IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO C966/2008

REPORTABLE

In the matter between:

THEEWATERSKLOOF MUNICIPALITY Applicant

and

SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL (WESTERN CAPE DIVISION) First Respondent

ARBITRATOR ADV C DE KOCK N.O. Second Respondent

IMATU on behalf of A J D HENN Third Respondent

JUDGMENT ON SANCTION

TIP AJ:

Introduction

1. This case came before me as a review of an award made by the second respondent, an arbitrator sitting under the auspices of the SALGBC, concerning two charges on which an employee had been found guilty and for which he had been dismissed by the Theewaterskloof Municipality, the applicant in these proceedings. The employee is Mr A J D Henn, who

has been represented throughout by IMATU, the third respondent. The arbitrator found him not guilty of the first charge and although it appeared (albeit ambiguously) that he upheld the finding of guilt on the second charge, he imposed no sanction in respect of it. Instead, having observed that the sanction of dismissal was not an appropriate sanction under the circumstances, the arbitrator went on to state that he was "… *unable to make a finding as to what would have constituted a fair sanction …*" In consequence of that view he failed to properly determine the dispute which had been referred to him.

2. My judgment on the review was delivered on 12 March 2010, in which I made an order upholding the 'not guilty' result on the first charge and declaring that Mr Henn was indeed guilty on the second charge. I further directed that the applicant and the third respondent should have the opportunity to make fresh submissions in respect of the issue of the sanction, which they could pursue either in this Court or in the SALGBC. This was necessary for two reasons: firstly because my interpretation of the evidence was to a material extent different from that of the arbitrator and secondly because of his omission to make a finding on sanction. Both parties elected to place further submissions before me.

3. In these circumstances I am required to determine the sanction anew. However, although I am in this sense not confined to an ordinary review process, this does not mean that I am at large to fashion any sanction which I consider fitting. Rather, I must undertake the role which the arbitrator should have fulfilled, subject to the principles and guidelines which he then would have been obliged to apply. A consideration of those parameters will follow upon an outline of the essential facts, to which I now turn.

The facts

4. The principal judgment contains a fairly detailed review of the facts. For the purpose of this judgment on sanction it will be sufficient for me to deal

only with those pertinent to the second charge. It will be convenient to begin by reciting it:

> "*U het 'n bedrag van R7 000-00 wederregtelik vir uself toegeëien deurdat u gedurende Augustus 2006 u deelname in die essensiële vervoerskema opgesê het en sodanige toelaag vir u persoonlike gewin aangewend nadat dit foutiewelik vir Februarie en Maart aan u betaal was*."

As appears from this, the charge on which Mr Henn has been found guilty is closely related to the operation of a transport allowance scheme which is offered by the Municipality and, in order properly to evaluate his conduct, a summary of the evidence concerning it needs to be set out.

5. The Municipality had for a number of years operated a scheme as regulated in a Bargaining Council agreement, in terms of which essential transport use could be undertaken by qualifying employees on the basis that they used their own vehicles on municipal business for which they were financially compensated. For certain posts this compensation was in the form of a fixed monthly allowance. Mr Henn was a participant in this scheme as he occupied a senior post, namely that of Manager: Health Services. The scheme was called the 'essensiële vervoerskema' or 'essensiële vervoertoelaeskema'. In time, the Municipality came to the view that the allowance rates in the Bargaining Council scheme were on the low side and on 2 December 2004 the Executive Mayoral Committee decided on increased rates ("the UBK resolution"). In the light of the contentions raised by Mr Henn concerning a 'perk', which I will outline below, it is to be noted that it is clear from the minute that this decision indeed dealt solely with the scheme: "*Die essensiële vervoerskema as volg geallokeer word, naamlik : Alle bestuurders – R3 500.00 per maand*...."

6. As confirmed by Mr Henn in his evidence, this rate for managers represented an increase on the allowance which he had previously received. For that reason he wanted to go onto the new scheme. After submission of a memorandum motivating his inclusion, a written

agreement was concluded with retrospective effect as from 20 October 2004. After a while Mr Henn decided that the costs to him of running his vehicle exceeded R3,500 per month and on 2 August 2006 he gave notice that he would for that reason leave the scheme with effect from 1 February 2007. On his behalf, IMATU wrote to the Municipality on 23 and 30 January 2007, asserting that he was not receiving the R3,500 in accordance with the UBK resolution and that other managers were receiving the allowance as a 'perk' whereas Mr Henn was required to provide log sheets. The Municipality responded on 7 February 2007, pointing out that Mr Henn was not required to submit log sheets. It seems that neither of the authors of this correspondence was mindful of Mr Henn's withdrawal from the scheme on 1 February 2007. In fact, there was no perk scheme. Although a few individuals had come in from disestablished entities with contractual perks at the time of an amalgamation process, the Municipality itself offered no perks. Mr Henn knew this. He also knew that he had at no time been in receipt of a perk, but had at all times been on the same scheme as other managers, some of whom used their vehicles over greater distances than he did, and some for less. All of them were paid the same allowance. Mr Henn further confirmed in his evidence that nobody had at any time suggested to him that he was moving to a scheme where he would receive R3,500 per month as a perk without having to use his vehicle on the business of the Municipality.

