REPUBLIC OF SOUTH AFRICA

THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no. DA 14/12

In the matter between:

ABSA BANK LIMITED	**Appellant**
and	
DEVAPRIYA NAIDU	**First Respondent**
LESTER SULLIVAN NO	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION	**Third Respondent**

Heard: **4 March 2014**

Delivered: **24 October 2014**

Summary: **Parity principle: Employee convicted of misconduct involving dishonesty and dismissed. Both CCMA & LC held that dismissal was substantively unfair (and ordered reinstatement) on ground that another employee who previously committed similar transgression was only given final written warning and not dismissed. Held: Parity principle to be applied with caution. Each case to be treated on its own facts and circumstances. The principle not intended to profit employees who commit serious acts of**

misconduct. In the present instance, dismissal was substantively fair. Appeal upheld.

Coram: Waglay JP, Ndlovu JA *et* Coppin AJA

JUDGMENT

NDLOVU JA

Introduction

[1] This appeal is against the judgment and order of the Labour Court (Cele J) handed down on 28 June 2012, in terms of which the Labour Court dismissed with costs the application launched by the appellant Bank, seeking to review and set aside the arbitration award issued by the second respondent (the commissioner) on 28 June 2010, acting under the auspices of the third respondent (the CCMA). Leave to appeal to this Court was granted by the Supreme Court of Appeal.[1]

[2] In terms of the arbitration award, the commissioner found that the dismissal, by the appellant, of the first respondent Ms Devapriya Naidu, was procedurally fair but substantively unfair, on the ground of lack of disciplinary consistency on the part of the appellant. Hence, the commissioner ordered that Ms Naidu be reinstated to the appellant's employ "*with effect from the date of her dismissal, the 7th October 2008 on the same terms and conditions as she was employed prior to her dismissal"* and further ordered the appellant to pay Ms Naidu "*the sum of R1 879 530 within 14 days"* from the date of the award.

The factual matrix

[3] Ms Naidu was formerly employed by the appellant as an executive investment broker at the appellant's Chatsworth branch in Durban. On 22 September 2008, she was charged with two counts of misconduct, which appeared in the disciplinary charge sheet as follows:

[1] SCA Order, per Case No. 013/13 dated 13 March 2013.

'1. It is alleged that you acted irregularly in the execution of your duties as a Broker with ABSA Brokers.

The above allegation bears reference to the following examples/incidents:

- Processing instructions without a valid signature from the client by detaching the second page of an existing instruction and sending with a new instruction to effect switch requests on 18 July 2008 for clients D Khan 0115495; K Naidoo 0094109; O Naidoo 0049188 and G Jeebodh 0033323.
- Processing instructions without valid signatures for transaction of D Pillay 00446409.

Concerning the degree of seriousness associated with the charge, it bears relation to the category "very serious offences" as contained in the ABSA Disciplinary Code.

2. It is alleged that you failed to comply with a provision of a statutory regulatory requirement which places an obligation on the Bank and where your position with the Bank places a burden on you to ensure compliance.

The above allegation bears reference to the following examples/incidents:

- Audit of client advice records not in place as per attachment.

Concerning the degree of seriousness associated with the charge, it bears relation to the category "very serious offences" as contained in the ABSA Disciplinary Code."

[4] The facts and circumstances that brought about the said misconduct charges can be summarised as follows. In terms of her job description, Ms Naidu, amongst other things, rendered intermediary services to the appellant's clients and, as such, to advise and recommend to a client the best investment portfolio was part of her responsibilities. She would then assist clients in investing their funds in various portfolios. With the consent of a client, she could move or "switch" funds from one investment portfolio to another. A "switch form" was used to implement the transfer of funds. The particulars of the client, the type of the investment and an original signature of the client had to be reflected on the switch form which was then faxed to the central point known as the Absa's Investment Management Services (AIMS), where the final transaction switch was to take place.

[5] Ms Naidu had a team of staff who worked under her supervision. She in turn reported to Ms Sharon Andrews, the Regional Manager for KZN Region1. The Provincial Support Manager was Mr Gordon Shaw-Newland and his Assistant was Ms Sandi Wroggermann who also served as the appellant's Complaints and Compliance officer. As such, Ms Wroggermann received and handled any complaints from clients lodged with the appellant.

[6] One of Ms Naidu's clients was a 70 year-old Mr Dawood Khan who, on Ms Naidu's financial advice, deposited with the appellant a capital investment of R100 000 in a Property Market Fund. Unfortunately, it happened that there was volatility in the market which went so bad that Mr Khan's investment dropped to about R60 000, thus causing him a loss of some R40 000. Hence, Mr Khan lodged a complaint with the appellant against Ms Naidu. In due course, however, the appellant sent him a letter, under the hand of Mr Shawn-Newland, advising him that after its preliminary investigation of his complaint, it found no fault on the part of anyone of its staff.

[7] Mr Khan was not satisfied with the appellant's response and thus referred his complaint to the Ombud for Financial Service Providers, in terms of section 27 of the Financial Advisory and Intermediary Services Act (the FAIS Act).[2] Consequently, the appellant relented and agreed to refund Mr Khan of his R40 000 loss. Thereafter, Ms Naidu advised and duly obtained consent from Mr Khan to move his investment from the Property Market portfolio to the Money Market portfolio. To that end, Mr Khan duly signed the prescribed switch form and the switch was finalised.

