REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 397/2011

In the matter between:

PRISHILLA DEVI SINGH	**Applicant**
and	
FIRST NATIONAL BANK	
A DIVISION OF FIRST RAND BANK LIMITED	**First Respondent**
ALMERO DEYZEL N.O	**Second Respondent**
COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**Third Respondent**

Heard: 14 November 2013

Delivered: 09 September 2014

Summary: Review of an arbitration award – cross-review filed out of time.

Condonation. Factors to be considered when determining reinstatement as primary remedy

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JUDGMENT

PRINSLOO, AJ

Introduction

[1] There are multiple applications before this Court. There is the review application filed by the Applicant, Ms Prishilla Devi Singh('hereinafter referred to as Singh'), there is a cross-review application filed by the First Respondent First National Bank (hereinafter referred to as FNB') and two applications for condonation. The pleadings alone are almost 250 pages.

[2] The application is no doubt voluminous and with the record comprising of 769 pages, the papers before Court exceed 1000 pages.

[3] I have to mention that in the end the issue that had to be determined, was a crisp one and the excessive volume of papers before this Court, was the result of the manner in which FNB conducted the case.

[4] It is necessary to deal with all the applications separately.

[5] The brief chronological sequence of events is as follows:

[6] The Applicant, Ms Singh was employed by the First Respondent, since November 1996 as a coordinator. Singh was dismissed on 16 October 2009 after she was found guilty of misconduct. She appealed the outcome and after her appeal was dismissed, she referred an unfair dismissal dispute to the Third Respondent ('CCMA').

[7] The Second Respondent ('the arbitrator') arbitrated the dispute and an award was issued on 31 March 2011. This award is the subject of the review and cross-review applications.

[8] On 16 May 2011 Singh filed an application for review.

[9] During June and July 2012 Singh filed the transcribed record of proceedings , a Rule 7(A)(8) notice and supplementary affidavit.

[10] On 27 July 2012 FNB filed an opposing affidavit. In the opposing affidavit FNB raised a point *in limine* that Singh took 11 months to file the record of proceedings, that the 11 months period is excessive and in the absence of a condonation application and explanation for the delay the review application is defective and stands to be dismissed on this ground alone.

[11] On 10 August 2012 FNB filed a 'cross-review'.

[12] FNB also filed an application for condonation for the late filing of the cross-review, which was filed more than 14 months outside the prescribed 6 week period.

[13] On 7 May 2013 Singh filed an application for condonation the late filing of the transcribed record of the arbitration proceedings.

[14] In summary the following applications are to be considered: the review application filed by Singh, the cross-review filed by FNB, the condonation application for the late filing of the transcribed record filed by Singh and the condonation application for the late filing of the cross-review.filed by FNB

[15] In my view it is sensible that I deal with the different applications separately and I will first deal with the cross-review filed by FNB.

<u>The cross-review and the application for condonation for the late filing of the cross-review application:</u>

[16] As already stated FNB filed a 'cross-review' and the relief sought is the review and setting aside of the arbitration award and for the award to be substituted with an order that the dismissal of Singh was fair, alternatively referring the matter back to the CCMA for hearing *de novo*.

[17] The review filed by FNB is called a 'cross-review' and the first issue to be determined is what is the status of the review filed by FNB.

[18] In *S A Broadcasting Corporation Ltd v Grogan N O and another*[1] this Court held that:

> "Rule 7A makes no provision for an animal such as a 'counter-review'. This is in contradistinction to rule A 5(5) of the Rules of the Labour Appeal Court, that provides for a notice of cross-appeal to be delivered within 10 days (or such longer period as may on good cause be allowed) after receiving notice of appeal from an appellant.
>
> The absence of a similar provision in rule 7A relating to a 'counter-review' does not, to my mind, mean that a respondent in a review application can sit on his hands and then, only after the applicant has filed a rule 7A(8) notice, file a counter-review without further ado. On the contrary, it appears to me that

[1] (2006) 27 ILJ 1519 (LC).

> what is styled as a 'counter-review' is simply an application for review by a different name. The second respondent seeks to review different aspects of the findings of the arbitrator, and on different grounds. That would usually be the case where a respondent seeks to bring an application for a 'counter-review'. He has to file a proper application for review, and has to do so within six weeks after publication of the award."

[19] There is no provision in Rule 7A for a 'counter or cross-review' and the cross-review filed by FNB is in fact nothing but a review by a different name.

