



Arbitration Award Rendered

Case Number: GAJB 28802-23
Senior Commissioner: Eleanor Hambidge
Date of Award: 9 June 2024

In the **MATTER** between

Christine Anne Lawson

(Employees)

And

Standard Bank SA LIMITED

(Employer)

APPROVED

1. DETAILS OF HEARING AND REPRESENTATION

- 1.1. The alleged unfair dismissal involving Ms. Christine Anne Lawson (Employee) and Standard Bank SA Limited (Employer) was heard over a number of days. Throughout the proceedings, both parties were represented by legal practitioners. Mr. Dube represented the Employer, whereas Mr. Posthuma represented the Employee.
- 1.2. At the arbitration, the parties also handed up their respective bundles of documents and the proceedings were recorded. A pre-arbitration meeting was also held and in terms of such, I was called upon to decide whether the Employee breached the Employer's Code of Ethics and Conduct and its Harassment Policy; whether the Employee caused psychological and emotional distress for her subordinates; whether the Employee's treatment of her subordinates caused a hostile working environment in which employees experienced undue stress; whether the Employee publicly addressed her employees in a hostile and intimidating manner; whether under the Employee's leadership the employees adopted patterns of behaviour detrimental to the Employer and could therefore pose a risk to the Employer; whether under the Employee's leadership there was a loss of skilled employees in her team as a direct result of her conduct; whether the Employer objectively and properly investigated the allegations made by Ms. Carol Sithole or whether it relied solely on the subjective allegations made by disgruntled employees; whether the Employee received consistent performance reviews in regard to her engagement with staff during the period the Employer alleges the harassment took place; and whether the Employee's dismissal was substantively unfair.
- 1.3. I had afforded both parties an opportunity to submit their closing arguments in writing and such were duly received and taken into consideration. I am greatly indebted to both legal practitioners for the quality of their respective closing arguments.

- 1.4. I was further afforded an extension by the Director of the CCMA to submit this award outside the 14 day-period.

2. BACKGROUND TO THE DISPUTE

- 2.1. The Employee, Head of Compliance: Global Markets and Market Abuse, was dismissed on 19 December 2023, pursuant to a disciplinary hearing.
- 2.2. She earned R 2 264 160-00 per annum (R 188 680-00 per month).

3. ISSUES TO BE DECIDED

- 3.1 Only the substantive fairness of the dismissal was placed in dispute.
- 3.2 The Employee sought compensation if successful in her claim for unfair dismissal.

4. SURVEY OF EVIDENCE and ARGUMENT

- 4.1 At this arbitration before me, the Employer called a number of witnesses - Ms. Carol Sithole; Ms. Catherine Furey-Blaize; Ms. Teresa Wilson; Ms. Aobakwe Maponyane-Ndou; and Mr. Hilton Packies.

The Employee testified in support of her own case and the following witnesses also testified for her – Mr. Ricolyn Govender; Ms. Chantal Maharaj Dhansam; Mr. Malcolm Ryan; and Ms. Bianca Buys.

All the witnesses testified under oath and, for ease of reference, the relevant aspects of their respective testimonies will be dealt with under the analysis, hereunder.

5. ANALYSIS OF EVIDENCE ARGUMENTS:

5.1 In terms of section 192 of the LRA the Employer is to discharge the onus that the dismissal was fair and such onus is to be discharged on a balance of probabilities.

5.2 Only the substantive fairness of the dismissal was ultimately placed in dispute.

5.3 An arbitration under the auspices of the CCMA is a hearing *de novo*. Thus I am required to hear the evidence afresh. As an arbitrator, I am not supposed to “review” the decision of the chairperson of the internal hearing (see in this regard the judgment by Honourable Judge Nkutha-Nkontwana, as she then was, in *Performing Arts Council of Free State v CCMA and others*, case number JR 82/18, which judgment was handed down on 27 May 2021), wherein the Court held that the Commissioner had misconstrued her duties when she had reviewed the decision of the chairperson of the disciplinary enquiry. However, as much as an arbitration constitutes a hearing *de novo*, this does not mean that I start the dispute on an entirely clean slate, but I am bound by the reasons advanced by the Employer for dismissal and for instance, I am entitled to draw negative inferences in relation to the credibility of witnesses when their versions at arbitration materially contradict that offered during the disciplinary hearing.

5.4 Substantive fairness

5.4.1 The duties of an arbitrator are twofold in that I must first determine whether the misconduct was committed and thereafter decide whether dismissal was the appropriate sanction.

Was the misconduct committed?

5.4.2 Having applied my mind to the totality of evidence and argument before me, I find that the Employer failed to discharge the onus that the misconduct was committed.

