



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

C459/2020

In the matter between:

SANLAM LIFE INSURANCE

and

ANDRE RHEEDER

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

COMMISSIONER MADELEINE LOYSON N.O.

Second Respondent
Third Respondent

First Respondent

Applicant

Date heard: June 1 2022

Delivered: September 12 2022

Summary: Opposed review of an arbitration Award; Commissioner abrogating expert knowledge of the industry concerned to herself, and assessing the credibility of the witnesses before her in an irrational manner; Arbitration conducted in a misconceived manner resulting in no fair trial of the issues. Award reviewed and set aside and dispute remitted for re-hearing.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case number WECT 17095-19. In terms of the award, the third respondent (the Commissioner) found that the dismissal of the first respondent (Rheede) was

substantively unfair and that he should be reinstated into his position as head of Sanlam properties division with limited back pay, equivalent to four months of his remuneration. A cross-review was also brought by Rheede, in which he seeks that the award should be reviewed to the extent that his reinstatement should not be with limited back-pay, but with all salaries and benefits to which he would be entitled but for his unfair dismissal.

- [2] Rheede was employed by the applicant (Sanlam) on the 1 September 1989 and in 2015 was appointed to the position as the Chief Executive Officer of Sanlam Properties (a part of the Sanlam Investment group). He held this position at the time of his dismissal on 5 August 2019. In her award, the Commissioner deals with the charges leading to his dismissal in the following way:

“5. On 16 April 2019 he was charged with three broad allegations of misconduct (each with numerous individual sub-charges), basically, as follows:

5.1 “... you failed and/or refused to avoid/properly address or remove yourself from a conflict of interest and/or breached the trust relationship and/or misused/abused your position and/or willfully or negligently engaged in conduct which could have damaged the reputation of the company and/or failed to act in terms of your duties towards the company or in the best interest of the company.” (This charge concerned the purchase of wood from a contractor on a development site.)

5.2 “... as a senior manager you are alleged to have displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded your employer’s governance structures and/or were disrespectful towards or undermined the authority of your line manager, Mr M Shanmugam.” (This charge was elaborated upon by means of reference to seven incidents to support it. An additional incident was also cross-referenced in the third main charge below and will be dealt with in respect of that charge.)

5.3 “... refused to comply with your transformation obligations/duties after having been directed to embrace/advance the transformation

initiatives of Sanlam when you failed to foster practices that created an inclusive culture by the continued use of Afrikaans in the department, leaving the diversity and inclusion workshop without an acceptable excuse and by excluding, by-passing or side-lining your superior (Mr Shanmugam) as a person of colour..." (This charge was informed by three separate incidents.)"

[3]

It is submitted by Sanlam that the Commissioner's Award (some 54 pages long) is reviewable on the grounds that it reflects gross irregularities and/or legal errors on the part of the Commissioner; that she misconducted herself in the performance of her duties as an arbitrator; and/or that she exceeded her powers; and that, as a consequence, she reached a decision that no reasonable decision-maker could have reached and denied Sanlam a fair hearing.

[4]

The Commissioner refers to the actual charges against Rheede as 'legal gobbledegook'. However, their full extent was contained in a pre-arbitration minute signed by the parties and bear recording for the purposes of this judgment:

"Allegation 1:

Allegation 1 relates to Mr Rheeder, as the Head of Sanlam Properties, taking for his own benefit an opportunity which belonged to Sanlam, by purchasing Oregon Pine wood from the contractor responsible for a Sanlam Properties development. The allegation was set out as follows in the notice to attend a disciplinary enquiry:

1. As the Head of Sanlam Properties you failed and/or refused to avoid/properly address or remove yourself from a conflict of interest and/or breached the trust relationship and/or misused/abused your position and/or willfully or negligently engaged in conduct which could have damaged the reputation of the Company and/or failed to act in terms of your duties towards the Company or in the best interest of the Company, when you visited a development site on 13 July 2018 and ultimately purchased wood from the developer for your own use in circumstances where:

- 1.1. you would not have known about the transaction if you had not visited the site for work purposes; and/or
- 1.2. you purchased the wood without prior express permission from your line manager, Mervyn Shanmugam (Mr Shanmugam); and/or
- 1.3. you did not ascertain whether the Company wanted to purchase the wood before securing it for yourself; and/or

- 1.4. *it was inappropriate and/or unprofessional for you to ask the developer if you could purchase the wood for your personal benefit as the developer could have felt that he could not refuse given your position as the Head of Sanlam Properties; and/or*
- 1.5. *the wood was stored by the developer on your behalf from about September 2018 till about February 2019 at no cost; and/or*
- 1.6. *you knew or should have known that you were conflicted in the above transaction.*

Allegation 2:

Allegation 2 relates to nine separate instances in which Mr Rheeder as a senior manager is alleged to have displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam.