[20] The 'cross-review' application should have been filed by 17 May 2011 but it was only filed in August 2012, more than 14 months late. FNB seeks condonation for the late filing of the 'cross-review'. The degree of lateness is no doubt excessive.

[21] It is trite that the longer the delay the better the explanation for the delay should be. FNB tendered the following explanation for the lateness: FNB received the award on 5 April 2011 and complied with the award on 19 April 2011, as it had no intention to pursue the matter any further. When Singh's review application was received it was forwarded to Ms Deirdre Venter, a partner at FNB's attorneys of record and she did not peruse the award and the review application in much detail, pending the receipt of the entire record of proceedings. The complete record of proceedings and supplementary affidavit were received on 28 June 2012 and upon receipt, Ms Venter read the entire record of proceedings in preparation for drafting the answering affidavit, she formed the view that FNB had to oppose the review application and a real possibility existed that if there was no 'cross-review', Singh could be successful with her review application and FNB was advised to file a 'cross-review'.

[22] FNB averred that the delay was not as the result of its dilatoriness. The delay was because FNB was unaware how defective the award was until it received advice from MsVenter, who formed the view only after having considered the record of the proceedings in depth. In a nutshell the review application filed by Singh was forwarded to the attorneys immediately after it was received and FNB only became aware that the award was defective when the complete record was filed.

[23] FNB, having been aware of the defects if the arbitration award raised a number of grounds for review and seeks to review and set aside the arbitration award.

[24] There are two difficulties with the explanation tendered by FNB. .Firstly FNB's explanation is that it was unaware that the award was defective and only became aware of the defects in the award when the complete record was filed. Effectively FNB's explanation is that it waited for the complete transcribed record to be filed, perused and considered by its attorneys before the review was filed. This cannot be.

[25] A review application has to be filed within 6 weeks after the award has been served on the parties. Rule 7A specifically provides for a supplementary affidavit to be filed subsequent to the filing of the transcribed record and it is so to allow the applicant in the review application to supplement the application after having had the opportunity and the benefit of perusing the transcribed record. Parties cannot wait for the transcribed record to be available before a review application is filed and this explanation as tendered by FNB is not acceptable and not in accordance with the provisions of Rule 7A.

[26] This is more so in view of the fact that on FNB's own version the review application filed by Singh was forwarded to FNB's attorneys immediately after it was received, the attorney did not peruse the award and the review application in much detail, pending the receipt of the entire record of proceedings and only when the answering affidavit was prepared, the attorney formed the view that a real possibility existed that if there was no cross-review, Singh could be successful with her review application. It is inconceivable that the attorney would not have considered the award in its entirety when the review application was received and only paid attention to the matter when the opposing papers were prepared. If that is in fact so, it does not constitute an acceptable explanation for the delay in filing the review application.

[27] The second difficulty in the explanation tendered is that FNB complied with the award on 19 April 2011 and on its own version had no intention to pursue the matter any further. This position changed 14 months later and it is evident that the change was as a result of the risk identified by FNB's attorney of Singh being successful in her review application if there was no 'cross-review'.

[28] The concept of peremption is well established in our law and has been applied and endorsed in labour matters. The peremption principle was explained in *Hlatshwayo v Mare and Deas* 1912 AD 242 as follows:

> "[A]t bottom the doctrine is based upon the application of the principle that no person can be allowed to take up two positions inconsistent with one another, or as it is commonly expressed to blow hot and cold, to approbate and reprobate."

[29] In labour matters the principle was endorsed in the case of *National Union of Metalworkers of SA and others v Fast Freeze*[2], wherein the court had the following to say concerning peremption:

> "If a party to a judgment acquiesces therein, either expressly or by some unequivocal act wholly inconsistent with an intention to contest it, his right of appeal is said to be perempted, ie he cannot thereafter change his mind and note an appeal. Peremption is an example of the well known principle that one may not approbate and reprobate, or, to use colloquial expressions, blow hot and cold, or have one's cake and eat it."

[30] The concept of peremption is based on the general notion that a litigant has two elections to make: either accept or reject the outcome of the judgment or the arbitration award. As a general rule a party that perempts the arbitration award would not be entitled subsequently to challenge that arbitration award. The basic requirement, however, to sustain a claim of peremption entails having to show that the acceptance of the outcome of the arbitration award expressly or by conduct was unequivocal.