[8] During July 2008, Ms Naidu had reason to believe, which indeed turned out to be correct, that the Property Market (which Mr Khan had previously switched from) was set to rise rapidly. Accordingly, Ms Naidu advised and duly obtained consent from a number of her clients to move their investments from Money Market to Property Market in anticipation of that rapid rise. She had obtained signatures of those consenting clients. However, when she attempted to communicate with Mr Khan for the same purpose, she did not succeed to get through to him. He was reportedly out of the country. She

[2] Act 37 of 2002.

then, without Mr Khan's knowledge and consent, proceeded to process the switch of his investment from Money Market to Property Market. As she would obviously not have Mr Khan's signature, she used an old signed switch form from a previous transaction and attached it to the new investment transfer forms and thus effectively transferred Mr Khan's funds from Money Market to Property Market without his knowledge and consent. She did this in violation of the appellant's rules and the code of conduct under the FAIS Act, to which the appellant and herself were subject. This was the crux of the misconduct charge preferred against Ms Naidu, particularly in relation to count one of the disciplinary charges.

[9] Ms Naidu brought the fact of the switch to the attention of her superiors, Mr Shaw-Newland and Ms Andrews. However, there was a dispute whether she fully disclosed to the superiors on how she went about to secure the signatures. In the meantime, she made two telephone calls to Ms Wrogermann on different days. During the first telephone discussion, she mentioned that she was contemplating to switch Mr Khan's funds back to Property Market. In the second call, she confirmed to Ms Wrogermann that she was going to proceed and implement the switch, using Mr Khan's old signed switch form, because she was not prepared to find herself in a situation where she was held personally liable for Mr Khan's R40 000 loss. She further indicated during the conversation that she was aware that what she was about to do was wrong and that she could be dismissed for it.

[10] Consequent to Mr Khan's complaint, an investigation was conducted and it was subsequently established that there were more cases where the *"copy and paste"* system was used to secure signatures of clients under similar circumstances. Hence, Ms Naidu was charged with the misconduct aforesaid.

[11] At the ensuing disciplinary enquiry held on 6 October 2008, Ms Naidu was duly represented by an attorney on the instructions of her trade union. The appellant was also represented by an attorney. Ms Naidu pleaded guilty to count one, as it pertained to the transaction involving Mr Khan. In respect of the other transactions, she sought to explain that the clients concerned had given their consent and permission to their investments being moved to

Property Market. In this regard she produced proof in the form of a letter, affidavits and even oral evidence (from two of those clients) to support her averment that consent and authorisation had indeed been obtained.

[12] In respect of count two, Ms Naidu pleaded guilty but also sought to explain that, in any event, all the brokers in the region, including her, were not complying with the requirement referred to in that charge, for the simple reason that their "*IT system was not geared to comply with this requirement"*. Notwithstanding, Ms Naidu was convicted on both counts and summarily dismissed with effect from 7 October 2008. It is not clear from the papers as to when Ms Naidu joined the appellant, but it is stated that she had been in the appellant's employ for some 20 years. At the time of her dismissal she was earning R104 000 per month.

[13] She lodged an internal appeal against the dismissal sanction, but was unsuccessful, on the basis that both transgressions were categorised as *"very serious offences"* in terms of appellant's disciplinary code, which prescribed a sanction of dismissal for any misconduct involving a misrepresentation or a false declaration of any kind. Over and above the dismissal sanction, the appellant reported Ms Naidu to the Financial Services Board[3] which, in turn, found her misconduct to be sufficiently serious to have her debarred from practising as a Financial Advisor,[4] a ban that would endure either for life or for a specific period.

The arbitration

[14] Ms Naidu was not satisfied with her dismissal which she considered unduly harsh, on the basis that there were other employees who had previously committed similar transgressions but were not dismissed. In this regard, she particularly mentioned her colleague, Ms Pin Lai. Hence, she referred a dispute to the CCMA for conciliation, complaining that her dismissal was both substantively and procedurally unfair on the ground of inconsistency on the part of the appellant in the treatment of its employees.

[3] Established in terms of section 2 of the Financial Services Board Act 97 of 1990.
[4] Section 14 of the FAIS Act.

[15] The conciliation process bore no fruit in resolving the dispute between the parties. Consequently, a certificate of outcome to that effect was issued, which paved the way for Ms Naidu to refer the dispute for arbitration before the commissioner. It was common cause that during the course of the arbitration hearing, the charge referred to in count two was withdrawn by the appellant.

[16] The evidence for the appellant was adduced from the following witnesses, who were all employees and officials of the appellant: Mr Hermanus Stephanus de Wit; Ms Sharon Andrews (the Regional Manager for KZN Region1); Mr Gordon Shaw-Newland (the Provincial Support Manager); Mr Kevin Michael Wasmuth and Ms Sandi Wrogermann (Assistant Provincial Support Manager as well as Complaints and Compliance Officer). Ms Naidu also testified and called three witnesses, namely, Ms Oumasantha Naidoo, Mr Kershan Naidoo and Ms Elizabeth Fairweather de Villiers.

[17] Concerning the other four clients of the appellant referred to in the misconduct charge (two of whom were the Naidoo's called by Ms Naidu as her witnesses), the commissioner accepted that there was sufficient evidence to exonerate Ms Naidu from blame in regard thereto. In reaching this conclusion he considered the following:

1. That none of the four clients complained or suggested that they had not given the required authority.

2. That it was probable that Ms Naidu was not personally involved in the physical handling of the transactions involving the four clients.

3. That the volume of work on the particular day in respect of which the investigation was carried out was in the region of 3000%, which was far more than the normal day. Hence, with such additional work load it was not surprising that Ms Naidu's staff might have encountered some problems and resorted to taking short cuts when they could not find the specific switch forms that had been originally signed by the clients.

4. That Ms Naidu, on her own initiative, brought the Khan matter to the attention of her superiors; and that if there were more than one such matter there was every reason to believe that she would have brought all of them to her superior's attention at the same time.