5.4.3. As a point of departure, the allegations levelled at the Employee, for which she was dismissed pertained to the following: *“Gross misconduct in that during the period 2019 to 2023, as a leader within the bank, you failed to create / maintain an environment in which –*

1. *employees feel psychologically safe*
2. *employees perform optimally and do not engage in conduct which is detrimental or poses the risk to the bank*

3. *employees feel that they are treated in a fair and unbiased manner*
4. *employees feel respected in line with the bank's code of ethics and*
5. *employees skills and qualifications are required by the bank duly retained in employment.”*

5.4.4 The “charge sheet” then continues to elaborate on these allegations by stating:

“Your conduct and/ behaviour have caused the following:

A. A number of your team members (current and recent exits) to report that they have experienced or are experiencing the following under your leadership:

- Being emotionally distressed as a result of the manner in which you engaged with them over the period of 2019 to date (prior to suspension). Where certain people in your team have had to refer themselves to ICAS and/or reach out to P&C due to work stress and anxiety attacks.*
- Suffering from anxiety as a result of you publicly addressing some of your team in a hostile and intimidating manner when you shouted at them in front of stakeholders. These incidents took place on the 6th and 13th March 2023 and this involved 2 of your direct reports at the time.*

B. A number of your team members (current and recent exits) to report that they have/had adopted patterns of behaviour that were/are detrimental to the Bank and could pose a risk to the Bank. In this regard –

- Employees are too afraid to challenge decisions or put forward solution to problems as this has resulted in them feeling excluded and unsupported by yourself in comparison to the rest of the team members.*
- Employees have left your team and there are other further team members wanting to leave the team, as a result of your leadership style and ways of working fostered in the team by you as a leader.*

C. Loss of skilled employees and/or potential loss of employees despite it being the duty of the Bank's executives to ensure that it retains employees whose skills and qualifications are required by the Bank.

D. Psychological or emotional harm despite it being the duty of the Bank and its executives to ensure that its employees do not suffer either physical, psychological or emotional harm in that:

- You have breached the duty not to cause psychological and/or emotional harm to employees in that you have fostered a culture of favouritism, fearfulness and mistrust amongst the team.*

- *You have breached the duty to ensure that the Bank retains employees whose skills and qualifications are required by the Bank in that your actions have resulted in a loss of employees over the period for 2022 – 2023.*

The breaches of the duties set out above constitute a serious breach of the duty of care and co-operation that you owe to the Bank and constitutes gross misconduct.”

5.4.5 In support of its case, the Employer relied on its Ethics Policy, as well as its Harassment Policy. In response to my question, I was assured that no reliance whatsoever will be placed on the *Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace*, which came into operation on 18 March 2022, since it was common cause that the Employee was found not guilty of racism and, accordingly, no listed or arbitrary ground for discrimination could be relied upon. Notwithstanding such concession by the Employer, one of its witnesses, Ms. Sithole, nevertheless attempted to embellish her version by testifying that the Employee was indeed a racist, which aspect of Ms. Sithole’s testimony I had disregarded for obvious reasons. As to the version of Ms. Sithole as a whole, for a variety of reasons, I find such not to be probable at all. I will elaborate on this aspect in due course and the reasons for not attaching any value to her testimony. I will also deal with the testimony of the other witnesses led to show that the Employer failed to discharge the onus on a balance of probabilities that the misconduct was committed.

5.4.6 As much as the Employer should be commended for ensuring a safe working environment free of harassment and toxicity, this obligation of an employer extends to all employees, inclusive of its managers. By adopting the approach as displayed in this matter before me by attaching too much value on the subjective views of some employees, as opposed to others, and showing no support whatsoever for its own manager, the Employer runs the risk in creating a situation in future whereby managers will not be able to manage at all as every reasonable and lawful instruction or any form of constructive criticism, which, after all, constitute exercising managerial prerogative, will be countered by an ill-conceived claim of harassment (or bullying). However, this observation must not be misconstrued because harassment (and bullying) can be considered a plague in some workplaces and, accordingly, it is my duty to determine based on the evidence before me, whether harassment had indeed taken place.

5.4.7 The Employer, in its Policy, provides a definition for harassment:

“Improper conduct (verbal nonverbal physical and or visual in nature) by an individual that is aimed at and hurtful to another individual in the work environment, that the individual knew or should have known would cause offence or harm. Harassment may include physical psychological and emotional abuse.

Improper conduct is any objectionable act, comment or display that demeans, belittles causes personal humiliation or embarrassment, and any act of intimidation or threat.”

5.4.8 This definition of harassment, as contained in the Employer's Policy, sets an objective standard to determine whether harassment has occurred. The Employer's Policy also contains a definition of bullying: *"A type of harassment which involves the abuse of coercive power by an individual or group of individuals. This includes intimidation which is intentional behavior that cause the average person to fear injury or harm. Workplace bullying may involve aggressive behaviour in which someone repeatedly causes another personal emotional distress or discomfort"*. Once again, an objective standard is set and, in deciding this matter, I will apply all the definitions in an objective manner.