Allegation 2.1

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by telling Mr Shanmugam that he would not be able to get onto Propco as it already had very good people.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.1.1 *Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:*

2.1.2 *Informed him during one of your first meetings with him that he would not be able to get onto the Sanlam Propco as it already had very good people.*

Allegation 2.2

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, on various occasions, including his response to an email in which Mr Shanmugam communicated the need to strengthen the governance structure of the Alternatives business.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.2.2 *Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:*

2.2.3 *In response to his congratulatory email relating to the raising of R700 million in alternatives for Alexander Forbes, you sent an email to him on 12 July 2018 stating that "I want us to spend a long session and focus on corporate governance for Sanlam Properties in particular. If we understand how we are currently functioning and identify any issues that needs to be addressed then I am willing to change the process immediately to improve. If we cannot justify change based on improvement then there is no reason to change. The introduction of a new corporate governance process that is going to impact on my ability to manage my funds will be difficult to agree to".*

Allegation 2.3

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, in his conduct in respect of a residential development in Nelspruit in August 2018.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.3.1 *Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:*

2.3.2 *In relation to the residential development in Nelspruit, sent an email directly to Robert Roux on 28 August 2018 referring to your discussion with him and asking him whether you could set up a meeting to discuss your proposed transaction with the parties copied in your email. Mr Shanmugam, who had asked you for a proposal, was merely one of the people copied in your email.*

Allegation 2.4

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by excluding Mr Shanmugam from an email sent to Mr Roux on 28 August 2018.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.4.1 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:

2.4.2 In relation to the Sanlam Properties memorandum of understanding with Sanlam Life, sent an email to Robert Roux on 28 August 2018 attaching the memorandum of understanding with Sanlam Life, but excluded Mr Shanmugam from this email.

Allegation 2.5

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by excluding Mr Shanmugam from an email sent to Sana-Ullah Bray on 29 August 2018.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.5.1 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:

2.5.2 In relation to the Braampark Building Lease sent an email to Sana-Ullah Bray on 29 August 2018 copying in Robert Roux, but excluded Mr Shanmugam from this email.

Allegation 2.6

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by including Mr Naidoo and Mr Roux in an email which he sent to Mr Shanmugam in respect of the wood transaction detailed in Allegation 1.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.6.1 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance

structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:

2.6.2 In relation to the wood transaction, again failed to engage with Mr Shanmugam directly. In this regard on 13 March 2019 he sent you an email informing you that “a good example of this unacceptable conduct is your email below. It is unnecessary to involve Nersan, and Robert, in this detail, and it is an attempt to by-pass or side-step me. I will explore the possible other reasons for this when we engage over this in the disciplinary meeting, as I have told you on numerous occasions to stop doing this, yet you ignore this time and time again. You not only undermine me and show disrespect to my authority as your senior, but you make it uncomfortable for Nersan and Robert, who have had to forward your emails to me when you have failed to inform me or engage with me yourself. This reflects poorly on you.”

Allegation 2.7

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by questioning an instruction of Mr Shanmugam in relation to a development in Newlands.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.7.1 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:

2.7.2 In relation to the potential Newlands Development, responded to an email from Mr Shanmugam on 12 December 2018 stating that “The instruction in your email not to enter into any agreement with the seller prior to the approval of the proposal to PROPCO is inherently contradictory. It is expected of me to agree to the terms of the transaction prior to submitting the proposal to PROPCO. This transaction, should the proposal be approved, will be funded entirely by Sanlam Estate; no third-party investor will participate in the development. I have discussed this transaction with Neil van Rensburg (Neil is the chairman of PROPCO and represent the interest of Sanlam Estate on PROPCO). Neil has reiterated that Sanlam Properties must adhere to the Sanlam Properties approval framework and are comfortable to follow the current decision-making process. In light of this we urgently need to resolve the impasse created by your instruction

not to enter into agreement with the seller prior to the approval of PROPCO”.

Allegation 2.8

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by continuing to use an email signature referring to himself as the CEO of Sanlam Properties after his title had changed, and by responding to an email from Mr Shanmugam instructing him to change his email signature by close of business the same day, in an email after close of business which still contained the same email signature.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.8.1 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:

2.8.2 Continued to use the email signature referring to yourself as the CEO of Sanlam Properties after it was agreed that your title had changed. This was raised with you in an email from Mr Shanmugam on 4 March 2019 where he instructed you to change your email signature by close of business and to explain why you were still using your old title. You responded after close of business, still using the old signature and indicating that you had forgotten to change the signature on Outlook.

Allegation 2.9

It is alleged that Mr Rheeder as a senior manager displayed discriminatory conduct on the basis of race and/or was grossly insubordinate and/or was grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded his employer's governance structures and/or was disrespectful towards or undermined the authority of his line manager, Mr Shanmugam, by failing to follow the proper channels in respect of a potential property portfolio.

The allegation was set out as follows in the notice to attend a disciplinary enquiry:

2.9.1 Notwithstanding your position as a senior manager of the Company, you displayed discriminatory conduct on the basis of race and/or were grossly insubordinate and/or were grossly insolent and/or failed to follow reasonable and lawful instructions and/or disregarded the Company's governance structures and/or were disrespectful towards or undermined the authority of Mr Shanmugam, as your line manager, on various occasions when you for example:

2.9.2 Failed to adhere to the agreement that all funds would go through Todd as the head of Alternatives resulting in SMMI complaining that you presented them with incomplete information in respect of a potential property portfolio you wanted them to invest in. In this regard Mr Shanmugam emailed you on 4 April 2019 to confirm that "[w]e have structured ourselves so that Todd coordinates all the client facing activities for us. We had an agreement that all of our funds will go through Todd as head of our Alternatives distribution. I have communicated this to you and all of our funds on numerous occasions. Please will you follow this agreed process going forward for both internal and external clients."