[31] When FNB paid the compensation amount awarded to Singh, it had no intention to pursue the matter any further and it accepted the award and complied with it. The conduct of FNB was inconsistent with any intention to contest the award and the contesting of the award by review only came to life 14 months after payment was made and only after the risk of Singh being successful was identified.

[32] The risk of Singh being successful on review could have been addressed by simply opposing her review application.

[2] (1992) 13 ILJ 963 (LAC).

[33] Mr Snider on behalf of FNB argued that FNB never waived the right to file an application for review when it complied with the arbitration award. FNB considered that it would be more expensive to file an application for review than to just pay the compensation awarded. Only after it realised that there was a risk of re-instatement, the risk for FNB changed hence the 'cross-review' application.

[34] Mr Naidoo on behalf of the Applicant argued that the 'cross-review' filed by FNB was a waste of the Court's time and amounted to unnecessary costs for the Applicant. FNB could have simply opposed the Applicant's review application without filing a 'cross-review'. He argued that the 'cross-review' should be dismissed and costs should be awarded on an attorney and client scale.

[35] It is concerning that FNB complied with an award and 14 months later took up a position inconsistent with the one where it accepted the award and complied with it.

[36] Even if peremption does not apply *in casu*, FNB's prospect of success is a factor to be considered. I have perused the transcript of the arbitration proceedings and in view of the evidence adduced and the facts placed before the arbitrator, I am not convinced that his findings on the unfairness of Singh's dismissal are so unreasonable that it calls for interference from this Court. Furthermore, I am of the view that FNB's prospects of success are not good. It is trite that a slight delay and good explanation may compensate for prospects that are not strong, but FNB's delay is excessive and the explanation tendered not convincing.

[37] In *Melane v Santam Insurance Co Ltd*[3] it was held that:

> "Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case….. What is needed is an objective conspectus of all the facts."

[38] I am not convinced that on an objective conspectus of all the facts and circumstances, it can be concluded that condonation should be granted for the late filing of FNB's 'cross-review' application.

[3] 1962 (4) SA 531 (A).

[39] As I have already stated the extent of the delay is excessive, the explanation for the delay is not reasonable and FNB's prospects of success are weak, in view of the evidence adduced and of the fact that it complied with the arbitration award.

[40] The application for condonation cannot succeed and condonation for the late filing of the 'cross-review' application is refused.

The delay in pursuing the review application and the need to apply for condonation:

[41] In opposing Singh's review application FNB raised a point *in limine* and stated that Singh took 11 months to file the record of proceedings and that she had to file an application for condonation. In the absence of a condonation application, the review application is defective and stands to be dismissed.

[42] Singh subsequently filed an application for condonation and she explained the reasons for the delay as follows: she received a directive from this Court on 1 July 2011 to uplift the record of proceedings, a deposit was paid to the transcribers on 14 July 2011 and on 18 August 2011 she was advised that the record was incomplete. Enquiries were made with the CCMA and on 27 September 2011 the CCMA filed the complete record and the transcript was completed by 6 December 2011. The Applicant was unemployed and had to get funds to pay the transcribers and she borrowed from her family members, who did not have the funds immediately available. After she secured funds to pay for the transcript, she had to secure funds to pay for copies and a complete record was served and filed on 11 June 2011.

[43] The application for condonation is opposed and FNB raised a further point *in limine* alleging that Singh was aware of the need to apply for condonation on 26 July 2012 when its answering affidavit was filed, yet the application for condonation was filed only on 6 May 2013, more than ten months after she became aware of the need to apply for condonation. FNB in opposing the condonation application, stated that *'in the absence of a condonation application for the late filing of this application'* the application stands to be dismissed. FNB seeks an order barring the Singh from proceeding with the review application.

[44] It is trite that this Court may, on good cause shown, condone non-compliance with any period prescribed in the Rules for the Conduct of Proceedings in the Labour Court ('the Rules'). In my view condonation could also be granted for non-compliance with time periods prescribed in the practice manual of this Court.

[45] An application for condonation would be necessary only when there is non-compliance with a prescribed period.

[46] The starting point would be to consider whether Singh had to apply for condonation for the delayed filing of the record and the resulting delayed pursuance of the matter.

[47] Rule 7(A) does not prescribe a time period within which an applicant should file the record of proceedings and this is the cause for most delays in review applications. The practice manual of this Court that was applicable at the time this review application was filed, also did not prescribe a time period.