5.4.9 By applying these objective standards as to what constitutes harassment (and bullying), as per the Policies of the Employer, I am not persuaded that the Employer had discharged the onus that the Employee had indeed harassed (or bullied) some of her subordinates.

In addition to the objective standards set in the relevant Policies, the learned author Alan Rycroft, referred to by both legal practitioners, has the following to say about harassment in an article on workplace bullying¹: *"Workplace bullying has been linked to a feeling of incompetence in handling the job, to a sense of alienation from colleagues, to anxiety that there will be no promotional recognition, to job security, to feelings of inadequacy, to knock on tensions in personal relationships, and to depression.*

Rycroft also suggests the following definition for workplace bullying: *"[Harassment]...is generally seen as persistent and unwelcome conduct which is hostile or offensive to a reasonable person (my emphasis) and induces a fear of harm and demeans, humiliates or creates a hostile and intimidating environment..... "Taking these generic aspects of harassment, it has been suggested that bullying refers to any unfavourable or offensive conduct on the part of a person or persons, which has the effect of creating a hostile workplace environment... In these terms, bullying includes a wide range of insulting, demeaning or intimidating behaviour that lowers their self-esteem or self-confidence of an employee."*

5.4.10 I pause to mention, at this juncture, that the attorney for the Employee called four witnesses (Mr. Ricolyn Govender; Ms. Chantal Maharaj Dhansam; Mr. Malcolm Ryan; and Ms. Bianca Buys) who also reported to the Employee over a period of time, and all four witnesses convincingly testified, at this arbitration, not to have been harassed by the Employee. Nor have they witnessed any incidents of harassment, when it was common cause that the employees reporting to the Employee all worked in an open plan-area. Therefore, it does beg the question how overt the harassment, if any, could have been. These witnesses called by the attorney for the Employee were also complimentary of the Employee's leadership and management style and said that there was no blame-culture in place.

The flawed Investigation conducted:

5.4. 11 I may add that neither Mr. Malcolm Ryan nor Ms. Bianca Buys, who also reported to the Employee, formed part of the Investigation and were not interviewed by the Investigator at any stage. It therefore begs the question as to why the versions of some employees were completely disregarded during the course of the Investigation. The attorney for the Employer chose not to call Ms. Gumede, who conducted the Investigation. I was only furnished with “themes” compiled by the Investigator, pursuant to an interview-process conducted and, as previously stated, such interview-process did not necessarily include all the employees reporting to the Employee. The Employee was, however, afforded an opportunity to respond to such “themes”, in writing, which she had denied in their entirety. The Employee was, however, never formally interviewed either. Therefore, based on the limited facts before me, in that the Investigator was not called, I find that the manner in which the Investigation was conducted could not have been fair and objective. Accordingly, as I was called upon in terms of the pre-arbitration minute, I find that the Investigator failed to objectively and properly investigate the allegations made by Ms. Carol Sithole in her resignation letter and had relied solely on the subjective allegations made by some employees, not all, which “themes” as to a lack of any objective evidence of harassment perpetrated by the Employee, is further unpacked hereunder.

Lack of grievances lodged:

5.4.12 In addition to finding that the manner in which the Investigation was conducted was materially flawed, I have also attached a lot of value to the fact that at no stage were any grievances lodged against the Employee. Although the legal practitioner for the Employer had relied on the Labour Court judgment in **Centre for Autism Research and Education CC v CCMA and Others** [2020] 11 BLLR 1123 (LC), wherein the Court *inter alia* found that the lack of a grievance was not necessarily fatal, I consider myself bound by a more recent judgment of the Labour Appeal Court. In **Makuleni v Standard Bank of South Africa Ltd** (JA 125/2021) (2023) 44 ILJ 1005 (LAC); [2023] 4 BLLR 283 (LAC), a judgment involving the same employer, Honourable Judge of Appeal Sutherland had the following to say about the lack of grievances against the employee in *Makuleni*:

“[21] A fourth aspect is the question of why the witnesses did not complain at the time the incidents occurred. This notable omission was treated quite differently by the commissioner and by the Labour Court. The excuse given by the witnesses was that they were too scared to come forward, being intimidated by the appellant. The commissioner rejected that as unconvincing. In this regard, the commissioner took into account, inter alia, the example of the appellant calling Ncedi Sithebe 'stupid'”

¹ (2009) 330 ILJ 1431

because her team member committed a serious and embarrassing error about a client's overdraft where Sithebe did, indeed, complain to Steven Blom, the Regional Manager. Moreover, having complained to him and he states he would take it up with the appellant, Sithebe asked him not to. The appellant thereafter also apologised for the jibe (sic) Blom testified that when he followed up with Sithebe, she told him the issue had been resolved. In addition, in regard to another incident, Sithebe testified that when a co-employee, Yashna, (who did not testify), wanted to complain about the appellant upsetting her by asking her to pay for a replacement nametag, Sithebe went to great lengths to stop her doing, so. Both these examples tend to contradict the notion that there was no space to lodge a grievance. Moreover, of considerable importance, the formal grievance process in a business of the size and sophistication of the respondent was at all times available to be used but was not, why would the commissioner's view, giving weight to these factors, be unreasonable?"

