IN THE LABOUR COURT OF SOUTH AFRICA HELD AT

JOHANNESBURG

CASE NO. JR 3124/05

In the matter between:

THE STANDARD BANK OF

SOUTH AFRICA LTD **Applicant**

And

KENNETH MOSIME N.O. **1st Respondent**

MANKWANE GERTRUDE MASELANE **2nd Respondent**

JUDGEMENT

Molahlehi J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the first respondent (the arbitrator) under number TOKISO-P5/176, dated 10 October 2005. In terms of this award the

arbitrator found the dismissal of the second respondent, Ms Maselane (Maselane), to be substantively unfair and directed that she be reinstated and compensated in an amount equal to her salary from 13 April 2005 to the date of the award. The arbitrator also ordered that the applicant should ensure that the name of Maselane is removed from the Register of Employee's Dishonesty System Africa's Central Database.

[2] The late filing of both the review application and the answering affidavit which were not opposed by the respondent were condoned.

Background facts

[3] Maselane, who was before her dismissal employed by the applicant as customer consultant at the applicant's Boksburg branch was charged with the following offence:

> *"In that you performed unauthorised and unwarranted enquiries on the account of Nyokong, account number 020721463 on 28 august 2004 and also your unexplained interest in the accounts and the concurrent fraudulent activity called into question your involvement in the events."*

[4] Subsequent to her dismissal arising from the disciplinary enquiry

regarding the above charges, Maselane referred an unfair dismissal dispute to TOKISO Dispute Settlement (Pty) Limited, a private dispute resolution agency, for arbitration in terms of the collective agreement. The dispute was arbitrated by the arbitrator who after hearing and considering the evidence of both parties, found the dismissal to be unfair.

[5] At the arbitration hearing the applicant presented its case through the testimony of both Mr Rolf Wiesler ("Wiesler"), an investigator from forensic services unit, and Ms Elaine Miller ("Miller"), a senior customer consultant.

[6] The version of the applicant during the arbitration hearing was briefly that the client of the applicant's, Mr Nyokong, attended at the bank on 12 August 2004 and requested a bank cheque because he did not have a cheque book with him. Before he could be issued with a bank cheque he had to sign what is referred to as "counter cheque" which would authorise the bank to debit his account.

[7] Nyokong was assisted by Mrs Samantha Pillay, (Pillay) a customer consultant inquiries. It turned out after signing the counter cheque that that signature was different from the specimen signature which the bank had. Because of this Pillay referred Nyokong upstairs to

the consultants who would assist him with amending his signature and to update his particulars.

[8] On arrival upstairs Nyokong was assisted by Maselane in amending his signature and after that he went back downstairs but instead of returning to the enquiries counter he went the ATM and withdrew R8 000,00 using his ATM card, resulting in his account being debited with this amount.

[9] On 20 August 2004, Mrs Joubert (Joubert) a staff member at the Boksburg branch issued a cheque in favour of a certain person in the amount of R8 000,00 using the original counter cheque which was signed by Nyokong on 12 August 2004.

[10] The procedure for processing a bank cheque in the applicant's operations is as follows:

a) Before a bank cheque can be issued it must be signed by two staff members.

b) Each bank cheque has a serial number and when the cheque is drawn, the client's account id debited and that of the bank is credited. The credit serial number must match the bank serial number.

c) After processing the cheque the serial number must match the bank serial numbers will be reflected as a "mark- up".

d) The next step is to capture the transaction on line and immediately the bank cheque credit and the counter cheque are stamped "DO NOT CAPTURE" and then placed in the basket.

e) The bank cheque has to be signed by two staff member be fore it can be issued.

[11] On 20 August 2004, someone went to the bank and presented the cheque for encashment. The teller who attended to this person contacted the Central Boksburg branch to confirm whether the bank cheque was issued. After confirmation and authorisation the cheque was honoured and also processed through the system.

[12] The bank discovered the problem with the cheque on 30 August 2004 when Nyokong raised with it the fact that his account was wrongly debited with the amount of R8 000, 00. For this reason the bank had to refund Nyokong for the amount wrongly debited against his account.

[13] It was after the cheque had been processed through the system and

cheque number 73863 got to the bank cheque account that the bank realised that it was not processed because it could not "mark up the number." It was at this stage that the bank realised that something was wrong. The bank cheque could not go through the account because the credit had never been captured.

[14] Following this discovery, Mr Weisler commenced with an investigation by calling for the "Branch Delivery System" (BDS) log which shows all the enquiries made by staff members on the customers' accounts.