The Arbitration Award

[5] As noted above, the Award is very lengthy and records the evidence given by the witnesses in detail. In the Court's view, it is the treatment of the evidence by the Commissioner, as well as what may be usefully described as her insights, that deserve particular scrutiny. Before she begins her analysis of the evidence she has heard, the Commissioner makes the following observations:

"105. Prior to commencing with an analysis of the evidence tendered by the witnesses, it is important that cognizance be taken of the context within which the dispute arose – a context quite out of the ordinary and entirely different to that of an average employee in a workplace, even at managerial level. The main players (Roux, Shanmugam and the applicant) were each appointed into positions of extreme responsibility, status and power, in one of the most high-profile and successful companies on the JSE. They are ultimately accountable, in their division, for a total portfolio running into hundreds of billions of Rands, which demands of them possession and application of unique skills and experience in a highly competitive investment environment, fraught with challenges and unrelenting pressure. This kind of work environment indeed calls for extraordinary leadership, dedication, commitment and decisive decision making ability when needed. Interaction at that level, between such role players would of necessity require a mature and keen insight into each other's strengths and weaknesses. Critically, as a top management team, there would have to be an appreciation and respect for the strengths of each individual member of that team. Each member would have to appreciate and understand that they were appointed precisely because of those individual and

extraordinary strengths, abilities and characteristics (some desirable and some maybe less desirable in some circumstances) – in complementary relationship to one another, to achieve the ultimate goals of the organization. This requires sensitivity, sincerity, strength of character and an undaunted determination to operate effectively as a team. Holding positions of such seniority requires of them to know and understand one another intimately, to be able to communicate frankly and appropriately, to be able to “talk tough” when situations require it and to stand up to and deal decisively with situations where perceived difficulties or threats in any shape or form are confronted. There is no place in a top management structure for indecisiveness, weak leadership or fear of confrontation.”

- [6] The content of the above rings more ‘industrial psychologist or expert witness’, than Commissioner. Nevertheless, the above statement does appear to construct the prism through which the evidence of the witnesses is treated. For example, the Commissioner analyses the evidence given by the CEO of Sanlam Investments Group inter alia, as follows:

“108. **The first witness of the respondent was Roux**, the CEO of Sanlam Investments Group. Roux was a complex witness in the sense that the manner in which he explained the significance of the reporting structure and how reporting had to be effected, appeared contrived and over-exaggerated for effect. His version that Shanmugam was “the most important person” in the reporting line of the applicant is indeed strange. Yes, Shanmugam was his “first-line” supervisor, but I cannot accept that he was “the most important”. In his own words, the applicant was firstly “accountable” to Shanmugam. I accept entirely that Shanmugam had to be consulted and informed on important matters, decisions and proposals that he might be unaware of and which have direct implications and a bearing on him and in respect of which he, in his position, would be asked to account about. Roux’s statement that Shanmugam had to be copied, consulted and acknowledged on “everything” simply cannot hold water at that level in that specific organization. It is not a corner shop. Shanmugam could indeed hold him ultimately responsible for his, the applicant’s actions – but it does not mean that the applicant was a robot who simply had to mechanistically and indiscriminately copy his each and every e-

mail to Shanmugam. That would reduce him to nothing more than a clerk without any independent ability, lee-way or power. It is unthinkable that in a world where a man is the CEO of a high-performance business division, he should copy each and every mail to his superior, who himself has six business units to run, or to consult with him on an issue or at every step in the process of conducting his projects, responsibilities or tasks. He is a CEO precisely for his ability to exercise his discretion appropriately and to do what is necessary as and when it is necessary – to “run” the business he was appointed to run. Prior to Shanmugam’s arrival and based on the applicant’s unblemished performance track record, it must and can be accepted that he had in the past done exactly what was expected of him in being accountable to his superiors in an appropriate and acceptable manner and the manner in which he took decisions and executed the mandate of his division. Indiscriminate copying of e-mails to extremely busy and pressurized superiors at that level would amount to imposing information overload on those who routinely have personal assistants to shield them from exactly that which does not absolutely require their attention at a specific moment in time or which does not resort to their specific portfolio. Surely, if it was expected that each and every e-mail be copied to the superior in the event that someone might at a later stage be asked a question about it, of itself implies that it is expected that superior would be under an obligation to read it. That is simply an untenable expectation. As was demonstrated in evidence, Shanmugam did not in fact read even everything copied to him – even extremely and fundamentally important information such as the MOU. Furthermore, to expect an individual to be copied on e-mails containing information he was already in possession of or privy to by means of not one, but various, platforms (such as is the case with PROPCO information and decisions) is simply inexplicable.

109. The (unintended) picture emerging of Roux in the context of that evidence was of a military general ensuring that those in his “chain of command” (his own choice of words) strictly adhered to a routine copying of e-mails up that chain almost indiscriminately, about “whatever one does”, *was not flattering*. I accept that a superior has to be “kept in the loop”, but I do not think that could ever mean copying people indiscriminately or “consulting” and

“informing” other than on a “need to know” basis – *it simply is not prevailing business practice as Roux seems to suggest*. I also accept that two senior executives cannot arrive at a meeting at odds with one another or not fully prepared to deal with issues that may arise. Nevertheless, a superior cannot put the blame for being uninformed in respect of issues he should in the normal course of events be aware of. *He cannot expect of his subordinate to spoon-feed him.*” (My emphasis)

110. ...Roux had never mentioned to anyone that he was unhappy with that aspect of the applicant’s work or that the applicant had in any way changed his style or system of keeping people, especially Roux, informed. I am of the view that the specific e-mails and incidents complained of were “dug up” during March 2019 when the charge sheet was being drawn up and evidence to substantiate Shanmugam’s claims were being sought. It is the only reasonable inference to draw from the sudden displeasure at the way in which the applicant carried out these aspects of his work.