[18] On the misconduct charge and conviction involving Mr Khan, the commissioner opined that the sanction of dismissal was *"too harsh"* in the circumstances of the case. Summing up his observations and findings, he stated the following:

> '44. There is in fact no doubt, despite the applicant's contradictory evidence that Mr Khan could only gain from her unauthorized action. The only person who was at any real risk of losing money was the applicant [Ms Naidu] herself. Had Mr Khan's funds dropped at all he would clearly have had a claim against the applicant which I have no doubt [she] would have paid immediately as she knew he had not authorized any fund movement. Had he instituted the claim against the respondent [the Bank] they would obviously have paid and claimed the money in turn from the applicant. At the time her monthly earnings were almost double the amount invested for Mr Khan so there was no genuine risk for the respondent. As there is precedent for them claiming monies directly from brokers.
>
> 45. Taking all the factors into account I am satisfied that dismissal was too harsh a sanction considering the following:
>
> - The applicant believed what she was doing was in the best interests of of both her client and the respondent.
> - She had 20 years of unblemished service with the respondent.
> - She had little, if anything, to gain personally from her actions.
> - The applicant's degree of dishonesty was not sufficient to warrant a dismissal.
> - The applicant's breach of the FAIS legislation was not sufficient to warrant a dismissal.

- The applicant was very remorseful and the possibility that the applicant would commit the same offence again is virtually nil.

- The applicant herself had raised the potential problem with the respondent. It was not something she concealed and was subsequently discovered by the applicant (sic).

- Judging from the Pin Lai matter the respondent itself was of the opinion not every transgression in the nature of the applicant's should be sanctioned by a dismissal.

- The respondent did not sanction other blatant dishonesty towards Mr Khan in any manner. This dishonesty was in breach of his rights, in breach of FAIS legislation and was designed to prejudice him, not to act to his advantage.

- The client in reality could not have lost any money on the transaction and neither could the respondent.

- To punish a person by taking their livelihood for the rest of their lives, or even for 10 years, because of one split second moment of madness done in the interests of the respondent and the client is simply not fair.'

[19] Accordingly, the commissioner declared that the dismissal of Ms Naidu was procedurally fair but substantively unfair; and he ordered that she be reinstated with effect from the date of her dismissal, namely, 7 October 2008. In this regard, the commissioner calculated the arrear salary due to Ms Naidu to be the sum of R1 920 933 from which the commissioner further ordered that the sum of R41 403 (being the amount reimbursed by the appellant to Mr Khan) be deducted. The commissioner sought to explain this ancillary order in the following terms:

> '50. While I accept that they (sic) may not have been a legal obligation on the respondent [now the appellant] to pay the R41 403 to Mr Khan I accept that it did so in good faith. I consider that it would be equitable in the circumstances of this case to deduct this amount from the amount payable to the applicant [Ms Naidu]. R1 920 933 less R41 403 amounts to R1 879 530.'

[20] The commissioner ordered the appellant to pay to Ms Naidu the said amount of R1 879 530 within 14 days of the award. Ms Naidu was, in turn, directed to resume her duties with the appellant within three days on her receipt of the award.

[21] The appellant was not satisfied with the outcome of the arbitration process and escalated the matter on review before the Court *a quo* in terms of section 145 of the Labour Relations Act (the LRA).[5]

The Labour Court

[22] The grounds of review relied upon by the appellant can be summarised as follows:

1. It was unreasonable for the commissioner to interfere with the sanction of dismissal, given the fact that Ms Naidu conceded that -
   - she acted dishonestly;
   - she misrepresented the information on the switches; and
   - she was aware that the appropriate sanction for dishonesty and misrepresentation was summary dismissal.
2. The commissioner failed to take into account that although Ms Naidu reported her indiscretion to her superiors she did not fully explain her participation role in the switch transactions concerned, which role involved dishonesty and misrepresentation on her part.
3. The commissioner failed to take into account that the Bank did not act inconsistently in the treatment of its employees, in that the incident pertaining to Ms Pin Lai was differentiated from Ms Naidu's misconduct in the following respects:
   - Ms Pin Lai was involved in only one incident.

[5] Act 66 of 1995.

- Ms Pin Lai's matter did not involve a financial transaction, but an insurance quote.

- Ms Pin Lai's client was at the time overseas but fully aware of the steps taken by Ms Pin Lai and had agreed thereto.

- In any event, Sanlam was the only insurer that required the signature of a person sought to be insured. Otherwise, other insurance companies did not require such signature.

4. The commissioner committed a material irregularity by failing to consider the fact that whilst Ms Pin Lai received a final written warning valid for 12 months, the commissioner imposed no sanction whatsoever on Ms Naidu.

5. The commissioner failed to properly consider the evidence placed before him, hence his award constituted a decision which a reasonable decision-maker could not make.

[23] Having considered the matter and submissions on review, the Court *a quo* remarked, amongst others, as follows:

> '[27] Dishonesty has a corroding effect to the trust which the employer is entitled to expect from its employees in its various operations. However, an employer who exhibits a propensity of condoning acts of misconduct performed under dishonest circumstances runs the risk of being ordered by courts to reinstate employees found guilty of acts of misconduct in line with the parity principle. Ms Pin Lai employed the same cutting and pasting of a signature in the absence of the original signature and when caught, she was not dismissed. The applicant did not only retain Ms Pin Lai in its employment after she was found guilty of a similar misconduct, she was paid a commission for that transaction. The applicant's attempt to differentiate the two misconducts is tantamount to saying a misconduct of theft is different, depending on what is stolen. That approach would have an adverse effect on the applicability of the parity principle. The applicant's tolerant (sic) of this misconduct shows that it is prepared to live with it.'

[24] In its judgment, the Court *a quo* accordingly dismissed the review application with costs. It is that judgment against which the appellant now appeals to this Court.