[15] The investigation revealed that on 28 August 2004 an enquiry had been done at the Boksburg branch by user 10 A670319, and this was the user number of Maselane. The investigation also revealed that the inquiry was done before the bank opened on that particular Saturday and was made on Nyokong's account.

[16] The inquiry which was conducted is known as a display accounts history, which means that Maselane had looked into the history of Nyokong's account.

[17] Weisler testified that Maselane informed him when he enquired as to why she had made the enquiry that she had been instructed by Mrs Ayer (Ayer) to do so. However when told that Ayer denied

ever giving her the instruction, Maselane changed and said that the instructions were given by Ms Miller (Miller). Miller (in some instances spelled Muller) also denied ever giving her instructions to Maselane.

[18] In the note, written on 3 November 2004, subsequent to the interview with Weisler, Maselane stated the following:

> *"I remember being called by manager, Mrs Muller, who asked me if I knew anything about Mr Nyokong. That was days after I helped the customer. I cannot remember exactly what happened or what was happening when I was asked again about Mr Nyokong at enquiries. The reason why I have performed Enquiry 01 on A/C might be that I wanted to check the history note to remind myself what I did for the client".*

The case of Maselane

[19] Maselane testified that on the 12 August 2004, she attended to Nyokong to amend his signature as it appeared on the index card. In checking the index card she found that there were three or four different signatures of Nyokong. After explaining to him the need

to have a consistent signature in the index card, she prepared a new card, contain Nyokong's signature and amended his particulars in the bank's records in terms of the Financial Intelligence Centre Act 38 of 2001 (FICA).

[20] She further testified that because of her busy schedule she could not record all the above information in the black book as required. She only managed to make the entry in the black book two weeks thereafter. She did not know where Nyokong went to after assisting him with amending his signature. It was few days thereafter that she heard Ayers talking about Nyokong at the enquiries and when she enquired as to what the problem was she was told that there was a problem with the counter cheque which had been issued to a client. The next time the issue of Nyokong arose was when she met with Miller at the bar and was asked if she remembers what she had done for Nyokong. She informed Miller that she assisted Nyokong with the amendment of his signature and update his records in terms of FICA requirements.

Grounds for review and the award

[21] The applicant contended that the arbitrator committed misconduct

and gross-irregularity in that he failed to apply the rules of evidence relating to circumstantial evidence. It is also contended that the arbitrator committed an irregularity in that he failed to apply the law correctly in relation to the issue of parity.

[22] In considering the matter the arbitrator posed to himself two questions for consideration as follows:

> *"5.6.1 Whether or not the fraudulent encashment of the cheque on the 28 August 2005 was precipitated or facilitated by Maselane; and if not*
>
> *5.6.2 Whether or not an inference can be drawn from the circumstances of this case that Maselane's inquiry into the account of Nyokong on the 28 August 2004 can be linked to the subsequent fraudulent t activity involving that account.*

[23] In answering these questions the arbitrator came to the conclusion that the issue for determination was "whether or not a plausible inference could be drawn from the facts proven before him."

[24] In his analysis the arbitrator found that the applicant had failed to answer the first question of whether Maselane could have

precipitated in or participated the fraudulent encashment of the cheque. He found that the answer to the question was only provided by the chairperson of the disciplinary inquiry when he found that it "was not known" why Maselane performed the enquiries. In this regard the arbitrator found that there was no evidence presented both at the disciplinary and the arbitration hearings to establish the link between the two facts- referring to the enquiry done by Maselane and the fraudulent encashment of the cheque.

[25] In relation to the existence of the rule, the arbitrator found that:

> *"There was also no "law" or "rule" produced by the respondent to show how Maselane had breached it."*

[26] Under the heading **"**Conclusion and findings**",** the arbitrator in essence found the following:

i) That Maselane may not have been disingenuous in the arbitration regarding the reasons for her enquiry into Nyokong's account. The compensation was for this reason limited to six months.

ii) There was nothing gross in Maselane offering differing explanation for her enquiry 01 on the day in

question.

iii) That there was no basis for blacklisting Maselane by the applicant. The commissioner found this black listing to be baseless and based on such improbable facts that "one has to whistle at it."

iv) That the applicant has failed to "prove by direct and independent evidence that the Applicant was involved in the fraudulent cashing of the bank cheque on the 28 august 2004, as there was insufficient circumstantial evidence" to show that she was involved in the fraudulent encashment of the cheque.