111. In respect of his evidence about the wood saga, I entirely accept Roux’s explanations and reasoning in respect of the nature of the business, the fact that assets of clients are being dealt with and that responsible conduct was of paramount importance. I also accept that whenever even a potential conflict of interest might arise, one would err on the side of caution and immediately seek advice and guidance from one’s superior. That goes without saying. *Once again, however, in accordance with what appears to be a very rigid and unyielding approach, almost militaristic in nature, Roux appears to recognize no grey areas. He accepts and expects only rigid, inflexible almost robotic adherence to basic principles without being willing to acknowledge that not everything can be put in a neat box.* Working largely with “money” or balance sheets requires that type of rigidity and in the financial world indeed expects that approach and extent of control over money and assets. In this case, the subject matter was scrap wood with no market value – not the normal type of situation of “conflict of interest” which could be expected to arise in the context of an investment organization. His confident evidence around what should have been done at the time the issue arose was clearly in hindsight. He conceded, however, that even he had never encountered such a situation before, but

insisted that the principles governing work with clients' assets were applicable and would not be swayed. He also dispelled any notion that the reaction of those senior persons who the applicant indeed informed about his intentions and their responses, had any impact on what the applicant subsequently did or did not do – again a reflection of an unyielding, rigid inflexibility. I have no doubt that it was exaggerated for purposes of justifying the applicant's dismissal. His view that "No rule was required – it was simple" was simply not the response from each and every person the applicant had spoken to about the matter prior to the charges being formulated by Shanmugam. His view that there could have been a perception that he was acting irregularly was not the view adopted either by those the applicant spoke with at the time – very senior persons themselves, albeit not in the direct reporting line of the applicant – nor even Shanmugam. The latter only formulated an opinion once legal counsel had been consulted. I reject Roux's version that the issue was simple and straightforward and self-evidently a conflict of interest.

113. I concur that the curt and critical tone amounting to an almost scathing response from the applicant to Shanmugam's congratulatory e-mail was inappropriate; however, *I do not believe the actual content is such that it is entirely unacceptable and justification for any form of discipline. The letter is an example of robust, straightforward criticism (perhaps inappropriately, especially given the fact that Shanmugam had only been there for two weeks). All that it wished to convey between the lines was that the applicant was extremely proud of his division, did not simply want change for the sake of change, especially where proven systems were in place, and that he had a genuine sensitivity and concern about too much publicity around "strengthening" corporate governance (implying something is not strong) as opposed to "strengthening an already strong system" to an even greater degree.* The applicant's use of the term "my" department as opposed to "the" department, as I interpret it, is purely his way of expressing his own commitment and dedication to "his" task and the pride that he takes in being associated and at the head of it. I have sympathy too, for a possible impression that Shanmugam had only been in the position for two weeks and therefore would not really have been in a position to evaluate adherence to or weaknesses in the corporate governance of the Property

Division. From the applicant's e-mail, which was clearly a knee-jerk response (drafted two hours after receiving Shanmugam's e-mail) it was apparent that "improvements and further" strengthening was addressed elsewhere as well. He therefore understandably felt as if his division was under a microscope and assumed to be not functioning "optimally" in respect of governance structures – something he was not happy about, given his personal pride in his division and its work. Unlike Roux's displeasure at the letter, Shanmugam took no offence, probably saw the mail for what it was worth and what had informed it – hence his measured response.

115. Roux's expressed and purported requirement of strict adherence to reporting lines in respect of communication did not, it appears apply to him. He criticised the applicant for going over the head Shanmugam in respect of the Nelspruit proposal, but had himself by-passed Shanmugam when he initially asked the applicant for a proposal, without involving Shanmugam at that point.

116. In respect of the MOU he had himself copied to Shanmugam, his accompanying e-mail on doing that simply stated "just in case you are not in the loop". It expressed no concern about Shanmugam's having been "by-passed" and certainly did not recommend that Shanmugam take issue with it. His view that one should copy, at least out of courtesy, is not appropriate. At that level, executives do not want to receive mail upon mail. They would regard it as a nuisance and simply anything but courteous. His comment: "I tell my boss what I do" speaks volumes. In addition, his constant repetition of the fact that "it was not the first time" begs the question as to why he did not challenge Shanmugam on his apparent inaction or did not address the applicant himself, as Shanmugam indicated he thought he would do.

117. In respect of the building tender and lease, I find it incomprehensible that Roux would not have understood why Shanmugam was not copied in it. It related to a simple FICA requirement – documents had to be signed and submitted. The only reason even he was copied on it was because he, and only he, would be at a meeting that day where the request for finalization of the FICA documentation would be discussed. There was absolutely no need whatsoever to have copied Shanmugam. There is no need either, for anyone asked to provide FICA documents, to want to discuss it with him at all. Once again, no

intelligent, independent thinking was brought to bear on the actual content of the e-mail. Simply because Shanmugam's name did not appear on it, it was seized upon. Under cross-examination, however, he conceded that he himself forwarded the e-mail to Shanmugam because he "assumed" he was not in the loop."

[7] As submitted by Mr Conradie for the applicant, it is apparent that the Commissioner saw it as her function to pronounce on 'prevailing business practice' which she found to be at odds with the testimony of the CEO of Sanlam Investments. In so doing, she was exceeding her powers, it was argued.