The appeal

[25] It was submitted on behalf of the appellant that the Court *a quo* erred in a number of respects, including the following:

1. In finding that there was inconsistency on the appellant's part in the manner that it treated its employees on the issue of discipline.

2. In holding that the misconduct incident involving Ms Pin Lai was comparable to that of Ms Naidu. The Court *a quo* ought to have held that the two cases were distinguishable.

3. In failing to consider that the appellant was certainly not prepared *"to live with"* the sort of misconduct that Ms Naidu had committed. In other words, the Court erred in failing to consider that the trust relationship between the appellant and Ms Naidu had irreparably broken down.

Analysis and evaluation

[26] It is settled law that, for an arbitration award to pass muster of judicial review for reasonableness under section 145 of the LRA, it has to be one falling within the range of decisions which a reasonable decision-maker could have made in the circumstances.[6] Recently, in *Herholdt v Nedbank (Cosatu as amicus curiae),*[7] the Supreme Court of Appeal amplified the review test as follows:

> 'While the evidence must necessarily be scrutinized to determine whether the outcome was reasonable, the reviewing court must always be alert to remind itself that it must avoid "judicial overzealousness" in setting aside administrative decisions that do not coincide with the judge's own opinions. ...A result will only be unreasonable if it is one that a reasonable arbitrator

[6] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (LAC) at para 110.
[7] 2013 (6) SA 224 (SCA) at para 13.

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

[27] I think it is apposite, at this stage, to refer to the basic guideline on determining whether a dismissal for misconduct was fair. The Code of Good Practice[8] provides:

> 'Any person who is determining whether a *dismissal* for misconduct is unfair should consider -
>
> (a) whether or not the *employee* contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
>
> (b) if a rule or standard was contravened, whether or not –
>
> (i) the rule was a valid or reasonable rule or standard;
>
> (ii) the *employee* was aware, or could reasonably be expected to have been aware, of the rule or standard;
>
> (iii) the rule or standard has been consistently applied by the employer; and
>
> (iv) *dismissal* was an appropriate sanction for the contravention of the rule or standard.'

[28] It was common cause that Ms Naidu pleaded guilty to the misconduct charge involving Mr Khan. Her conviction on this charge is, therefore, not in dispute. It seems to me that the crisp issues here are (1) whether the appellant, as the employer, had acted inconsistently in the treatment of its employees in dismissing Ms Naidu, since it had previously issued a final written warning to another employee (Ms Pin Lai) who had allegedly committed a similar transgression as Ms Naidu; and (2) whether the decision of the commissioner (that the dismissal of Ms Naidu was substantively unfair) was one which a reasonable decision-maker could not have made.

[8] The Code of Good Practice: Dismissals, section 7, schedule 8.

[29] In terms of the appellant's disciplinary code, misconduct offences were compartmentalised into various categories depending on their seriousness. It is common cause that Ms Naidu's misconduct, in relation to Mr Khan's matter, was categorised under the heading *"Very serious offences"* where reference was made to offences involving *"Misrepresentation or false declaration of any kind"* and *"Dishonesty of any nature"*. There was no challenge by Ms Naidu on the validity or reasonableness of the misconduct offences in question.

[30] In her capacity as the appellant's representative,[9] Ms Naidu was, in terms of the Code of Conduct for Administrative FSP's, obliged to ensure that she obtained a signed mandate from a client before rendering any intermediary service to such client.[10] During her cross-examination at the arbitration hearing, she conceded that she was aware of this provision.[11] Under the ABSA Group FAIS Policy,[12] it was the responsibility of the appellant and its representatives, including Ms Naidu, to *"[p]revent legal liability or regulatory breach and protect the reputation of the Absa Group by implementing appropriate procedures to consider and protect the interests of Absa and customers."* Again, Ms Naidu confirmed that she was aware of this provision.[13]

[31] To the extent relevant, the General Code for Authorized Financial Services Providers and Representatives[14] provides as follows:

> 'Subject to the provisions of this Code, a provider other than a direct marketer, must-
>
> (a) provide a reasonable and appropriate general explanation of the nature and material terms of the relevant contract or transaction to a client, and generally make full and frank disclosure of any information that would reasonably be expected to enable the client to make an informed decision.'

[9] In terms of section 13(1) of the FAIS Act.
[10] Code of Conduct for Administrative Authorized Financial Services Providers (FSP's) Part II, at para 5.1 - published in terms of section 15 of the FAIS Act.
[11] Record Vol 12, at 965 lines 20-25.
[12] ABSA Group FAIS Policy, para 2.3. See Record Vol 2, at 143.
[13] Record, Vol 12 at 967.
[14] General Code of Conduct for Authorised Financial Services Providers, 2003, Part VI at para 7(1) - published in terms of section 15 of the FAIS Act.

[32] It is common cause that Ms Naidu was fully aware that what she did was wrong and constituted a misconduct for which she was, admittedly, prepared to take whatever consequences that could follow, including her dismissal. This awareness on Ms Naidu's part is manifest in the two telephone conversations which she had with Ms Wrogermann prior to her switching Mr Khan's investment to the Property Market Fund without his knowledge and consent. Amongst others, the following extract is taken from their first conversation of 18 July 2008:[15]

> 'MS NAIDU: Ok, you know what, I'm just going to send him, I've got an old … (inaudible) … signed on the 25th of June where I switched [Mr Khan] to Market. I'm going to switch him back on that because he's out of the country. I can't get hold of him. I'm going to just do that. I'll take the consequences what comes.
>
> MS WROGEMANN: Ok.
>
> MS NAIDU: Whatever comes to me because I'm…'" (Emphasized)

There was consensus between both counsel that, in the context of the conversation, the word marked as "*inaudible"*, above, was likely to be intended for the word "*form"* - meaning the switch form.