The applicable legal principles

[27] **T**his being a private arbitration, the review has to be considered in terms of the provisions of the Arbitration Act 42 of 1965 (the Act). Section 33 (1) of the Act reads as follows

"*[1] Where* **–**

a) any member of n arbitration tribunal has misconducted himself in relation to his duties as arbitrator or as an umpire ;or

b) an arbitration tribunal has committed any gross irregularity in the conduct of the arbitration proceedings or has exceeded its powers; or

c) an award has been improperly obtained, the Court may, on the application of any party to the reference after due notice, to the other party or parties, make an order setting the award aside."

[28] As is the case with compulsory arbitration an irregularity in private arbitrations does not refer to the result or the correctness of the decision but to the reasoning process or the method of the trial. Thus an incorrect decision arising from a mistake on a point of law does not amount to gross irregularity. However, it was held in **Goldfields Investment Ltd & Another v City f Johannesburg & Another 1938 TPD at 560 that** it would be gross irregularity if the arbitrator misconceives the whole mature of the enquiry on the duties he or she is supposed to perform.

[29] A narrow approach has been adopted by the courts in dealing with reviews of private arbitrators. The underlying consideration of this approach is the recognition that the process arise from the consent of the parties who through an agreement determines the powers of

the arbitrator. This approach confines itself to mainly issues related to procedural aspects of the arbitration. In **Total Support Diversified Health System SA (Pty) Ltd and Another 2002 (4) SA 661 (SCA),** the court held that the basis upon which an award will be set aside on the grounds of misconduct is very narrow. See **National Union of Mine Workers & Others v Grogan NO & Another (227) 28 ILJ 1808 (LC).**

[30] The critical question when dealing with complaints of irregularity is to determine whether or not the conduct of the commissioner presented a fair trial of the issues which were presented before him or her by the parties.

[31] In dealing with the issue of "gross irregularity and exceeding powers: by private arbitrators, Harms JA in **Telcordia Technologies v Telkom SA Ltd (2006) 139 SCA (RSA),** quotes with approval from the judgement of Lord Steyn in the Lesotho **Highlands Development Authority v Impregelio SPA (2005) UKHL 43 para24** wherein it was said:

> *"But the issue was whether the tribunal "exceeded its powers" within the meaning of s68 (2) (b) (of the English Act). This required the court below to address the question*

whether the tribunal purported to exercise a power which it did not have or whether it erroneously exercised a power that it did have. If it is merely a case of erroneous exercise of power vesting in the tribunal no excess of power under s68 92) (b) is involved. Once the matter is approached correctly, it is clear that at the highest in the present case, on the current point, there was no more than an erroneous exercise of the power available under s48 (4). The jurisdictional challenge must therefore fail".

[32] In **Amalgamated Clothing and Textile Workers Union of SA v Veldspan (Pty) Ltd 1994 91) SA at 169,** it was held that the concept of misconduct as envisaged in the Arbitration Act 42 if 1965, does not extend to bona fide mistakes that may be made of law or fact by arbitrators. The Court may however interfere where the mistake is so gross that it manifests evidence of misconduct or partiality on the part of the arbitrator. See **Amalgamated Clothing and Textile Workers Union of SA v Veldspan (Pty) Ltd 1994 91) SA at 169 AD C-D.**

[33] In Telcordia (supra) the Supreme Court of Appeal, held that the Courts in reviewing private arbitration awards should give due

difference to the award, having regard to the autonomy of the parties. By agreeing to refer their dispute to private arbitration by implication the parties limit the common law ground of review and the power of interference by court is thus limited to instances of procedural irregularities.

[34] In this regard the Court in **Telecordia (**supra), held at para 51 that:

> *"Last, by agreeing to arbitration the parties limit interference by courts to the ground of procedural irregularities set out in s33 (1) of the Act. By necessary implication they waive the right to rely on any further ground of review, "common law" or otherwise. If they wish to extend the grounds, they may do so by agreement impose jurisdiction on the court. However as will become apparent the common law ground of review on which Telkom relies is contained by virtue of judicial interpretation in the Act, and it is strictly unnecessary to deal with the common law in this regard. But, by virtue of the structure of the judgement below and the argument presented to us, it is incumbent on me to take the tortuous route".*

[35] In terms of his or her powers the arbitrator is confined to the power

as spelt out by the parties in terms of their terms of reference or their agreement to refer the dispute to arbitration. The test for determining whether an arbitrator exceeded his power which he or she did not have or whether he or she erroneously exercise the power he or she had.