7. Through administrative error and despite the fact that Mr Henn had by then left the transport allowance scheme, the Municipality included the amount of R3,500 in his salary payment for February 2007. Mr Henn wrote to the Municipality referring to the fact that he had withdrawn from the transport scheme but at the same time stating: "*Ek bedank u egter vir die "perk"- voordeel wat vanaf 1 Februarie 2007 ingevolge UBK besluit 278/2004 aan my uitbetaal word.*" For the reasons already outlined, the probabilities are strongly against Mr Henn having held a *bona fide* belief that this was a perk for which no performance on his part was required. Indeed, as with previous payslips, the very payslip for February records

that the item of R3,500 was for 'essen. vervoer'. In any event, the Municipality's response to Mr Henn's letter included this specific statement: "*Weens 'n misverstand het u egter nog steeds die bedrag van R3 500 vir Februarie ontvang, en sal die bedrag derhalwe van u verhaal word.*" This letter could have left Mr Henn in no doubt that, as far as his employer was concerned, there was no perk and the payment to him of R3,500 had to be repaid as it had been made in error.

8. Mr Henn was again erroneously paid an allowance amount of R3,500 for March. On 23 March 2007 Mr Fisher, the Municipality's Chief Personnel Officer, wrote to him noting that he had incorrectly received the allowance for both February and March 2007 and requesting him to make the necessary arrangements with the salaries section for those amounts to be repaid. However, as with the February payment of R3,500, Mr Henn did not refund the March amount. Instead, he spent it, notwithstanding that he was well aware that he should not have received it at all. As he put it in his evidence, he spent the money merely because it had been paid to him.

9. The Municipality could not unilaterally deduct the overpaid amounts from future salary payments and, a few days later on 29 March 2007, a clerk from the salaries came to him with a repayment document. Mr Henn completed this, authorising the Municipality to deduct an amount of R10 per month in respect of his indebtedness for these payments. At that rate, it would have taken about 58 years to liquidate the debt of R7,000 and the tender of R10 per month can in the circumstances only be described as derisory. Mr Fisher's view was that it was unclear that a rate of R10 per month could even be thought of as amounting to a repayment offer. Both he and Mr Venter, who was Mr Henn's immediate superior, testified to discussions with Mr Henn at which it was made very clear to him that an offer of R10 was totally unacceptable to the Municipality, which considered it to be ludicrous ('belaglik'). The response of Mr Henn was disdainful, being that he was a poor white ('n arme blanke') and that he could not afford more. Having regard to his

post and salary, said Mr Fisher, this too was construed by the Municipality as ridiculous.

10. About two months later, on 22 May 2007, there was a meeting between Mr Henn and senior officers of the Municipality at which it was *inter alia* recorded that he owed the Municipality R7,000 which he had offered to repay at the rate of R10 per month, that by accepting the erroneous payments while knowing that he wasn't entitled to them he had not acted in the best interests of the Municipality, that this could be seen as unlawful appropriation of Council funds, that certain provisions of the Municipal Finance Management Act had been contravened, that since the payment of the R7,000 was hence unauthorised expenditure it should be repaid within 48 hours *alternatively* that he could rejoin the scheme and set off that amount by using his vehicle without further payment for a period of two months and, finally, that he should inform the Municipality of his intentions within 48 hours failing which summons would be issued and disciplinary action would be considered.

11. In my view it is clear from these events and exchanges that there was ample time and scope for Mr Henn to reflect on his conduct and to engage with his employer on the basis of a meaningful offer with a view to reaching a mutually acceptable arrangement for the repayment of the money. It is however equally clear that Mr Henn did not at any stage consider it meet that he should suggest that he could do better than R10 per month. Rather, it is evident that his attitude had a good deal more to do with confrontation and intransigence than any wish to reach an appropriate accommodation. That this was indeed Mr Henn's attitude is roundly declared in a post-meeting letter of 24 May 2007 written by IMATU on his behalf in which it was *inter alia* denied that he had received any unauthorised payments and stated that any action to recover such amounts would be vigorously resisted. Consistently with its combative tenor, there was no suggestion even under the spectre of disciplinary steps that Mr Henn was moved to seek an agreement for him to undertake repayments at a more realistic level than R10 per month. The

die having thus been cast, Mr Henn could not have been surprised when he was served with a charge sheet on or about 7 June 2007.