[48] In my view and since no time period was prescribed within which the record had to be filed, there can be no non-compliance with a time period and therefore there was no need to apply for condonation.

[49] The accepted practice when an applicant delays unduly in prosecuting a review application is for a respondent to bring an application to dismiss the review proceedings under Rule 11 of the Labour Court Rules.

[50] I am of the view that if FNB were convinced that Singh was delaying or dilatory in pursuing her review application, it should have filed an application to dismiss her review application. FNB however never applied that remedy but raised a point *in limine* in respect of Singh's failure to apply for condonation in respect of the delayed pursuance of the matter.

[51] There is nothing in the Act or in Rules of this Court that provides that a litigant must apply for condonation on account of a delay in the prosecution of any legal proceedings.

[52] There was no need for the Applicant to apply for condonation for failing to pursue the review application expeditiously. Having said that, there is no need to consider the application for condonation.

[53] What remains to be considered is Singh's review application.

Background facts

[54] The brief history of this matter is as follows: the Singh commenced employment with FNB in November 1996 as a coordinator.

[55] On 14 September 2009 Singh was issued with a notice to attend a disciplinary hearing on 18 September 2009. The charge of misconduct levelled against her was:

> "Damage or loss suffered by the Bank through disregard of its rules and procedures (paragraph 4.2.18 of the Disciplinary Code and Procedure) in that it is alleged that on the 1st of July 2009 you failed to follow the laid down processes when you issued a card to a fraudster on the account of Mrs Cele account number 62227199694, subsequent to that an amount of R 3000 was withdrawn from Mrs Cele' account resulting in a loss of the said amount to the bank."

[56] After finalisation of the disciplinary enquiry Singh was found guilty and dismissed with effect from 16 October 2009. She appealed the outcome of the disciplinary process.

[57] The 'Golden Rules' are the prescribed rules to be followed and the relevant portion is the rules governing the procedure in issuing a replacement card.

[58] eGami is a computerised system that captures the customer details and when it is accessed, it enables one to view a copy of the customer's identity document as well as a copy of the customer's signature card with a specimen signature. The CIUD system enables one to view only the customer name and identity number.

[59] The incident that caused the charge of misconduct occurred on 1 July 2009 when a male person, posing as the son of the customer, Mrs Cele, presented an identity document and claimed that his mother was not well and she needed a replacement bank card. Singh issued the requested replacement bankcard and R 3000 was subsequently withdrawn from Mrs Cele's account. It later became evident that the fraudster and not Mrs Cele withdrew this

amount. At the time of the incident the Applicant had relieved Ms Jwara, a collections official, who was on her lunch break.

[60] The 'Golden Rules' provide that a customer be identified by requesting the customer's RSA identity document or driver's license and by verifying the face of the customer against the photograph in the identity document. The customer's identity document should be confirmed against the identity document on eGami and if it is not on eGami, it should be verified against the records held. If eGami is not available then the CUID system should be accessed and the customer's initials, surname and identity number in the identity document should be verified against the name and the number on the screen. After the customer's profile is accessed, four questions should be asked relating to information available on the customer's profile and if the answers were correctly answered, proceed with the transaction.

[61] FNB's case is that there was no compliance with the 'Golden Rules' and that the identification was not conducted in terms of the 'Golden Rules', as those require that the identity document of a customer must be verified against the identity document on eGami or the identity document held in the customer's bank file.. Singh did not verify Mrs Cele's identity document on eGami or on the customer's file.

[62] It appeared that the identity document of Mrs Cele held by FNB was issued on 1 July 1986 and the one presented by the fraudster, although issued to Mrs Cele, was issued on 7 February 2003.

[63] It is common cause that Mrs Cele's identity document was not available on eGami.

<u>The arbitration award</u>

[64] The arbitrator considered whether the Applicant was unfairly dismissed.

[65] The arbitrator identified the following issues that he had to consider: with reference to the bank's 'Golden Rules' what was meant by 'verify and scrutinise' an identity document for authenticity, what could be established by accessing the customer file and by accessing the CUID system and what purpose did it serve, whether the 'Golden Rules' required that the customer file

must always be accessed if there was no copy of the identification document or a copy of the signature card on the eGami system or whether it was only necessary in cases where the account was of the type in respect of which records were kept on the eGami system. The arbitrator further had to consider whether eGami was available in respect of savings accounts at the relevant time and if that was not the case, whether the 'Golden Rules' required in the case of a savings account that the identity document be checked against the records held or whether in such a case it was sufficient for the collections official to access the CUID and verify the identity number in the identity document.