[36] The issue of gross irregularity in the present instance arises from failure to apply the rules of evidence in relation to circumstantial evidence which the applicant sought to rely on to show that Maselane committed a serious misconduct by making an unauthorised enquiry into Nyokong's account.

[37] In **Allumini v Metal and Engineering Industries Bargaining Council & Others (unreported case number JR1877/04),** this court held that when faced with having to assess circumstantial evidence an arbitrator should always consider the cumulative effect of all items of evidence before him or her. In other words the arbitrator should look at the totality of the evidence and weight it on a balance of probabilities. (See also ***D T Zeffertt, A P Paizes and A ST Q Skeen at 99, LAWSA, Vol 9 (1st Issue) at paragraph 643. See also SA Nylon Printers (Pty) Ltd v Daniels (1998) 2***

BLLR 135 (LAC) at 1369 and NUMSA v Kia Motors (2007) 28 ILJ (LC) 2283.

[38] The learned author in the Law of Evidence (at page 93) set out the principles governing the use of circumstantial evidence in arriving at a decision. In this regard they quote the criminal case of **R V Blom 1939 AD 288 at 302-3** wherein Watermeyer said:

> "The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.
>
> *The true facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be doubt whether the inference sought to be drawn is correct."*

[39] The leading cases on circumstantial evidence in a criminal law context is **R v Blom** (supra) and in civil cases is **AA Onderlinge Assuransie-Assosiasie Bpk v De Beer 1982 (2) SA 603 (A).** The onus in civil cases is discharged if the inference advanced is the most readily apparent and acceptable inference from a number of possible inferences. Arbitrator **Cohen in Victor and Another v**

Picardi Rebel (2005) 26 ILJ 2469 (CCMA) held that a distinction between a permissible inference and a mere conjuncture or speculation must always be born in mind.

[40] It has been held that the process of drawing inferences can be very dangerous. Whilst the possibility of error in direct evidence lies in a witness being mistaken or lying about the facts, the use of circumstantial evidence involves a potential error which is that a tribunal or the court may be mistaken in its reasoning. In this regard the Zefertt *et all* (supra) have this to say:

> *"The possibility of error in direct evidence lies in the fact that the witness maybe mistaken or lying. All circumstantial evidence depends ultimately upon facts which are proved by direct evidence, but its use involves an additional source of potential error because the Court may be mistaken in its reasoning. The inference that it draws maybe sequitur, it may overlook the possibility of other inferences which are equally probable or reasonably possible. It some times happens that the trier of facts at having thought at a theory to explain the facts that he may tend to overlook inconsistent circumstances or assume the existence of facts which have not been proved and cannot legitimately be inferred."*

[41] The learned authors further quoted, Lord Wright in the English case of **Caswell v Powell Duffy Collieries Ltd [1939] 3 All ER 722 (HL) at 733** as having said:

> *"There can be no inference unless there are objective facts from which to infer other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had actually been observed. In other, cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjuncture."*

Evaluation

[42] In the present case, whilst the arbitrator refers to the correct legal principles to apply when dealing with the circumstantial evidence, he however, in a fundamental way, failed to apply the facts of this case to those principles. The failure arose in particular when the arbitrator had to deal with the concept of proof. The arbitrator further committed misdirection and a gross irregularity in failing to appreciate the task he had to deal with.

[43] Firstly the arbitrator failed in his task when for some strange reason

found that there was no "law" or "rule" produced by the applicant. In other words the arbitrator found that there was no rule against unauthorised enquiry into customer's accounts. This is seriously inconsistent with the evidence which was before him.

[44] Maselane was charged with performing unauthorised and unwarranted enquiries into the account of Nyokong. There is nothing in the record, particularly in the opening statements and cross examination that placed in dispute the existence of this rule. When the charge was put to her again during cross examination, Maselane respondent by saying (at page 493 line 10 to 15):

> *"Yes you cannot do inquiries on a customer's account unless you are like helping the customer or you are having."*

[45] It needs to be pointed out that the transcription of the recording of the arbitration hearing was of a very high standard. It is apparent from the record that Maselane was interrupted before she could finish her answer relating to the issue of the rule. She later said: *"There is a rule that we are not to…"* There was again an interruption apparently due to the change in the side of the tape. After the changing to side two of the tape the arbitrator reminded her that the discussion was still about the rule. The answer she gave

in my view indicated clearly that she conceded to the existence of the rule. After conceding to the rule she than sought to find other ways of explain instances when staff members of the bank could do inquiries into customers accounts. The incoherent answer she gave (at page 494 line 10) after admitting to the rule was as follows:

> *"MS Maselane: Yes in edition (sic addition) to that unless (inaudible) that um part of our marketing tactic to (inaudible) our progress to existing customers where by you um report or we also use um the new (inaudible that was previously just to see if maybe you can try to consult new products to our existing customers."*

[46] Thus, had the arbitrator appreciated the task before him he would found that the existence of the rule was common cause and that there was no need for the applicant to produce any other proof.