12. I next address the principles to be applied in the determination of an appropriate sanction.

The approach to sanction

13. The considerations that are generally to be taken into account when an appropriate sanction is to be determined have recently enjoyed a good deal of judicial attention: *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* (2006) 27 *ILJ* 2076 (SCA), being the *Sidumo* matter; *Engen Petroleum Ltd v CCMA & others* (2007) 28 *ILJ* 1507 (LAC); *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC); *Fidelity Cash Management Service v CCMA & others* (2008) 29 *ILJ* 964 (LAC); *Shoprite Checkers (Pty) Ltd v CCMA & others* (2008) 29 *ILJ* 2581 (LAC) and *Edcon Ltd v Pillemer NO & others* (2009) 30 *ILJ* 2642 (SCA). These cases have been usefully assembled and assessed by Anton Myburgh 'Determining and Reviewing Sanction after Sidumo' (2010) 31 *ILJ* 1 and I have drawn with appreciation on his analysis of the topic for the purpose of this judgment.

14. Myburgh addresses the standard to be applied when a dismissal is challenged and he traces its refinement from the 'reasonable employer test' through the 'fair employer test' (the SCA in *Sidumo*) and the 'own opinion test' or, better, the 'reasonable citizen test' (the LAC in *Engen*) to what may be described as the 'impartial commissioner test' (the CC in *Sidumo*). Guidelines for commissioners were thereafter helpfully condensed by the LAC in its *Fidelity Cash* judgment. The CCMA has also prepared arbitration guidelines, as yet unpublished, which deal with the sanction issue. In his review of such guidelines Myburgh has put in place two focal points, one dealing with an overall catalogue of factors to which regard must be had and the other dealing with the particularly important

question of the role or status of the employer's initial decision to dismiss. I deal with each below.

15. The LAC's summary in *Fidelity Cash* straddles both points, at paras [94] and [95]:

> "*In terms of the Sidumo judgment, the commissioner must -*
> *(a) 'take into account the totality of circumstances' ...;*
> *(b) 'consider the importance of the rule that had been breached' ...;*
> *(c) 'consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal' ...;*
> *(d) consider 'the harm caused by the employee's conduct' ...;*
> *(e) consider 'whether additional training and instruction may result in the employee not repeating the misconduct';*
> *(f) consider 'the effect of dismissal on the employee' ...;*
> *(g) consider the employee's service record.*
>
> *The Constitutional Court emphasized that this is not an exhaustive list. The commissioner would also have to consider the Code of Good Practice: Dismissal and the relevant provisions of any applicable statute including the Act ....*
>
> *Once the commissioner has considered all the above factors and others not mentioned herein, he or she would then have to answer the question whether dismissal was in all of the circumstances a fair sanction in such a case. In answering that question he or she would have to use his or her own sense of fairness. That the commissioner is required to use his or her own sense of justice or fairness to decide the fairness or otherwise of dismissal does not mean that he or she is at liberty to act arbitrarily or capriciously or to be mala fide. He or she is required to make a decision or finding that is reasonable.*"

16. The factors gathered in these passages are largely self-explanatory, as is the prescription that the commissioner may turn to the question of whether dismissal was in all the circumstances a fair sanction only after having given impartial consideration to them all. As noted, this list of factors is neither exhaustive nor does it imply any ranking in respect of relative importance. What is relevant and important in any given case will invariably be defined by the particular facts of that case. That said, it will usually be so that the core inquiry to be made by a commissioner will involve the balancing of the reason why the employer imposed the dismissal against the basis of the employee's challenge of it. That requires a proper understanding of both, which must then be weighed

together with all other relevant factors in order to determine whether the employer's decision was fair. That is a commissioner's essential task and the fact that an arbitration takes the form of a *de novo* hearing does not alter it. The nature of this task was clearly and succinctly stated by the Constitutional Court in *Sidumo* per Navsa AJ at para [79]:

> "*To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.*"

The following excerpts from the minority judgment of Ngcobo J (as he then was) add to a practical understanding of the standard to be applied, at paras [178] to [180]:

> "*... But recognizing that the employer has such discretion [that is, to determine sanction] does not mean that in determining whether the sanction imposed by the employer is fair, the commissioner must defer to the employer. ... What this means is that the commissioner ... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting-point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.*
>
> *In answering this question, which will not always be easy, the commissioner must pass a value judgment. However objective the determination of the fairness of a dismissal might be, it is a determination based upon a value judgment. Indeed the exercise of a value judgment is something about which reasonable people may readily differ.*
>
> *But it could not have been the intention of the law-maker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case the outcome of a dispute could be determined by the background and perspective of the commissioner....*"