[33] During their second telephone conversation on 28 July 2008, the following appears:[16]

> 'MS NAIDU: I don't know angel. I'm not sleeping with this case now.
>
> MS WROGEMANN: Well I'm not sleeping with anything. I've to try and write letters …
>
> MS NAIDU: I don't know whether I must just, you know what, I think I'll just take them into the market today. I've got a signed switch. I've got a signed switch.

[15] Transcript of telephone conversation. See Record, Vol 4, at 262 lines 10-19.
[16] Transcript of telephone conversation: Record, Vol 4, at 274 lines 15-24; 275 lines1-23; 276 lines 1-4. See also Vol 12 at 962 lines 14-18.

MS WROGEMANN: So they basically signed a switch. So I mean …

MS NAIDU: I've got a switch form. I switch to money market.

MS WROGEMANN: Yes.

MS NAIDU: I'll switch it back with the same form.

MS WROGEMANN: Oh ok.

MS NAIDU: Sandy will I get in trouble? I'll get fired.

MS WROGEMANN: I can't tell you that my dear. I don't know. I really, I don't know. I don't know. I don't even know what the value of the investments (sic) is.

MS NAIDU: 61 now. And if he sat he would have been 79. …

MS WROGEMANN: What does Sharon, have you spoken to Sharon?

MS NAIDU: No.

MS WROGEMANN: Because I'm not a hundred percent sure whether you'll get into trouble or not … and that type of thing.

MS NAIDU: You know what, I'll take the, if they fire me it's one of those things. I'm going to, I'm not going to pay 40 000 out of my own pocket. By the time this case goes it will be after the 14th August. When are you going to respond to him?

MS WROGEMANN: Well I'm going to have to respond to him soon. Very soon, because my six weeks is almost up.' (Emphasized)

[34] Ms Naidu complained that her dismissal was unfair because the same sanction was not imposed on Ms Pin Lai who, according to her, had committed a similar misconduct as hers, yet was not dismissed but only issued with a final written warning. Therefore, her plea raised the issue of alleged inconsistency on the part of the appellant in its treatment of employees in relation to discipline. In other words, the appellant did not follow the parity principle.

[35] It is trite that the concept of parity, in the juristic sense, denotes a sense of fairness and equality before the law, which are fundamental pillars of administration of justice. In the Australian decision in *Green v The Queen,*[17] it was said that *"the parity principle is an aspect of the systemic objectives of consistency and equality before the law – the treatment of like cases alike, and different cases differently."* Indeed, in *Chemical Energy Paper Printing Wood & Allied Workers Union and Others v Metrofile (Pty) Limited,*[18] this Court also stated:

> '[35]. Our law requires that employees who have committed similar misconduct should not be treated differentially. In *National Union Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) Goldstein J had occasion to consider the fairness of an offer of re-employment with loss of allowances linked to length of service. The learned judge reasoned, in that case, at 1029G-H, that the offer of re-employment was unfair because its acceptance would have resulted in employees losing allowances that depended on length of service. This, the learned judge found, would mean that employees were being unequally punished.
>
> [36] This principle, also referred to as the 'parity principle', was aptly enunciated in *National Union of Metalworkers of SA and Others v Henred Fruehauf Trailers (Pty) Ltd* (1994) 15 ILJ 1257 (A) where the court stated at 1264A-D:
>
> > 'Equity requires that the courts should have regard to the so-called "parity principle". This has been described as the basic tenet of fairness which requires that like cases should be treated alike (see Brassey "The Dismissal of Strikers" (1990) 12 ILJ 213 at 229-30). So it has been held by the English Court of Appeal that the word "equity" as used in the United Kingdom statute dealing with the fairness of dismissals, "comprehends the concept that the employees who behave in much the same way should have meted out to them much the same punishment" *(Post Office v Feennell* (1981) IRLR 221 at 223). The parity principle has been applied in numerous judgments in the Industrial Court and the LAC in which it has been held for example

[17] *Green v The Queen* (2011) 86 ALJR 36 at [28].
[18] (2004) 25 ILJ 231 (LAC) at paras 36-37.

> that an unjustified selective dismissal constitutes an unfair labour practice.'

[36] However, it ought to be realised, in my view, that the parity principle may not just be applied willy-nilly without any measure of caution. In this regard, I am inclined to agree with Professor Grogan when he remarks as follows:[19]

> '[T]he parity principle should be applied with caution. It may well be that employees who thoroughly deserved to be dismissed profit from the fact that other employees happened not to have been dismissed for a similar offence in the past or because another employee involved in the same misconduct was not dismissed through some oversight by a disciplinary officer, or because different disciplinary officers had different views on the appropriate penalty.'

[37] In *SACCAWU and Others v Irvin and Johnson (Pty) Ltd,*[20] this Court (per Conradie JA) stated:[21]

> 'In my view too great an emphasis is quite frequently sought to be placed on the principle of disciplinary consistency, also called the 'parity principle' … There is really no separate principle involved. Consistency must be measured by the same standards … Discipline must not be capricious. It really is the perception of bias inherent in selective discipline that makes it unfair. Where, however, one is faced with a large number of offending employees, the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of a discretion in each individual case. If a chairperson conscientiously and honestly, but incorrectly, exercises his or her discretion in a particular case in a particular way, it would not mean that there was unfairness to the other employees. It would mean no more than his or her assessment of the gravity of the disciplinary offence was wrong. It cannot be fair that other employees profit from that kind of wrong decision. In a case of plurality of dismissals, a wrong decision can only be unfair if it is capricious, or induced by improper motives or, worse, by a discriminating management policy … Even then I dare say that it might not be

[19] Grogan, *Dismissal, Discrimination and Unfair Labour Practices* 2nd ed, (Juta 2007) at 273-274.
[20] (1999) 20 ILJ 2302 (LAC).
[21] *SACCAWU v Irvin & Johnson*, above, at para 29. See also *Cape Town Council v Masitho and Others* (2000) 21 ILJ 1957 (LAC) at para 14.