[8] The applicant further submits that the way in which the Commissioner treats the evidence of the witnesses is not consistent with that of a reasonable decision maker. Indeed, I note that the Commissioner's treatment of the evidence before her is a mélange of such pronouncements on business practice and an unorthodox approach to assessing the credibility and demeanor of witnesses, which appears to be at times by means of 'mind reading'. The treatment of the evidence of Mr Neesen Naidoo (Naidoo) is relevant. The Award reads:

"120. ...Most importantly, he had been the applicant's superior. He knew him well and had successfully managed him in the past, without complaint from either party. His approach was clearly one of robust, open discussion, regular interaction and from a basis of information sharing. He was careful in highlighting that important issues for him (and aptly so) were information related to decisions in respect of anything which could impact on generation of income and expenditure, contributions to group return for shareholders or any form of risk. *He seemed to be saying* that he did not require that "everything" be shared with him – only those issues of importance he highlighted.... (my emphasis)

122. Once again, I do not think that Naidoo felt the same as Roux or Shanmugam about the appropriateness of the e-mail in which the applicant sets out his version of the wood purchase. He said that "at some stage" it would have been necessary to do what he did and that he should "probably" have discussed it with Shanmugam first. His response suggested that he did not agree that it had been entirely wrong, inappropriate or indicative of an attempt

to undermine Shanmugam. *There appeared to be much that Naidoo was wanting to say, but left unsaid. He clearly had much understanding and empathy for the position the applicant found himself in, expressed more by what he did not say as opposed to what he did say. His entire demeanour during the process spoke of an underlying reluctance to exaggerate his responses for mere effect.*" (emphasis mine)

- [9] Needless to say the powers of an Arbitrator do not extend to mind reading. What Naidoo actually had to say in examination in chief is recorded in the transcribed record. He explicitly explained in his testimony that when he was Shanmugan's superior, the new governance structure and reporting line had not yet been established. It was only established in 2016 or early 2017 under Shanmugan's predecessor, Mr Ben Kodisang (Kodisang). In addition, his testimony includes the following.

9.1 *On the question of what he expected from Rheede when he was directly in Rheede's reporting line:*

"That I am fully up to speed with any and all matter relating to the business and that you know, I have a generally holistic understanding of any of the risks or impacts that might affect the outcomes of the business and might, from an overall Santam Investments perspectives I think have either material or positive or negative effects on the business. So I expect to use my own judgment in determining what is relevant or not."

9.2 *On any proposal that Rheede might make to Propco, or Elco, what his expectation was in terms of reporting:*

"Just to be aware of them, to know what is going on in the business so that I may make a decision or rather take my own view on whether or not there are material impacts on the business."

9.3 *On what kind of autonomy Rheede would have to take decisions and make proposals without reporting in the Sanlam Investment Group reporting line:*

"So we took a decision to include Sanlam properties quite explicitly as part of Sanlam Investments, on the expectation and the reality ultimately that we would get third party clients into the portfolio as well, into the

business, as part of the client make-up and from a business perspective it was an active decisions to say, that was a client segment that we want to target, we want to pursue third party clients, we want to get clients other than Sanlam as investors in our direct property portfolio again, because that is a decision from a business perspective that we thought would help us to grow the business.”

It was as a result of that decision that Sanlam Properties became a very clear part of Sanlam investments and therefore, you know, once we had made that decision there, there was really no mandate for Sanlam Properties to operate outside of the Sanlam Investments Business structure.”

- 9.5 *On the evidence that Rheeder made the arrangement to acquire the wood in July 2018 and informed Mr Shanmugam that he had arranged to take the wood off the site on the 12 October 2018:*

“I don’t think it was the appropriate way to deal with it. Way to deal with it would have been to flag with Mervyn, Mr. Shanmugam that there was the opportunity to acquire the wood of the site, to fully agree on the details and align effectively, or on behalf of Sanlam to effectively take a view, a holistic view as to whether it was appropriate for that wood to be taken or not.”

- 9.6 *On what was the importance or effect of an incident like this:*

“It can set a precedent of how these things are dealt with, and you know how that may be looked at in the future. There may have been other opportunities for the wood to be used within the Sanlam Group had the discussion been broached.

You know, from a business perspective we operate in a third-party client environment, you know, where things like community Development are very high up on the agenda. If Mervyn for instance had decided that there was better opportunity to use the wood in a community development project and I am using this simply as an example, you know that may have been a more appropriate use of the wood and that could have been discussed or engaged Andre on the matter at the time but since the

opportunity wasn't presented, it doesn't open the door for the conversations to be had and for those decisions to be taken.

Specifically, what was in the best interest of the business at the time".

- 9.8 *On the proposition being put to him that Mr Shanmugam would give evidence that very early in his tenure he had a meeting with Rheeder in which he suggested that there should be people of colour on Propco because developing third party business was very important at this time and structures had to be seen to be transforming.....:*

"I think it goes back to the point that we discussed earlier, we made quite an explicit decision to include Sanlam Properties as part of the overall Sanlam investments business because we wanted to deliberately grow a third-party client base. I think we all should be aware that from a third-party client-base there is a general imperative, you know, for more diverse and inclusive representation in decision making committees for a number of reasons. I think that third-party clients are very aware of the benefits of a diverse committee, both you know from a race and gender and work experience perspective. It just changes the dynamic and strengthens decision making in committees and that is a general observation more than something specific just to Sanlam Properties, it would apply everywhere....."

- 9.8 *On what his expectation of Rheede would be if he had been Rheede's line manager in respect of a document highlighting changes to the MOU between Sanlam Life and Sanlam Properties:*

"To discuss the changes with me so that I may take a view whether or not they make sense for the business, whether or not they challenge or pose any risks for what we are doing from a business perspective. And certainly to discuss them with me before discussing them with Mr Roux."