[47] Turning to the charge itself, Maselane conceded that she had done the inquiry 01 on Nyokong's account using his account number which she obtained from the black book. She indicated that she did not have knowledge of the existence of the counter cheque which was issued by Ayer and Joubert. She also did not know the person who cashed the cheque from Nyokong's account on that day.

[48] Whilst it is a well established rule of our law that the burden of proof rests upon the employer to show that the dismissal was fir in all respects, the making of a prima facie case discharge that first part of the burden and may if the employee fails to rebut it by discharging his or her evidentiary burden result in upholding the version of the employer.

[49] In my view once Maselane had conceded to the offence of unauthorised inquiry into Nyokong's account, it should have been found that the applicant had discharged its *prima facie* case and it was then for Maselane to show that the enquiry was innocent and that the fraudulent encashment of the cheque was a mere coincident unrelated to the inquiry. Maselena had the evidentiary burden of showing her breach of the rule was innocent. In other words what was required of Maselane was to show the righteousness her conduct.

[50] The arbitrator as indicated earlier found that he could not draw any inference from the three reasons that Maselane provided for the inquiry. It is apparent that the arbitrator adopted a peace meal approach to dealing with the three reasons as to why the inquiry was done.

[51] When asked during cross examination, why she conducted a detailed balance inquiry Maselane said that she went into inquiry 01 and that there were a number of other items that this inquiry would show (at page 506 line 3 to 20 of the transcript). She further claimed that the reason why the screen never showed the account history was because she was interrupted by a customer before she could go into the history of the account.

[52] When asked further under cross examination (at page 563, line 15 to 20 of the transcript) why she made an 01 enquiry, Maselane said:

> *"The reason why I might have done an inquiry 01 on the account maybe I wanted to check history notes to remind myself what I did for the client."*

[53] The transcript also shows that after a very lengthy engagement between the arbitrator and the representative of the applicant about whether she remembered why she did the enquiry, Maselane says:

> "I performed the enquiry because I wanted to check the work that I recorded in the black book to check what exactly I was doing for the customer before I could submit into account."

[54] It is common cause that had she used the account number she

would have gone straight into the history of the account. It is also apparent that an hour after conducting the enquiry a cheque that had been in transit for 16 (sixteen) days was suddenly cashed.

[55] Whilst it is important that when using circumstantial evidence the arbitrators must exercise extreme care to ensure that they do not make hasty and false deductions, however where the evidence points to a chain of circumstances the combination of which points to an offence and not a mere suspicion then there should be no hesitation in drawing an appropriate inference.

[56] In my view Maselane failed to provide a satisfactory and convincing explanation for conducting the enquiry and therefore the *prima facie* case which the applicant had established should have prevailed. Having failed to provide an acceptable and satisfactory explanation, the only reasonable inference to have been drawn by the arbitrator should have been that she was guilty of an act of dishonesty and that the only appropriate sanction in the circumstance was dismissal particularly taking onto account that she occupied a high position of trust. In other words the explanation provided by Maselane did not break the chain of

circumstances pointing to her dishonest conduct.

[57] It is also important in analysing the totality of the evidence which was before the arbitrator that whilst Maselane did not deny that when an enquiry 01 is done in an account it would reflect the balance of the funds, she however strenuously during cross examination persisted that she did not, in this instance, see the balance of funds in Nyoking's account.. Interestingly, also when put to her during re-examination by her legal representative, that the enquiry would reflect a balance on the customer's account, she evaded the question and only dealt with the method she used to check on the history notes and that it was just a coincident that the fraudulent act was committed on the same day that she conducted the enquiry.

[58] The evidence presented by the applicant, evaluated together with the failure by Maselane to explain the reason for the unauthorised enquiry leads to only one plausible or natural inference that can be drawn and that is that the unauthorised inquiry was made not in what the arbitrator called "disingenuous" but in violation of the duty of righteousness and trust on the part of Maselane. It is not clear what the arbitrator meant by "disingenuous." What seems clear however is that the arbitrator found her somehow not innocent

of wrongdoing because it was for this reason that he awarder her six months compensation and not the maximum as provided for by the Labour Relations Act.