> so unfair as to undo the outcome of other disciplinary enquiries. … If, for example, one member of a group of employees who committed a serious offence against the employer is, for improper motives, not dismissed, it would not … necessarily mean that the other miscreants should escape. Fairness is a value judgment.'

[38] There was unchallenged evidence from Ms Andrews to the effect that an employee (one Mike Pillay) who committed "exactly" the same dishonest misconduct as Ms Naidu, was dismissed.[22] In my view, therefore, there seems to be no justification, on the facts of this case, in holding that, just for the single instance of Ms Pin Lai, the appellant exhibited *"the propensity of condoning acts of misconduct performed under dishonest circumstances"* and that the appellant's tolerance of such acts of misconduct showed *"that it is prepared to live with it"*.

[39] I agree with counsel for the appellant that the situation in relation to Ms Pin Lai was not comparable to that of Ms Naidu. Ms Pin Lai was a bond insurance advisor whereas Ms Naidu was an executive investment broker. Unlike Ms Naidu's, the misconduct committed by Ms Pin Lai - although also containing an element of dishonesty – did not involve a financial transaction. It only involved a bond insurance quote from Sanlam which, Ms Pin Lai processed by using the client's signature from a previous transaction. In other words, in Ms Pin Lai's case, no client's monies in the appellant's custody were interfered with, without the client's knowledge and authorisation, which was what Ms Naidu did with Mr Khan's investment funds. Indeed, there was evidence that in Ms Pin Lai's matter, the client was aware and had given permission that the insurance quote be obtained from Sanlam. The signature was not possible to get since the client was out of the country. There was further evidence that Ms Pin Lai had acted impulsively when she committed the misconduct. On the other hand, the telephone conversations which Ms Naidu had with Ms Wrogermann, as illustrated above, patently demonstrated that Ms Naidu had ample opportunity to reflect on what she was contemplating to do and to refrain from doing it. However, she reconciled herself with her determination to proceed and commit the dishonest

[22] Record, Vol 8 at 603 lines 14-23.

misconduct.

[40] There was argument by Ms Naidu's counsel that Ms Naidu did not commit the misconduct for her own personal gain, but that she did it in the best interests of Mr Khan and the appellant. However, it did not seem to me that such argument was entirely supported by facts in this case. It appears that there was a perceived looming scenario - which Ms Naidu seemingly dreaded - that she could be held by the appellant personally liable for Mr Khan's R40 000 loss which the appellant had refunded to him, by virtue of the apparent ill investment advice which Ms Naidu had given to Mr Khan, in the first place. Hence, she was heard in her telephone conversation with Ms Wrogermann saying, amongst other things: *"You know what … if they fire me it's one of those things … I'm not going to pay 40 000 out of my own pocket."*[23] In the circumstances, her conspicuous haste in ensuring that the "switch" materialised was, in my view, only an attempt on her part to recoup the perceived financial loss. It had nothing to do with any sense of altruism on her part. Her protestation to that effect is, therefore, utterly disingenuous. Her real motive was to save her own skin.

[41] Accordingly, I am not persuaded that Ms Pin Lai's matter was so similar to that of Ms Naidu as to have warranted that they should have both been treated in the same way in terms of sanction. In my view, the facts in the two matters were sufficiently distinguishable. In any event, it did appear that the two misconduct enquiries were presided over by two different chairpersons and at different times. According to Mr Wasmuth's evidence, Ms Naidu appeared before Ms Tilly Bester,[24] whereas in terms of Ms Pin Lai's disciplinary papers, she appeared before (Mr/Ms) JW Van Zyl, reportedly the appellant's branch manager at Sunnyside.[25] In other words, it is clear that even if the two transgressions were considered as similar, the two *"different disciplinary officers had different views on the appropriate penalty"*[26] to be imposed. However, in the words of this Court in *SACCAWU*, above, "*it cannot be fair that other employees [such as Ms Naidu in this case] profit from that*

[23] Record, Vol 4, at 276 lines 1-4.
[24] Record, Vol 10, at 806 lines 2-4.
[25] Record, Vol 1, at 66 and 66a.
[26] Grogan, above.

kind of [discrepancy]".[27]

[42] Indeed, in accordance with the parity principle, the element of consistency on the part of an employer in its treatment of employees is an important factor to take into account in the determination process of the fairness of a dismissal. However, as I say, it is only a factor to take into account in that process. It is by no means decisive of the outcome on the determination of reasonableness and fairness of the decision to dismiss. In my view, the fact that another employee committed a similar transgression in the past and was not dismissed cannot, and should not, be taken to grant a licence to every other employee, willy-nilly, to commit serious misdemeanours, especially of a dishonest nature, towards their employer on the belief that they would not be dismissed. It is well accepted in civilised society that two wrongs can never make a right. The parity principle was never intended to promote or encourage anarchy in the workplace. As stated earlier, I reiterate, there are varying degrees of dishonesty and, therefore, each case will be treated on the basis of its own facts and circumstances.