[66] The arbitrator found that an identity document is verified and scrutinised for authenticity by looking for signs that it was tampered with and by placing it under a UV light to see whether it has the characteristics of an authentic identity document. The evidence showed that it was not disputed that the identity document produced by the fraudster on 1 July 2009 was an authentic identity document reflecting the identity of the account holder, Mrs Cele.

[67] FNB's evidence was that a copy of the customer identity document and signature card had been loaded onto the eGami system in respect of all accounts. Singh's version was that in 2009 the eGami system was introduced and only information relating to customers who held Silver, Gold and Platinum cards was loaded onto the system. Mrs Cele held a savings account and as at July 2009 saving accounts were not loaded onto the eGami system. It was accepted that Mrs Cele's account was not loaded onto the eGami system.

[68] In respect of the interpretation of the 'Golden Rules' FNB testified that the prescribed procedure was for the collections official to access the client file if the copy of the identity document and signature card was not available on the eGami system. This means that if copies were not available on eGami, it had to be checked against the records in the client file.

[69] Singh's version was that if eGami was not available, the 'Golden Rules', for practical reasons, made provision for an exception and that was that when eGami was not available, a different check had to be done. The arbitrator accepted that Singh asked the prescribed questions and that she had

compared the face of the person in the bank with the face on the identity document and that she had no reason to become suspicious.

[70] The arbitrator found that FNB failed to prove on a balance of probabilities that the reason for dismissing Singh was a fair one.

[71] In respect of procedure the arbitrator found Singh's dismissal procedurally unfair. The disciplinary panel dismissing Singh relied on allegations that were not put to her during the disciplinary enquiry and she had no opportunity of stating her case.

[72] The arbitrator then went further and accepted that the trust relationship remained affected and he based this finding on evidence that Singh failed to follow procedures in a respect not covered by the charge she was dismissed for. This related to the evidence that Ms Jwara was present when the thumbprint was affixed, where Ms Jwara denied that she was present. The arbitrator found that it was improbable that Ms Jwara was present when the thumbprint was affixed and the Singh's evidence on this aspect was false. He found that a continued employment relationship would be intolerable and awarded Singh six months' compensation.

The test on review

[73] The test that this Court must apply in deciding whether the arbitrator's decision is reviewable has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others;*[4] as 'whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion.' The Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[74] In the decision of *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[5] the Supreme Court of Appeal held that:

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the

[4] (2007) 28 ILJ 2405 (CC) at para 110.
[5] (2013) 34 ILJ 2795 (SCA).

> conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator 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."

[75] In the subsequent judgment of *Goldfields Mining South Africa (Kloof Mine) v CCMA and others*[6] the Labour Appeal Court held that:

> "In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable."

[76] It is in view of this test that Singh's grounds for review must be assessed.

Grounds for review

[77] Singh raised one main ground of review namely that the arbitration award is unreasonable in respect of the relief that was granted and the determination that she was not to be re-instated. Her case is that the arbitrator based his award on evidence in respect of an issue that was never an allegation of misconduct against her and his findings in this regard were unreasonable. This relates to the findings in respect of Ms Jwara and the affixing of the thumbprint.

[78] In its answering affidavit FNB admitted that the arbitrator's findings in this regard were unreasonable and not supported by evidence. FNB specifically pleaded that the issue before the arbitrator was not Singh's failure to follow procedures in that she allowed Ms Jwara to witness after the event and that the issue of Ms Jwara was '*a side issue, not of any importance to the case against the Applicant.'* FNB confirmed that the case against Singh was her failure to follow the bank's 'Golden Rules'.

Analysis and conclusion

[6] *(*2014) 35 ILJ 943 (LAC).

[79] Singh seeks to review the arbitration award and to set aside the determination that she is compensated as opposed to re-instated. She seeks to be re-instated retrospectively from date of her dismissal on 17 November 2009.

[80] Singh's review application and challenge of the arbitration award is limited to the arbitrator's findings in respect of the relief he granted her after finding her dismissal procedurally and substantively unfair.

[81] Singh does not seek to review and set aside the arbitrator's findings in respect of procedural and substantive fairness and thus there is no review application before this Court in respect of those findings.