17. The above passages should be read with section 192 of the LRA:

> "*(1) In any proceedings concerning any dismissal, the employee must establish the existence of the dismissal.*
>
> *(2) If the existence of the dismissal is established, the employer must prove that the dismissal is fair.*"

18. Subsection (2) has two effects. The first is that the onus placed on the employer to prove the fairness of the dismissal is unqualified. Although there may be incidental movements in respect of the evidential burden during the hearing, the ultimate onus lies with the employer. This excludes any suggestion that a decision to dismiss will stand unless it can be shown to be unfair and, to the extent that the notion of 'deference' might have been enlisted to such end, that has now been comprehensively examined and rejected by the Constitutional Court. The second effect of the subsection is that it defines not only the employer's burden but, at the same time, the question which the commissioner is required to answer, being whether or not the dismissal is fair. What this underlines is that commissioners are not free to impose a sanction which they might have thought fair if they were determining the matter from scratch.

19. In this context, some supplementary observations on the nature of a value judgment and the practicalities of its application may not be out of place. As indicated by Ngcobo J in the passage quoted above, the 'value' element does not mean that commissioners may simply import their own values as the basis for deciding a dismissal dispute. Very often, that may be easier said than done because a commissioner must at the same time bring to bear his or her own sense of fairness in reaching a conclusion. In order to maintain the necessary distinction, some assistance may be drawn from the perspective that a typical arbitration comprises essentially two phases. The first is the receipt and evaluation of evidence in order to make factual findings. That phase is governed by the ordinary rules of evidence and procedure and no value judgment is involved. If the employee's guilt is established, the second phase arises, being the identification and weighting of the factors relevant to the determination of sanction. Various components must be placed in the scales: an objective analysis of the particular facts of the case; adequate regard to the applicable statutory and policy framework; and adequate regard to the pertinent jurisprudence as developed by the courts. Only then can a value judgment, properly so called as a comparative balancing of

competing factors, be made by the commissioner, producing as an end result an impartial answer to the central question whether or not the dismissal was fair. Reaching a value judgment in relation to competing factors will in many cases be fairly straightforward but in others it may be helpful to conduct the comparison process with reference to a common question, being how the factor relates to the relevant features of the employer's operational requirements. A proper assessment of those requirements underlies the determination of what is fair and at the same time provides an objective framework for a value to be placed on one factor and another.

20. These principles must now be applied to the matter before me.

The sanction in the present case

21. Submissions were made to me by both parties as to whether Mr Henn had acted dishonestly. As it was formulated, dishonesty is not an element of the second charge. On the facts, his conduct was not dishonest in the conventional sense, in that there was nothing furtive in his actions and there can be no suggestion that he at any time contemplated that he could 'get away with' the two payments which had erroneously been made to him. However, the question of trustworthiness is of broader moment than its role in offences which are centrally dependent upon proof of outright dishonesty. So, too, the wider issue of whether an employment relationship is sustainable involves the evaluation of a good many facets. An offence such as fraud or theft will generally be so destructive of one such facet that the relationship itself would inevitably perish. Here, the aspect which has been damaged by Mr Henn goes to this question: is the Municipality fairly entitled to expect that an employee at the level of manager will at all times act in its best interests, that he will seek to promote its operational requirements, that he will not wittingly retain and spend municipal funds erroneously paid to him, and that he will timeously and purposefully seek to correct his conduct once he has strayed? The answer must surely be that it not only can but, as an entity of government, is obliged to have such expectation.

22. What is evident from the facts before me is that Mr Henn was moved by defiance rather than deceit and that he is not to be placed in the same category as a thief or a fraudster. . He has sought to justify that defiance with the dual contention that his participation in the transport allowance scheme entailed some adverse differentiation *vis-à-vis* other managers and in any event that he should have been paid R3,500 per month as a perk. As is apparent from the evidence summarised above, however, I am satisfied that Mr Henn knew at all material times that he had no proper foundation for these contentions. He knew moreover that his stated view was not shared by his employer and, likewise, he knew full well that he was not entitled opportunistically to seize upon the mistaken payments into his account. Instead, especially as a senior manager, he had a clear duty to repay those amounts without delay and to engage with the appropriate official to ensure that no further disbursements of municipal funds of that kind were made. As to his grievances, if he had any *bona fide* conviction concerning them, he should if so inclined have pursued them purposefully through the ordinary channels. An employee who embarks on recalcitrant or defiant conduct because of an unresolved grievance does so at his or her peril. See *Johannes v Polyoak (Pty) Ltd* [1998] 1 BLLR 18 (LAC) at 20E-H:

> "*A striking feature of the case ... is that ... she refused to capitulate. As a senior shop steward of her union, she could have been under no misapprehension as to what her recalcitrance may hold in store for her ... it must have been clear to her that her lonely crusade was likely to end in the disaster of dismissal.*"

See further, similarly, *Slagment (Pty) Ltd v BCAWU & others* [1994] 12 BLLR 1 (AD) 10:

> "*Even if one were to assume that management was guilty of insensitivity, its relevance to the fairness of the dismissals would be questionable.*
>
> *The employees had been guilty of sustained disobedience. They had deliberately set themselves on a collision course with management. They were insubordinate and insulting. Their conduct was such as to render a continuance of relationship of employer and employee impossible.*

Counsel for the applicants did not contend that their resentment at Pieterse's appointment justified or excused their conduct. What he submitted was that it was mitigating, and that to dismiss the employees in the light of it was excessively harsh, unjustified and unfair.

I do not agree. The recognition agreement between Slagment and the union included a section dealing with "Grievance Procedure", which provided a means for the communication and settlement of grievances speedily and without disruption of the work. If the employees had a grievance, this was the route which they should have followed."

23. The general principle that conduct on the part of an employee which is incompatible with the trust and confidence necessary for the continuation of an employee relationship will entitle the employer to bring it to an end is a long-established one. See *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* 18 (AD) at 26E-G:

"*It is well established that the relationship between employer and employee is in essence one of trust and confidence and that, at common law, conduct clearly inconsistent therewith entitles the 'innocent party' to cancel the agreement .... On that basis it appears to me that our law has to be the same as that of English law and also that a reciprocal duty as suggested by counsel rests upon the employee. There are some judgments in the LAC to this effect .... It does seem to me that, in our law, it is not necessary to work with the concept of an implied term. The duties referred to simply flow from naturalia contractus.*"

24. An appreciation of the character of the trust and confidence which is relevant in this case must have regard also to the fact that the Municipality is subject to a statutory domain which includes the control and accountability provisions concerning municipal funds contained in the Local Government: Municipal Finance Management Act 56 of 2003, as well as the Local Government: Municipal Systems Act 32 of 2000, section 4(2) of which obliges the Council to use the resources of the Municipality in the best interests of the local community. Schedule 2 to the Act is a Code of Conduct for Municipal Staff Members which stipulates *inter alia* that employees must at all times act in the best interest of the municipality and in such a way that the credibility and integrity of the municipality are not compromised. It is also stated that employees may not use, take,

acquire, or benefit from any property or asset owned, controlled or managed by the Municipality to which that staff member has no right. Considerations such as these contribute to an appropriate understanding of the operational environment and requirements of the Municipality. To that extent they are relevant, although I fully bear in mind that the charge here in question was not framed as a breach of this Code. It is nevertheless an environment with which Mr Henn was well acquainted and within which his sanction must now be considered.

25. The above formed part of the submissions advanced on behalf of the Municipality as forming part of its view of Mr Henn's position. At the same time, the evidence of Mr Fisher shows that it was his view that Mr Henn may well not have been disciplined if an agreement had been reached for the repayment by him of the R7,000 which he had kept and used. There was hence a window period favouring Mr Henn during which the Municipality is unlikely to have proceeded against him merely because he had retained the erroneous payments. The essential proviso was, though, that a proper restitutionary arrangement had to be put in place. That however did not happen and it is on balance plain from the evidence that Mr Henn has himself to blame for the consequence. As appears from the further evidence of Mr Fisher, once the Municipality made it clear to Mr Henn that his offer to repay at R10 per month was totally unacceptable, his response was spuriously to lay claim to being a poor white who could not afford to up the rate. That notwithstanding, Mr Henn contends that his R10 offer was only an opening bid and that he had expected the Municipality to negotiate with him. That contention is easily made, but the fact of the matter is that Mr Henn effectively shut the door when the opportunity was there for him to make a revised offer that would convey good faith on his part. As illustrated in this exchange, it is clear from the record as a whole that far from playing his part in seeking a reasonable arrangement, Mr Henn has steadfastly maintained a defiant attitude, exemplified in the declaration through his union on 24 May 2007 that he denied even having received any undue funds and that any attempt by the Municipality to recover the amount of R7,000 would be

vigorously resisted. In keeping with that stance Mr Henn has indeed made no repayment at all and has indicated no preparedness to do so at an appropriate rate. That stance was not altered even at the stage of the arbitration.