[43] Incidentally, counsel for Ms Naidu referred to the letter dated 29 July 2008 addressed by Mr Shawn-Newland to Mr Khan[28] whereby he (Mr Khan) was advised that the appellant had not identified any negligence on the part of its brokers in relation to his complaint. In this regard, counsel submitted that at the time when Mr Shawn-Newland forwarded this letter, he was already aware that Ms Naidu had been negligent in handling Mr Khan's investment transfer transaction. On this basis, it was submitted, Mr Shawn-Newland had also been dishonest towards Mr Khan, yet he was not charged with any misconduct. It was argued that this was a further display of inconsistency on the part of the appellant. In my view, with respect to counsel, this was nothing more than a desperate effort to distract attention from the serious dishonest misbehaviour of Ms Naidu. In the first place, there is nothing to suggest that Mr Shawn-Newland, on the basis of anything that he did in relation to this matter, committed any misconduct, dishonest or otherwise, against the appellant. Instead, it seems to me that he only sought to act in the best

[27] *SACCAWU v Irvin & Johnson*, above, at para 29. See also Grogan, above.
[28] Record, Vol 3, at 221-222.

interests of the appellant in the circumstances at the time.

[44] Counsel also argued that Ms Naidu was remorseful of her actions and that this was confirmed by the appellant's witness, Ms Andrews, under cross-examination.[29] However, the fact that Ms Naidu verbalised remorse was, in the first place, no cogent proof that she was genuinely remorseful. Alternatively, even if she was genuinely remorseful, that would only be a factor in her favour in determining the appropriate sanction. In other words, it would not have placed an absolute bar against her dismissal, remorseful or not, taking into account the seriousness of the misconduct she committed.

[45] It is clear from the manner of questions which counsel put to Ms Andrews (under cross-examination during the arbitration hearing) that the purported remorse was premised on the utterances made by Ms Naidu to certain people, including Mr Shawn-Newland, such as saying something to this effect (in the words of counsel), *"Listen, I've committed this error … I know what I did was wrong, I should not have done it"*[30], and so on. It seems to me this was all that Ms Andrews confirmed to have been done by Ms Naidu, which counsel contended was a show of remorse on her part.

[46] Obviously, the fact of a guilty plea *per se* or mere verbal expression of remorse is not necessarily a demonstration of genuine contrition. It could be nothing more than shedding crocodile tears. Therefore, the crucial question is whether it could be said that Ms Naidu's utterances empirically and objectively translated into real and genuine remorse. In *S v Matyityi,*[31] the Supreme Court of Appeal remarked as follows on this issue:

> 'There is, moreover, a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful, and not simply feeling sorry for himself or

[29] Record, Vol 8 at 640 lines 1-12.
[30] Record, Vol 8 at 640 lines 9-10.
[31] 2011 (1) SACR 40 (SCA) at 47; para 13.

herself at having been caught, is a factual question. It is to the surrounding actions of the accused, rather than what he says in court, that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.' [footnote omitted]

[47] It is significant to note that in her notice of internal appeal, Ms Naidu exhibited no sign of remorse whatsoever. She sought to shift the blame to the attorney who represented her at the disciplinary hearing. In her grounds of appeal, she averred, amongst other things, the following:

'3. The ALBA attorney – Mr Johan Benade misled me into pleading guilty.

5. We are seeking a rehearing as my ALBA attorney – Mr Johan Benade advised (me) to plead guilty to all the charges.

7. New or further evidence are (sic) available which will bring new facts to bear and which could affect the result of the previous hearing.'

According to Mr Wasmuth, the acronym ALBA refers to ABSA Life Brokers Association.[32]

[48] There was further submission that the fact that Ms Naidu reported the matter to Mr Shawn-Newland was another demonstration that she was remorseful. In my view, it was not necessarily so. An investigation was already underway, consequent to Mr Khan's complaint. Therefore, if her impropriety had not yet surfaced, that was imminent to happen. That situation, she apparently realised. Clearly, it did not mean that if she did not make the report to Mr Shawn-Newland her fraudulent misbehaviour would have been suppressed *ad infinitum*. In any event, it was submitted in evidence for the appellant that

[32] Record, Vol 10 at 808 line 7.

when she made the report to Mr Shawn-Newland she did not disclose the full extent of her dishonesty in relation to Mr Khan's matter.

[49] In terms of the FAIS regulatory code of conduct the appellant and its representatives, including Ms Naidu, were required[33] –

> '[T]o ensure that the clients being rendered financial services will be able to make informed decisions, that their reasonable financial needs regarding financial products will be appropriately and suitably satisfied and that for those purposes authorised financial services providers, and their representatives, are obliged by the provisions of [the] code to –
>
> (a) act honestly and fairly, and with due skill, care and diligence, in the interests of clients and the integrity of the financial service industry;
> (b) …
> (c) …
> (d) act with circumspection and treat clients fairly in a situation of conflicting interests, and
> (e) comply with all applicable statutory or common law requirements applicable to the conduct of business.'

[50] Indeed, some of the remarks which Ms Naidu made during the arbitration hearing did not seem, in my view, to suggest that she was conceding her dishonesty in this affair and, therefore, remorseful. The following is an extract from the arbitration record, during her cross-examination:[34]

> 'MR MAESO: And you'll accept then that in the Khan scenario you cannot say that you acted professionally and with due care.
>
> MS NAIDU: I didn't, I may not have acted professional(ly) but I've acted with skill and care for the client, and that is what I feel. For Khan I've acted with my skills and care.'

[51] This Court, in *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[35], stated the following:[36]

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[33] Section 16 of the FAIS Act.
[34] Record, Vol 12 at 970 lines 20-25.
[35] *De Beers Consolidated Mines Ltd v CCMA and Others* (2000) ILJ 1051 (LAC).

> 'Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.'