[82] The only issue to be determined is whether the arbitrator acted reasonably when he awarded six months compensation to Singh instead of re-instating her.

[83] The arbitrator awarded compensation rather than re-instatement for the reason that the trust relationship remained affected. He based this finding on evidence that Singh failed to follow procedures in a respect not covered by the charge she was dismissed for. This was based on Singh's testimony that Ms Jwara was present when the thumbprint was affixed, where Ms Jwara denied that she was present.

[84] It is evident that FNB's case against Singh was her failure to follow the 'Golden Rules' and more specifically her failure to access the customer records for Mrs Cele. The case was not based on the signature of documentation and FNB placed no reliance on whether Ms Jwara was present or not and indeed signed the document in the presence or absence of the customer. FNB's witness, Mr Khoza confirmed in his testimony that the charge did no relate to Singh's failure to follow rules in terms of witnessing the signing or thumbprint and it was not relevant to the arbitration proceedings.

[85] FNB in its opposing papers explicitly stated that the issues surrounding the practice to witnessing a thumbprint was not a relevant factor to be taken into consideration by the arbitrator, as FNB's case was Singh's failure to follow the Golden Rules. FNB's case against Singh was her failure to verify the face of the customer against the face on the identity document, failure to authenticate

the identity document and signing arrangements against the paper based customer file and her failure to ask the customer the four questions.

[86] The arbitrator however placed much reliance on the aspect of the thumbprint and found that is was improbable that Ms Jwara was present when the thumbprint was affixed and Singh's evidence on this aspect was false. The arbitrator found the 'false evidence' given by Singh to be more serious than breach of the rule and held that it had a serious impact on the trust relationship with FNB.

[87] On the one hand the arbitrator finds Singh's evidence credible, and in fact preferred her version in respect of the aspects relevant to substantive and procedural fairness. On the other hand he finds her evidence to be false in respect of the thumbprint issue, an issue even FNB accepted was not a relevant factor to be taken into consideration by the arbitrator. The arbitrator failed to provide any explanation for why certain portions of Singh's evidence are to be accepted and believed and why her evidence on the thumbprint was false.

[88] Be that as it may, FNB accepted that the thumbprint issue was not a relevant factor to be taken into consideration by the arbitrator.

[89] It is common cause that the arbitrator found that the Applicant's dismissal was both substantively and procedurally unfair. Once an arbitrator has found that a dismissal is unfair, the arbitrator is then enjoined to consider the factors set out in section 193(2) of the Act[7]. It provides as follows:

> "The Labour Court or the arbitrator must require the employer to reinstate I or re-employ the employee unless –
>
> *(a)* the employee does not wish to be reinstated or re-employed;
>
> *(b)* the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
>
> *(c)* it is not reasonable practicable for the employer to reinstate or J re-employ the employee; or
>
> *(d)* the dismissal is unfair only because the employer did not follow a fair procedure."

[7] Act 66 of 1995.

[90] It is trite that re-instatement is the primary remedy in cases where dismissal was found to be unfair and denial of the primary relief should occur only in the circumstances provided for in the Act.

[91] In *Maepe v CCMA and another* [8] it was held that:

> "….if a case falls under one or other of the situations listed in s 193(2)(a) –(d), it is not competent for the Labour Court or an arbitrator to order reinstatement or re-employment. This is because s 193(2) makes provision as to when reinstatement or re-employment must be ordered and when it must not be ordered. In effect it says that reinstatement or re-employment must be ordered in all cases except those listed in s 193(2)(a) –(d)….."

[92] It is clear from the evidence led that Singh sought re-instatement.

[93] In *New Clicks SA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[9] it was said that:

> "This must be so, in that once a commissioner finds that the misconduct alleged has not been proven, then the cause of intolerability would be naturally removed. However, if an employer leads evidence to suggest that despite the finding of misconduct there exist circumstances and not allegations that would render continued employment intolerable.
>
> Again care must be exercised by employers to leave it for the commissioner as it is argued in this matter to fathom that the continued relationship would be rendered intolerable. It is the duty of an employer to present evidence that will suggest that continued employment would be intolerable.
>
> ……Therefore in such situations, a commissioner may justify refusing the primary remedy by taking into consideration such circumstances as supported by evidence. Of course given the fact that reinstatement is a primary remedy, commissioners should sparingly and after careful consideration of all circumstances invoke the provisions of s 193(2)*(b)* of the LRA to deny the remedy.
>
> Otherwise, commissioners might find themselves in the situation that prevailed pre-*Sidumo*, if too much weight is given to the circumstances.