- [10] The above evidence set out why, as Naidoo put it, it was regarded as imperative for Sanlam Properties to be brought under Sanlam Investments, so that transformation of the property portfolio could take place. There was thus no mandate for Sanlam Properties to operate independently. The introduction to the Commissioner's analysis of the evidence before her (quoted in paragraph

six above), which contains her opinions on how a business of the nature of the applicant should conduct its affairs, does not reflect that she took this evidence by Naidoo into account. The structural and governance changes were made in the context of diversifying and transforming Sanlam's property portfolio. Naidoo saliently explained why Rheede should have consulted with Shanmugan over the wood removal and the changes to the MOU. He would have expected this accountability in Shanmugan's position.

- [11] The Commissioner's assessment of Mr Shanmugan's testimony also bears recording, as it brings into further relief her method of assessing the credibility of the witnesses before her, and her opinions on how the business should be managed. Her analysis of his evidence and of him as a witness is as follows:

"126. The third witness was Shanmugam. He was a poor witness in a number of respects. He is a well-spoken gentleman who speaks in a very gentle and kindly manner. It is difficult to imagine that he works within an environment such as that of the respondent, as he simply seems too considerate, kind and gentle – unlike Roux and the applicant. His evidence and his approach to the applicant of being one that sought "to win him over", "to help him", "to give him time", "would not push him too hard", "would build on it", supports the view that *he is an individual who refrains from dealing immediately and decisively with competitive, controlling behaviour, confrontation and even aggression (sometimes desirable character traits in certain circumstances, especially at very senior levels)*. When confronted with it, he retreats and quietly reflects, as opposed to countering appropriately and timeously. His evidence was that the relationship with the applicant, from his point of view, was fraught from the start. *It is my finding much of the blame, if not all, lies at his doorstep*. He must have known from the very first meeting, that the applicant required "toning down" and, in fact, censuring for his remarks at the introductory meeting. Instead of confronting him and dealing with the unsavory comment, he simply left it unchecked. After the e-mail two weeks later about corporate governance, the indicators were flashing that the applicant required to be "brought into line". He should immediately have been taken to task, briefed about exactly who was in charge, what his requirements were and how decisions would be arrived at going forward. It is inconceivable, and there is no evidence to prove otherwise,

that at any stage there was a meeting between the applicant and Shanmugam, to focus on their new reporting relationship and what their expectations and requirements of each other were. In the absence of such actions, the applicant cannot be blamed for continuing to do what he always did and how he did it. The applicant could not react or be expected to do anything differently if he were not aware of what was required of him from Shanmugam. There simply is no credible evidence that he was indeed so aware. This pattern of avoidance of any form of confrontation with the applicant permeated the entire relationship until the e-mail on 6 March 2019, indicating the intention to take action against him for the very first time.

128. In respect of the Nelspruit development, this was again a situation where he had done nothing about it in any way shape or form or even reflected in the tone of the e-mails that he was unhappy. In respect of the MOU issue, his evidence was entirely unsatisfactory and even contradictory. Most disconcerting was his expectation and desire that Roux address the issue with the applicant, not him. That in itself speaks book volumes. It is an admission that, as the applicant's manager, he was unable to confront him about a silly thing such as being copied in an e-mail. His complaints about not being kept in the loop about PROPCO issues were also, in my view, unfounded. He sat on PROPCO and received all the related documentation. He was indeed "in the loop". He seemed also to want to say that because he was newly appointed, it was at that time, more imperative that he be kept informed. In my view, as a new employee, it cannot simply be expected that one can be spoon-fed, but that one should actively engage with others to make oneself familiar with matters which will impact on one – especially such an important document as the MOU. He indeed had a copy of that already and should at a bare minimum have read it himself.

134. Shanmugam testified that the relationship of trust had broken down and the applicant showed no remorse. I cannot accept that. As at 6 March 2019, he indeed did not envisage dismissal of the applicant nor any changes to anything else than the wood, insubordination and insolence. It is clear that something happened in the intervening period to result in that final charge sheet and a claim that dismissal and a breach of trust had suddenly become paramount.

135. In respect of the claim of racism, it is far-fetched. At no stage was there any evidence that there had been an incident where, but for his race, the applicant had treated him differently in a manner that impacted on his human dignity with serious consequences. The fact that the thought of possible racist motivation behind the applicant's "good people" remark and failure to copy him on e-mails and, in accordance with his expectations, did not consult with him, arose belatedly in a search for "possible" reasons. He had to think at length before the possibility occurred to him. This belated realisation, countered by evidence that there was no racism ever experienced by Naidoo and persons of other races, was certainly unfounded and a very unfair, extremely serious allegation to have made. People who have been exposed to racist conduct, as so eloquently expressed by Sebastian, an African female, know and identify it immediately when it occurs – not months after the fact. I therefore reject this spurious allegation and deem it as mere clutching at straws."

[12] The Commissioner's finding that Shanmugan was a poor witness and her rejection of his evidence, reflects her opinion that a non-combative management style is incompatible with a senior position in a company such as the applicant. Furthermore, she 'rejects' the expressed feelings of Shanmugan and her evaluation of his evidence boils down to a conclusion that he has lied about feeling that Rheede was being racist towards him. The treatment of his evidence, especially the notion that senior management positions require their holders to take a combative approach, brings to mind the Constitutional Court's warning on the danger of assuming "all triers of fact have the ability to interpret correctly the behavior of a witness, notwithstanding that the witness may be of a different culture, class, race or gender and someone and someone whose life experience differs fundamentally from that of the trier of fact."¹

[13] Shanmugan's evidence in chief dealt with the meeting with Rheede about the transformation of Propco which forms one of the incidents giving rise to the charges of insolence and insubordination:

¹ President of the Republic of South Africa and Others v South African Rugby Football Union and others 2000(1) SA a (CC) at [79]

“Yes so it happened soon after, you know, soon after I just arrived and I started having meetings with all the Heads of Businesses to discuss, so it would have been in the month of July.