26. The question of repayment terms was traversed at the arbitration and there is some evidence that it was not uncommon, if not the usual practice, that the Municipality would negotiate suitable repayment terms with its employees in instances where there had been mistaken overpayments to them. This evidence was however couched in the most general terms and it is to my mind plain that this would be done where employees had in a *bona fide* manner become financially embarrassed as a result of such errors. The converse does not emerge from the record, namely that this was the Municipality's practice even where an employee had deliberately used money in the knowledge that it was not due and that it would have to be repaid. In a case of that kind the true inquiry would be into the conduct of the employee. In any event, misappropriation remains precisely that despite the possibility that repayment terms might be negotiated. Evidence to that effect was indeed presented by Mr Fisher, being that the witting retention by an employee of erroneous payments would amount to the unlawful appropriation of municipal funds, which in turn could warrant disciplinary steps. Mr Venter testified to the same effect.

27. In this situation the observations on the role of remorse made by Conradie JA in *De Beers Consolidated Mines Limited v CCMA & others* (2000) 21 *ILJ* 1051 (LAC) at para [25] are directly in point:

> "*This brings me to remorse. It would in my view be difficult for an employer to re-employ an employee who has shown no remorse. Acknowledgment of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed*

in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great."

28. This passage was endorsed and applied by the LAC in its unanimous decision in *The Foschini Group (Pty) Ltd v Marie Fynn & others* (unreported; case no. DA 1/04; 31 January 2006). In that case, a sales assistant was found guilty of displaying abusive and threatening language as well as aggressive behaviour towards a customer, for which she was dismissed. The LAC held the dismissal to have been fair, holding at paras [21] and [22] that:

> "*Throughout the series of events which comprised this dispute, including the hearing before second respondent, first respondent showed no remorse or regret for the conduct which she had displayed on the day in question. In this regard the ... dictum ... in De Beers ... at para 25 is of application to the present dispute ...*
>
> *In the present case first respondent held a responsible position in appellant's organisation. It is trite that in the service industry 'The customer is king'. In the case of a senior employee, albeit under some measure of provocation, who pursues the customer to outside of the premises, then engages in an altercation of the kind which required her to be led back into the premises by the store messenger, and shows no regret or remorse for her conduct, an employer is entitled legitimately to adopt the attitude that the risk of continuing the employment of this person is unacceptably great.*"

Conradie JA's approach in *De Beers* was affirmed also by the SCA in *Sidumo* at para [49] and see further the Constitutional Court in *Sidumo* at para [117]. In the interests of completeness, I should note here that the LAC in *Engen* at para [190] queried the SCA's observation that the passage from the judgment of Conradie JA represented 'long-standing LAC authority', but did not over-rule it.

29. Just as the criterion of fairness embodies a range of content (as to which see the SCA in *Sidumo* at para [46]) so too does the factor of lack of remorse. In both *De Beers* and *Foschini* the absence of remorse related to misconduct on a single day. In the case of Mr Henn there is an additional dimension in that he has on an ongoing basis refused to undertake any meaningful repayment of the funds appropriated by him.

He took up the position on, for instance, 24 May 2007 that he had not received any funds which were not due to him, but could not avoid conceding in his evidence that he had retained those monies despite his knowledge that he was not entitled to them. Although the non-repayment does not bear on the finding of guilt, it is certainly relevant to the issue of sanction. It is a factor that takes Mr Henn beyond mere lack of remorse into a zone which in my view was fairly described by Mr Kahanovitz for the Municipality as one of defiance.

30. This prolonged and reiterated attitude and course of conduct by Mr Henn is of material consequence in respect of the view of him which the Municipality has legitimately come to adopt. It has had to confront the fact of a senior employee who, apart from inescapable admissions made at arbitration, has addressed to it no significant acknowledgement of any wrongdoing on his part. He has not sought to remedy that wrongdoing and has correspondingly made no overture of any recommitment by him to the values and responsibilities of the Municipality and his duties as one of its senior managers. Ineluctably, this has produced the view that there has been a process of corrosion leading to an irretrievable breakdown of the employment relationship. When it comes to the formulation of a value judgment, this will have to be weighed as a substantial factor.

31. It is to be underlined that Mr Henn's course of conduct leaves no space at all for one to distil a spirit of remorse or an allied desire to repair any damage to the employment relationship which had resulted from his unlawful retention of the amounts paid to him. In regard to the latter aspect, a striking feature of the case presented for Mr Henn was the submission that the root cause of the problems which have arisen lies in the Municipality's administrative incompetence in making the payments in the first place. That is a fundamentally unsound approach. The employment relationship has not been compromised because the Municipality made erroneous payments but because Mr Henn made the election to retain them. If anything, his status as a senior employee required him to ensure that the mistakes were immediately rectified and

not to opportunistically seize upon the commission of those mistakes in order to use undue municipal funds for his own benefit. His attempt to transpose the culpability on to his employer does no more than to accentuate his lack of remorse.

