregularly activated by a private person and that the account must now be de-activated, and if he or she still wanted to do business with the bank to re-open the account. But, the bank did none of that, but happily enjoyed the benefit of what they considered to be “dishonest conduct”.

[41] If there was any misconduct, it was not serious enough to warrant dismissal. The evidence on record is that when Mr Vallentyn and forensics learnt about this unfortunate incident, they did not give an indication that this was a serious transgression. It must have not been serious, for if it was so, forensics would have immediately, indicated as such to the appellant, and besides, forensics found no evidence of fraudulent conduct on the part of the appellant. It merely recommended remedial action after its investigation.

[42] The appellant’s unblemished record of thirty-three years of service also speaks for itself and militates against the sanction of dismissal. The further unchallenged evidence that the appellant will never do it again and the fact that she conceded in evidence that in hindsight she realised that she made an error of judgment, also confirms in her favour that dismissal was unwarranted.

[43] The prejudice argued orally before this court by the Bank’s counsel could not be substantiated. There is hardly any evidence on record of any prejudice suffered either by the bank or by the customers whose bank accounts were used. The prejudice contended for by the bank’s counsel that the appellant’s conduct would open the bank to money laundering activities is without merit. At the level and scale of money

that is involved in this matter, the allegations of money laundering are outrageous and farfetched and require no further comment.

[44] The further contention that the customers, whose accounts were accessed without their knowledge, would be prejudiced by the bank charges which would be accumulated in the accounts without their knowledge and consent, is also meritless. On its own version, the Bank confirmed that when the bank charges that accumulated after the accounts have been activated, are not paid, the amounts are eventually written off after a period of time.

[45] These, in my view, are findings that a reasonable arbitrator would readily make.

[46] It is trite that once it is found that the dismissal was substantively unfair, reinstatement is the primary remedy envisaged by the LRA.

[47] In the circumstances, the appeal stands to be upheld and I make the following order:

(i) The appeal is upheld.

(ii) The order of the court *a quo* is set aside and is substituted with the following order: “The review application is dismissed.”

(iii) There is no order for costs.

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Kubushi AJA

Waglay JP and Coppin JA concur.

APPEARANCES:

FOR THE APPELLANT: A C Oosthuizen

	F Le Roux
	Instructed by Kaplan Blumberg Attorneys
FOR THE FIRST RESPONDENT:	M Pillemer
	Instructed by Stone Wylie Attorneys