[59] The word “disingenuous” in my view means everything to do with untruthfulness including dishonesty. There are no degrees of untrustworthiness and therefore an employee who is untrustworthy is one who is unreliable, dishonest, undependable, deceitful, and cannot be trusted.

[60] In summary, it is therefore my view that because the arbitrator failed to understand the case which was presented by the applicant and the weight to be accorded to the explanation provided by Maselane, he failed in his basic duty of properly determining the evidence before him. In fact the arbitrator misunderstood the case that was before him. He firstly misconstrued the common cause fact relating to the existence of the rule against unauthorised clients’ account enquiry and secondly that the case of the applicant was based on the circumstantial evidence that the enquiry made by Maselane into Nyokong’s account was not innocent and not that Maselane precipitated or participated in the fraudulent encashment

of the cheque.

[61] I now proceed to deal with the issue of parity. Although the arbitrator makes reference in his award that to the issue of parity when referring to the role plaid by Pillay, Ayer and Joubert in the encashment of the cheque, I do not understand him to have based his conclusion that the dismissal was unfair on this ground.

[62] If my understanding is incorrect, then it would be my view that the arbitrator would again have failed in a fundamental way to correctly applies the principle of parity.

[63] In dealing with the issue of consistency, ***Du Toit Bosch et al Labour Relations Law', A comprehensive Guide***, state the following:

> *"Consistency however implies treating like cases alike. An employer may thus be justified in differentiating between employees who have committed similar transgressions on the basis of differences in personal circumstances of the employees (such as length of service and disciplinary record) or the merits (such as the roles played in the commissioning of the misconduct)."*

[64] In dealing with the same issue the Labour Appeal Court in case of **SACCAWU and Others v Irvin & Johnson (1999) 20 ILJ 2303(LAC) at page 2313 (para 29)** held that:

> *"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' (as to which see e.g. Grogan Workplace Law (4 ed) at 145 and Le Roux & Van Niekerk The SA Law of Unfair Dismissal at 110). There is really no separate 'principle' involved. Consistency is simply an element of disciplinary fairness".*

[65] The Court went further to say:

> "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 towards the other employees. It would *mean no more than that 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 a plurality of dismissals, a wrong decision can only be unfair if it is capricious, or is induced by improper motives*

or, worse, by a discriminating management policy. (As the case in **Henred Fruehauf Trailers v National Union of Metalworkers of SA & others (1992) 13 ILJ 593 (LAC) at 599H-601B; National Union of Mineworkers v Henred Fruehauf Trailers (Pty) Ltd (1994) 15 ILJ 1257 (A) at 1264.)** *Even then I dare say that it might not be 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, in my view, necessarily mean that the other miscreants should escape. Fairness is a value judgment. It might or might not in the circumstances be fair to reinstate the other offenders. The point is that consistency is not a rule unto itself."*

[66] It is evidently clear from the facts of the present case that the offences committed by the three employees were not the same as that committed by Maselane. They were charged and found guilty of negligence and issued with warnings for that reason. There was no evidence that linked the conduct of the three to the dishonest conduct of Maselane nor did any one of them conduct an unauthorised enquiry into the account of Nyokong or any other

customer. It does therefore appear very clearly that the gravity of the offence with which was Maselane was charged with is different to that of the three employees.

[67] In the light of the above any finding that there was inconsistent application of the disciplinary procedure would not be reasonable and therefore unsustainable.

[68] In the circumstances it is my view that the arbitration award of the arbitrator stands to be reviewed. The circumstances of this case do not however dictate that the costs should follow the results.

[69] In the premises the arbitration award issued by the first respondent under case number TOKISO-P5/176, dated 10 October 2005, is reviewed and set aside.

[70] The award is substituted with the following award:

> "1. The dismissal of the applicant (Ms Maselane) was substantively fair.
>
> 2. The unfair dismissal claim of the applicant (Ms Maselane) is dismissed."

[71] There is no order as to costs.

_____

Molahlehi J

Date of Judgment: 14 May 2008

Date of Hearing: 19 February 2008

APPEARANCES

For the Applicant: Attorney M Delany

Instructed by: Perrot, Van Niekerk & Woodhouse Inc

For the Respondent: Attorney M Mthombeni

Instructed by: Mthombeni and Associates