32. I turn now to a different consideration, being that of long service. In this regard Mr Henn is at the high end of the spectrum, with 22 years of service. That is an impressive history but it does not stand as a number of years *in vacuo*. Like any factor it must be evaluated in the circumstances of the case as a whole; it does not *ipso facto* trigger a reduction in the sanction or trump the other factors. In general, there are two aspects to long service. The one aspect is that an employee with lengthy service will have become imbued with a proper understanding of the rules, objects and values of his employer. That might be an appropriate circumstance to take into account at the stage of determining guilt. However, when it comes to sanction, the tablet must be turned over to display the mitigatory aspect of long service. In the present case, the disciplinary chairperson did not see it that way and held that Mr Henn's breach was compounded by his long service, which was accordingly held to weigh against him for the purpose of sanction as an aggravating circumstance. Her approach does not accord with our law. When it comes to sanction, long service can never as such leave an employee worse off than one who has been in service for a short time. See in this regard item 3(5) of the Code of Good Practice which plainly contemplates that long service should be taken into account as an element of mitigation:

> "*When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.*"

For recent statements that long service is indeed a mitigating factor see the SCA's judgment in *Sidumo* at para [51] read with para [28] and, again, para [117] of the Constitutional Court's judgment in *Sidumo*. At the same

time, both judgments also make it clear that long service is but one of the factors to be considered when determining sanction.

33. A further and closely related fact in favour of Mr Henn is that he preserved a clean disciplinary record throughout his 22 years of service. Although a value judgment must eventually be based on a holistic appraisal of all factors, this is a case in which a primary comparison can helpfully be drawn between the length of service and clean record, on the one hand, and the circumstances of the offence and lack of remorse amounting to defiance, on the other. The lens through which the product of this comparison is to be observed is that of the Municipality's operational requirements. When that is done it becomes clear that the capacity of the Municipality to continue its employment of Mr Henn is eroded as his defiance is prolonged from one week to the next. By the same token, the force of his past record incrementally diminishes as he protracts his display of the face not of a loyal and long-serving manager but that of an implacable and challenging employee. In my judgment, the result of this balancing exercise is that it would be incorrect to hold that the dismissal was unfair and to require the Municipality to restore Mr Henn to a position in which he has wittingly compromised a core value and has set himself uncompromisingly against any course of reparation. There has either been no recognition by him of wrongdoing on his part or a stubborn refusal to say as much to his employer. Either way, he cannot now as a matter of fairness insist that he is to be placed back in his post.

34. A similar result follows in relation to progressive discipline, which has been broadly described in item 3(2) of the Code of Good Practice: Dismissal (Schedule 8 to the LRA):

> "*The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings.*"

35. For the third respondent, Ms Hartzenberg referred to the applicable Collective Agreement on Disciplinary Procedure and drew attention to its express incorporation of progressive discipline. Paragraph 2 of the section dealing with sanction states *inter alia*:

> "*In accordance with the Disciplinary Policy, any sanction that is imposed for misconduct will be intended to deter future repetition of that behaviour. The sanction imposed must be based on the seriousness of the offence and considering the employee's disciplinary record;*
> *The imposition of discipline is progressive ... except in cases of misconduct which would constitute grounds for immediate dismissal...* "

36. As is clear from the Code, progressive discipline is premised on a corrective purpose and outcome. If no correction is likely to be obtained or if the employment relationship is in any event irretrievably broken down, the scope for graduated discipline will likewise fall away. The facts of a particular case will indicate whether or not it should be applied. See for instance the *Sidumo* decision in the Constitutional Court (*supra*) at para [21]:

> "*The commissioner took the view that the concept of progressive discipline, endorsed by the Labour Court, was applicable. In terms of this concept employee behaviour is to be corrected through a system of graduated disciplinary measures, such as counselling and warning. The commissioner considered Mr Sidumo's service record in his favour. He concluded that dismissal was too harsh a sanction and motivated it as follows: There had been no losses suffered by the mine; the violation had been unintentional or had been a 'mistake'; and Mr Sidumo had not been dishonest. Before making his award the commissioner stated that he did not consider the offence committed by Mr Sidumo to 'go into the heart of the relationship [with the employer], which is trust'.*"

37. Mr Henn's position is different. He did not act unintentionally or mistakenly. Even if he had, there has been opportunity enough for him to correct what he has done. For the reasons outlined above, it is my view that instead of seizing such opportunity he has elected to hold himself on a confrontational course. There can be very little room for the notion of corrective discipline in this situation. Where an employee refuses to

demonstrate any acceptance of wrongdoing, indicates no degree whatsoever of remorse, makes no move to correct what he has done, and stands firm with an attitude of opposition towards his employer, then such employee through his own conduct undercuts the applicability of corrective or progressive discipline. In this case the employer concluded that the point had been reached where the employment of Mr Henn could not be continued. I see no good ground for declaring that it was unfair of it to do so. Although the LAC was dealing with a dismissal for poor performance, there are some evident parallels between the position of Mr Henn and those before that Court in *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC) at 866C-867B:

> "*An employer who is concerned about the poor performance of an employee is normally required to appraise the employee's work performance; to warn the employee that if his work performance does not improve, he might be dismissed; and to allow the employee a reasonable opportunity to improve his performance .... Those requirements may not apply in two cases which are relevant to this matter. The first is the manager or senior employee whose knowledge and experience qualify him to judge for himself whether he is meeting the standards set by the employer....*
>
> *The appellant did not satisfy the requirements of the appraisal, warning and opportunity to improve, which would apply in the case of an ordinary employee. But the respondent was not an ordinary employee. He had occupied a managerial position since 1990. ....*
>
> *The respondent deserves one's sympathy. He had advanced from being a farm labourer to a farm manager. He had over twenty years' service with the appellant. He had a clean disciplinary record. ....*
>
> *At the end of the day, one's sympathy for the respondent must give way to the cumulative effect of the circumstances outlined above, in particular that the respondent occupied a responsible position; he was aware of the potential consequences to the appellant and its customers if the vaccination program was not adhered to; he kept his superiors in the dark about his failure to adhere to the vaccination program; and he did not provide acceptable explanations for his poor work performance.*
>
> *The appellant had a valid reason for dismissing the respondent.*"

38. At a general level, Ms Hartzenberg submitted that the Municipality had not shown that the employment relationship had become intolerable. I do not agree. In the first place, the facts are strongly self-demonstrative. In the second place, it must be borne in mind that the employer in this

instance is a statutory body operating within a definite statutory environment in order to achieve an important set of statutory objectives. In the third place, and in any event, both Mr Venter and Mr Fisher gave explicit evidence on this issue. The former stated that a finding of guilt would impact negatively on his relationship with Mr Henn and that he would thereafter not be able to trust him. He explained that trust was important and that Mr Henn's post as Head of Health Services was a senior one. It was important that what he said could be relied upon and that he would properly deal with claims and the like. As Mr Fisher put it, for an employee to receive undue money and not to repay it was unlawful and dishonest.

39. Ms Hartzenberg placed some reliance on the fact that Mr Henn had written to the Municipality on 14 March 2007 and referred in the letter to the payment he had received for February. This does not take the case for Mr Henn very far, for the reasons outlined in this judgment. In any event, his position is if anything worse than that of the senior employee in *Tibbett & Britten (South Africa) (Pty) Ltd v Marks & others* [2005] 7 BLLR 717 (LC) who had made use of a company credit card for personal purchases. Revelas J upheld her dismissal notwithstanding that she had reported the use of the card and asked how the money could be repaid.

40. Various further submissions were made, being that: trust had not been destroyed; the Municipality should have applied its policy of negotiating repayment terms; the Municipality was itself responsible for the payments to Mr Henn; and the employee had long service and a clean record. On this basis Ms Hartzenberg contended that the dismissal should be set aside and that I should substitute it with a final written warning and an order that Mr Henn repay the amount of R7,000.

41. I have dealt with these submissions in the course of this judgment and am not of the view that any of them has been established in favour of Mr Henn nor, in particular, that a proper case has been made out for me to conclude that the dismissal of Mr Henn was unfair. In evaluating the

totality of the circumstances I do not lose sight of the grave impact that a loss of employment will be likely to have on Mr Henn. At the same time, I must place in the scale of fairness the fact that the capacity to avoid this effectively lay in his own hands for at least two months. I must then look also to the impact of Mr Henn's obstinacy on the Municipality and its operational milieu and the consequence for it of an order reinstating Mr Henn.

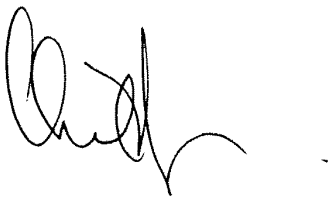
42. Ultimately, the issues before me resolve into this crisp question: is it my conclusion that the Municipality has shown that its decision to dismiss Mr Henn was fair? It is. Accordingly, that decision must stand.

43. This is not a case in which considerations of fairness and equity require that an order of costs need follow the result.

44. I make the following order:

1 The applicant's decision of 2 October 2007 to dismiss Mr A J D Henn is upheld.

2 There is no order as to costs.



K S TIP
ACTING JUDGE OF THE LABOUR COURT

DATE OF JUDGMENT:	14 MAY 2010
FOR APPLICANT:	ADV C S KAHANOVITZ SC instructed by Herold Gie Attorneys
FOR THIRD RESPONDENT:	MS E HARTZENBERG of IMATU