[8] 2008 29 ILJ 2189 (LAC).

[9] (2008) 29 ILJ 1972 (LC).

> All in all, I am saying for s 193(2)*(b)* to defeat the primary remedy, there must be convincing reasons for such. Accordingly, this court should not readily review the decision of a commissioner to not have refused reinstatement when there is some evidence by the employer that the employee is not to be trusted anymore.
>
> On the contrary, a decision to refuse the primary remedy is reviewable if no cogent reason supported by evidence is given for it. Such in my view would be an unreasonable award.
>
> In fact the LAC in *Kroukam* said, therefore, this court or an arbitrator has no discretion whether or not to grant reinstatement. Faced with such a true statement of law, I cannot see how the refusal to reinstate could have been justified."

[94] No evidence was led by any of the witnesses called by FNB that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable and no evidence was led by FNB that it would not be reasonably practicable to re-instate or re-employ Singh. Since the arbitrator found that Singh's dismissal was both substantively and procedurally unfair, he was obliged to consider whether there was compliance with section 193(2) and decide whether she should have been re-instated or compensated.

[95] It is trite law that an employer bears the onus to prove the existence of the exceptions contained in section 193(2) of the Act.

[96] *In casu* FNB dismally failed to do so. There was no evidence adduced by FNB that the trust relationship was negatively affected, that the conduct of Singh made a continued relationship intolerable or any argument that the evidence she adduced at the arbitration had a serious impact on the continued trust relationship with the FNB.

[97] The arbitrator, despite FNB's glaring failure to prove the existence of the exceptions contained in section 193(2) of the Act, found that an order for compensation as opposed to re-instatement was appropriate.

[98] The arbitrator awarded compensation rather than re-instatement for the reason that the trust relationship remained affected. He based this finding on

evidence that Singh failed to follow procedures in a respect not covered by the charge she was dismissed for. FNB adduced no evidence to discharge its onus to prove that re-instatement could not be awarded and this finding was not based on relevant evidence.

[99] In considering re-instatement the only relevant evidence before the arbitrator was the testimony of Mr Naidoo, the Umzinto portfolio branch manager. Mr Naidoo testified that he would have no objection to Singh being employed in the bank. This is not disputed by FNB.

[100] The arbitrator ignored the evidence of Mr Naidoo in this regard and he attached no weight to it when considering the appropriate relief.

[101] I am of the view that the arbitrator misdirected himself, considered an irrelevant issue to come to a relevant but unreasonable conclusion and the review as raised by Singh in respect of the relief granted, has merit.

[102] In his argument before this Court, Mr Naidoo on behalf of Singh submitted that the arbitrator correctly found Singh's dismissal unfair but did not re-instate her because he found dishonesty on an unrelated issue, irrelevant for purposes of considering the fairness of her dismissal. Mr Naidoo submitted that Singh is 60 years old and would have retired in May 2013 and she is seeking re-instatement from November 2009 until May 2013, taking into consideration the six months compensation she already received.

Conclusion

[103] In reviewing the arbitration award, the ground for review as raised Singh must be assessed and this Court can only decide whether the arbitrator's decision was so unreasonable that no other arbitrator could have reached the same decision. The test to be applied is a strict one.

[104] Having considered the evidence adduced at the arbitration proceedings, the findings made by the arbitrator and the ground for review raised by Singh, I cannot find that the arbitrator's decision fell within the band of decisions to which a reasonable decision maker could come to. The decision to award compensation rather than to award the primary remedy of re-instatement is

one that no reasonable decision maker could have come to and stands to be set aside on review.

[105] I can see no reason why the costs should not follow the result.

Order

[106] I therefore make the following order:

106.1 Condonation for the late filing of the First Respondent's review application is refused;

106.2 The arbitration award issued on 30 March 2011 under case number KNDB2970-10 is reviewed;

106.3 The award of compensation is set aside and is substituted with the following order: The Applicant is re-instated retrospectively from date of her dismissal;

106.4 The First Respondent is ordered to pay the costs and the costs associated with the cross-review application to be paid on an attorney and client scale.

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Prinsloo, AJ

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate Naidoo
Instructed by:	Jay Reddy Attorneys
For the First Respondent:	Advocate A N Snider
Instructed by:	Webber Wentzel Attorneys