[52] In the present instance, one needs carefully to look at the context of what Ms Naidu actually did and consider whether the commissioner's award which held that her dismissal was substantively unfair and ordered her reinstatement, was a reasonable decision, under the review test referred to above. It is significant to note that the kind of misconduct she committed did not only harm the appellant, as the employer, but it went further and harmed Mr Khan, the appellant's client, who was essentially an innocent outsider. 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.[37] There are varying degrees of dishonesty and, therefore, each case is to be determined on the basis of its own facts on whether a decision to dismiss an offending employee is a reasonable one. Generally, however, a sanction of dismissal is justifiable and, indeed, warranted where dishonesty involved is of a gross nature. In *Toyota SA Motors (Pty) Ltd v Radebe and Others,*[38] this Court held as follows:[39]

> '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

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[36] *De Beers Consolidated Mines Ltd v CCMA and Others*, above, at 1058E-G; para 22. See also *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO and Others* (2010) 31 ILJ 901 (LAC); [2010] 5 BLLR 513 (LAC) at para 25.

[37] *Shoprite Checkers (Pty) Ltd v CCMA and Others* [2009] 7 BLLR 619 (SCA) at para 20; *Edcon Ltd* v *Pillemer NO* [2010] 1 BLLR 1 (SCA) para 4 and 9.

[38] *Toyota SA Motors (Pty) Ltd v Radebe and Others* (2000) 21 ILJ 340 (LAC); [2000] 3 BLLR 243 (LAC) at para 15. See also *Mutual Construction,* above, at para 37; *Anglo American Farms t/a Boschendal Restaurant v Komjwayo* (1992) 13 ILJ 573 (LAC) at 592I-593A; *Mayimbo v CCMA and Others* [2010] 10 BLLR 1017 (LAC) at paras 15-18; *Woolworths (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2455 (LAC) at para 48.

[39] *Toyota SA Motors (Pty) Ltd v Radebe & Others*, above, at 344C-F.

> 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 judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.'

[53] In *De Beers Consolidated Mines Ltd*[40], above, the Court further pointed out that *"[t]he seriousness of dishonesty – ie 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."* In the present instance, considering the nature of the appellant's business, there can be no doubt, in my view, that Ms Naidu's dishonesty severely adversely impacted on the business.

[54] It is common cause that Ms Naidu occupied the position of executive investment broker, which was a senior position within the appellant's establishment. This fact is confirmed by the fairly high salary that she earned at the time of her dismissal. In the performance of her duties, she interacted with various investment clients - both current and prospective - and she did so in her representative capacity of the appellant. Resulting from such interactions, some serious financial transactions involving large sums of money were concluded by her (on behalf of the appellant) with the clients concerned. As such, it was obvious that the appellant would have placed a high level of trust and confidence in her. Indeed, it is a requirement, in terms of the FAIS Act, that a person must have *"personal character qualities of honesty and integrity"* [41] in order to qualify for the kind of position which Ms Naidu held. In these circumstances, it followed that she owed a fiduciary

[40] At1058I-J.
[41] Section 8 of the FAIS Act.

responsibility *vis-à-vis* the appellant towards ensuring that, at all times, she acted and performed her duties in a manner that was in the best interests of both the appellant and its clients. It seems to me, accordingly, that any false declaration or fraudulent misrepresentation that she made to any client – as she did in relation to Mr Khan – constituted a breach of her fiduciary duty and a breakdown in her trust relationship with the appellant.

[55] On the issue of breakdown in trust relationship, occasioned by an employee's dishonest misconduct, this Court (per Davis JA) in *Shoprite Checkers (Pty) Ltd v CCMA and Others,*[42] stated the following:[43]

> '[T]his Court has consistently followed an approach, laid out early in the jurisprudence of the Labour Court in *Standard Bank SA Limited v CCMA and Others* [1998] 6 BLLR 622 (LC) at paragraphs 38-41 where Tip AJ said:
>
> > "It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee… A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship and is destructive of it."'

[56] I am satisfied that, on the basis of her dishonest and fraudulent misbehaviour in relation to Mr Khan's matter, Ms Naidu's trust relationship with the appellant was, indeed, irreparably broken down. In my view, any plea of remorse, genuine or otherwise, was, in the circumstances of this case, most unlikely to bring back that trust, which was the cornerstone of her employment relationship with the appellant.

[57] Accordingly, the commissioner's award did not, in my view, constitute a decision which fell within the range of decisions which a reasonable decision-maker could have made, given the material presented to the commissioner. Hence, the award falls to be set aside and replaced with the order that the

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[42] [2008] 9 BLLR 838 (LAC).

[43] *Shoprite Checkers (Pty),* above, at para 16. See also *Park Club v Garratt* [1997] 9 BLLR 1137 (LAC) at 1139; *Leonard Dingler (Pty) Ltd v Ngwenya* (1999) 20 ILJ 1171 (LAC) at para 78; *De Beers Consolidated Mines, above,* at para 22; *Rustenburg Platinum Mines Ltd (Rustenburg Section) v NUM and Others* (2001) 22 ILJ 658 (LAC) at para 22; *De Beers Consolidated Mines*, above, at 1057C-D; *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] 2 BLLR 130 (LAC) at para 48.

dismissal of Ms Naidu was both substantively and procedurally fair. In the circumstances, it is not necessary to deal with the misconduct charges involving the other four clients in respect of which Ms Naidu pleaded not guilty.

The order

[58] In the result, the following order is made:

1. The appeal is upheld.

2. The order of the Court *a quo* is set aside and replaced with the following order:

'(1) The arbitration award reference number KNDB13424-08 issued by the second respondent is reviewed and set aside; and replaced with the order that the dismissal of the applicant was both substantively and procedurally fair.

(2) There is no order as to costs.'

3. No costs order is made for prosecuting the appeal.

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Ndlovu JA

Waglay JP and Coppin AJA concur in the Judgment of Ndlovu JA.

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