And, the background to that was that, you know, one of the key reasons was to try and improve the governance and the governance structures in the Alternatives Business because Alternatives are private assets, they are not public trading assets and they require a very, you know, significant or large level of diligence, when you conduct these businesses and enter into contracts and at the same time, Sanlam Investments has a strategy to draw its third-party business, in you know outside of Sanlam. To get third-party investors into which transformation is imperative.

And the particular discussion with Andre was about, we need to grow third-party business, we need to strengthen our governance structure. Propco, currently, you know consists of six white males on that committee. If we take this committee to our investors, they are going to ask us, especially the institutional investors, you know, who are driving transformation, they are going to ask us, what are we going about transformation and we will have to show them, or illustrate to them how we are changing our business and how we are representative you know of communities of race, gender, skills, you know, in order to get, you know, in order to be able to have a chance, you know of getting funds and growing our business.”

[14] He was asked if he could recall the exact words, or more or less the words which were exchanged on the question of Propco and having good people. He testified as follows:

“Yeah, so I mean the response was that Propco already had great people, it was an established, it was an established process which has been successful for a long period of time, it had had already good people, it had independent people on it already, and that he didn’t need to change it. It was not, he wasn’t willing to, you know, at that stage to change it.

What it said to me was that, you know, if he was unwilling to, to expand on ideas, that it would only change if he thought there was a good reason, you know to change it and you know, only if he had thought of it that we could

change it. So, in that respect I felt that my view was not important at all. You know, he was basically having disregard for my opinion.”

- [15] On the issue of discrimination against him personally, which the Commissioner rejected, Shanmugans explanation was as follows:

“When I sat back and thought exactly what was going on here. I was trying to search within myself you know, what kind, what could have been the possible reasons, you know, for Andre not respecting me and having disregard for my position as his superior And I thought about could it be because of my education, or, my qualifications or my experience, or my competence, you know, but I went through each, you know, each of them, I have got a university degree, Postgraduate I have got two degrees, I have got 21 years of experience in financial services

I have experience in all of those assets you know, under my control, under my responsibility, private equity, business equity, credit markets, infrastructure, derivatives, hedge funds, you know, I have been in the group for a long time and Nerson and Robert would not have given me the job if they didn’t think I had the technical competence you know to manage the business.

And, then I mean, the only other thing, you know, that I could think of was, you know, perhaps it is race, I was convinced that Andre does not respect me because he doesn’t think I am able to do it, he wasn’t ready to bring me into discussions, or even, I wasn’t expecting you know, to be treated in this manner but I wasn’t particularly welcomed into his business. You know, I never interacted with his teams, he took the teams away from me and I must tell you that this is not the Sanlam that I know. I first joined Sanlam in 1999.”

- [16] Given the above testimony, it is difficult to understand the Commissioner’s expressed insights that Shanmungan was a ‘new employee’ and that he felt that he needed to be spoon-fed.
- [17] The assessment of Rheede’s evidence by the Commissioner, and that of his witness Ruitters, again bears recording in relation to the assertion of the applicant that she exceeded her powers and didn’t allow for a fair trial of the issues:

“137. The applicant was a sound witness who testified from the heart, openly frankly, honestly and sincerely. He was clearly still upset at what had transpired to his once lengthy and illustrious career and understandably extremely perplexed and searching for the truth behind his dismissal. It was clear from his responses that he was taken aback at what Shanmugam had revealed about the nature of his communications, operational style and general conduct in reporting to him. He conceded that he was a person who came across as abrupt and straightforward. He stated that he had always conducted himself as he did and had not changed at all. There was never an issue with it and the way he did what he did was no different from the way in which he had dealt with Naidoo and Kodisang. He accepted that people have different management styles, but testified clearly, repeatedly and with emphasis, that he never once thought or was told that those issues constituted a problem. Not until he was charged did the issues ever come to light.

145. Once again, the applicant's explanations for the Nelspruit issue was well-articulated, clear and his actions at the time, justifiable. The intention behind the mail to Roux and others was not to put a proposal to them, but to gain their expert insight and advice on a “snag” that both he and Shanmugam could not resolve in order, eventually, to come up with a proposal. To date of the applicant's dismissal, that snag had never been resolved. *In my view, Shanmugam was embarrassed because he did not know the answer to the snag and did not want anyone else to become aware of his ignorance about it, not realising that indeed, it was a complex problem which seemed intractable at the time.* There was no need for him to have taken offence in the manner he did. Once again, Shanmugam never actioned his alleged unhappiness and dissatisfaction at the time. (my emphasis)

152. **The final witness for the applicant, Rutters,** was also an excellent witness. He testified in a calm, impartial manner, focussing purely on the facts as known to him. Importantly, he mentioned that there were regular on-site visits and walk-about with Sanlam representatives and those on site. It is therefore only reasonable to envisage conversations being engaged in about the two old houses, their history, what remained of them and also of course the future development waiting for a final go-ahead. In such a scenario it is not hard

to imagine discussions about many things, such as for example, the wooden floors, arising and ideas being bandied about. *I can well imagine someone with a love for gardening perhaps walking around such a site and perhaps noticing an old rose bush still blooming amidst the chaos. It would not signal anything underhand or dishonest for such an individual to ask whether he/she might remove it prior to a bulldozer arriving to flatten it. Perhaps a rosebush has more value than scrap wood, but it cannot be imagined that in that context, if the rosebush were not going to be a feature of the future development, it would be wrong for the contractor simply to say, "Yes, remove it", especially if other senior persons are also present and see no problem with it. It would be absurd to expect top executives of a company to be involved in a decision making process and what that entails, for a mere rose bush.*" (My emphasis)

159. In respect of the second charge related to discrimination, insubordination, insolence, disrespectful and disregard for governance structures, there was no evidence that he had breached the rules. At worst, he was perhaps rude, inconsiderate at times and addressed Shanmugam initially in their first two encounters in an insolent manner. The fact that Shanmugam took no action and expressed no displeasure at the time, but only charged the applicant seven months later, is entirely unsatisfactory and flies in the face of sound labour relations practices.....

162. A holistic view of all the evidence tendered leads to the inescapable conclusion that most, if not all, the issues raised and incidents referred to amount to not much more than a grossly exaggerated storm in a teacup. Individually, the rules the applicant was alleged to have breached are indeed important rules, basic to any employment contract, but the instances referred to do not justify a sanction of dismissal, even when dealing with a very senior executive who should know the rules and cannot hope for extensive progressive disciplinary measures to be applied to him as to ordinary employees in a workplace. The incidents and instances referred to were simply too insignificant to warrant any form of severe action to be taken – Shanmugam himself never acted on any of them. To do so seven months later in most of the instances is simply inexplicable and inexcusable. The reason for dismissal was not anything other than once again, a very legalistic interpretation of legal

principles as opposed to the realities of each instance sought to underpin justification for the dismissal – the worst example being that of the claim of racism. The applicant's claim that he was unfairly dismissed was correct – and egregiously so. It must have had a significant impact on his good standing, reputation and blemished his track record significantly, especially the charge related to racism of which he was entirely innocent. I am satisfied that the sanction of dismissal was inappropriate and grossly unfair in the circumstances – at worst, he should have been issued with a final warning in respect of the wood charge, as suggested by all those who gave an opinion prior to the disciplinary enquiry, even Shanmugam himself.”

- [18] Again, it is difficult to fathom how an arbitrator is led to delve into a rose bush analogy in dealing with Rheede's evidence. However, it is salient to note that on the evidence before her, the wood in question was old oregon pine which Rheede paid R11,000.00 to be removed and eventually had a carpenter fashion into a wine rack. As Rheede stated in examination-in-chief when he was referred to Naidoo's evidence that the wood could have been used in a community development:

“If anybody who was involved in this at that point of time had told me that it could be utilized to Sanlam's benefit in any other way than what it was used for, then by all means. My main objective was just to rescue the wood there was no, there was actually no gain I am not an expert. I am going to say that, but I realise that in the house the wood was in disrepair if that is the right word, there was wood rot and damage to the wood. I think the house is 80 to 100 years old and it was the original wood that was in there. So I paid R11,000 for the wood to be removed.”

- [19] The above evaluation of Rheede's evidence once again reveals a glaring failure by the Commissioner to rationally assess the evidence before her. Her statement that: “*In my view, Shanmugam was embarrassed because he did not know the answer to the snag and did not want anyone else to become aware of his ignorance about it, not realising that indeed, it was a complex problem which seemed intractable at the time.*” is again an opinion of the mind-reading variety with no evidential basis to support it.

[20] The Commissioner further appears to be of the view that Shanmugan should have immediately reprimanded Rheede and that his approach of attempting to win over Rheede to transformation imperatives over a period of time was inexcusable. This approach in my view once again derives from her pronouncements on the way the business in question should be run and senior employees should deal with each other.

[21] Ms Harvey for Rheede argued that the Commissioner did not exceed her powers in her assessment of the corporate structure and management style. She submitted that her remarks on structure were merely explaining her assessment of the implied rules of conduct (vis a vis who to copy into emails, decisions and the like). I cannot agree that the statements by the Commissioner referred to in paragraph 5 above, fall to be understood in this way. The statements are of a sweeping and general type outside of the expertise and powers of the Commissioner. These statements, which determined the way in which the evidence was considered by her, amount to gross irregularities preventing a fair trial of the issues and affecting the outcome of the Award. In addition, the irrationality of her findings in respect of the character of the witnesses, more than once based on what she perceives them to be thinking (rather than saying), further underlines that she conducted the enquiry in a misconceived manner. As the Labour Appeal Court stated in **Mofokeng Head of Department of Education v Mofokeng & Others**² stated:

“[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act 8 (PAJA); such

as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.....

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."

[22] In the Court's view, the irregularities and errors *in casu* are of such a magnitude that they failed to allow for a fair trial of the issues. The Award stands to be set aside. The dispute should serve before another arbitrator to duly determine on all the evidence before her, whether Rheede was guilty of the charges against him, and whether dismissal was a fair sanction in all the circumstances of the case. This is not a matter where costs should follow the result.

[23] I therefore make the following order:

Order

1. The Award under Case Number WECT 17095-19 is reviewed and set aside.
2. The dispute is remitted to the second respondent for hearing before a Commissioner other than third respondent.
3. There is no order as to costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

Applicant: BCHC Inc

Second Respondent: Suzanna Harvey instructed by Macgregor Erasmus Attorneys Inc