In line with the thinking and reasoning of the commissioner in **Makuleni (supra)**, which arbitration award wherein he found the dismissal of a branch manager to be unfair, was upheld on appeal, I am also not persuaded by the reasons advanced for not lodging grievances, at the time the incidents occurred, in the matter before me. Should it be true that the aggrieved employees had no confidence in Human Resources at the time, premised on utterances made by the Employee that she supposedly could influence them, surely their concerns, if legitimate at all, could have been escalated to another senior member of staff. The Employer is a large and sophisticated banking institution. The employees who testified at this arbitration all impressed me as intelligent and can hardly be termed blue-collar workers. For instance, I understood that (Aobakwe), who testified for the Employer, is a chartered accountant.

Was harassment proven, objectively so?

5.4.13 I now turn to the various incidents relied upon to show harassment over a period of time, some incidents dating back to 2019, coupled with a flurry of tears at times during the course of this arbitration, albeit not always so sincere, as in the case of Ms. Sithole. Having applied my mind to the evidence and argument, it is my finding that these incidents relied upon do not constitute harassment, objectively speaking, nor do these incidents establish a pattern of adverse behaviour from the Employee and therefore the Employer could not have been placed at risk. The witnesses called by the attorney for the Employer, with the exception of the Employee's line manager, struck me as highly-strung, over-sensitive, and, quite frankly, at times ill-disciplined and under-performing and not entirely truthful always and then, of course, not to underestimate the wrath of a disgruntled ex-employee (Ms. Sithole). I have no doubt in my mind that the

defamatory resignation letter from Ms. Sithole was indeed the catalyst for the Investigation which ultimately led to the dismissal of the Employee.

5.4.14 As to the version of events allegedly constituting harassment, presented by **Ms. Sithole**, she only raised her discontent for the first time in her resignation letter, in very vague terms, I may add, months after the alleged incidents of harassment had occurred. She chose not to lodge any grievance against the Employee. At this arbitration, Ms. Sithole's testimony can be broadly summarized as follows: She was not informed that a compliance officer was already employed in a position when she joined, and she would not have joined the Bank otherwise; at a meeting regarding a JSE matter on 06 March 2023, the Employee remarked that the meeting was poorly run and allegedly shouted at her; an email sent by the Employee on 7 March 2023 had an ulterior motive; when she was on leave her work was not attended to but when Mr. Malcolm Ryan went on leave his work was attended to; a portfolio of work in Angola was taken away from her; She received unfair treatment based on her race; and she wanted to attend a meeting with Chantal Maharaj Dhansam, but the Employee said that she was not allowed to go.

5.4.15 As to the allegation of racism, the Employee was found not guilty thereof by the Employer. As to the other incidents relied upon to substantiate harassment, it is a reasonable inference to conclude that the real reason for Ms. Sithole's derogatory resignation letter was not the alleged harassment by the Employee, but, in fact, Ms. Sithole was disgruntled, as was obvious during the course of her testimony, for not being promoted. Ms. Sithole also blamed her discontent on the Employee, when in fact it was common cause that the Employee had recruited her. Therefore, the version of Ms. Sithole that the Employee had an orchestrated "vendetta" against her is simply not probable. Not only do I find the version of Ms. Sithole not probable, but she did not impress me as a credible witness either, as previously stated. As to her demeanour, I find that her emotional outburst and tears during the evidence-in-chief were contrived in that she became quite aggressive and argumentative with the Employee's attorney, shortly thereafter, during the cross-examination. Not being promoted and not being promoted timeously so, does not constitute harassment. Similar to the other employees and ex-employees who testified for the Employer, Ms. Sithole did not lodge a grievance should she have felt aggrieved by delays in promoting her and other incidents of alleged harassment, but chose to attack the Employee for the first time, in her resignation letter. Ms. Sithole was also very vague in her recollection as to why she had perceived the body language of the Employee to be intimidating at times. I am also not convinced that her bursting into tears at the workplace could be attributed to the Employee either but was rather related to personal issues. As to the incident of the Employee allegedly shouting at her, I find that such did not occur at all, based on the evidence led by the Employee,

corroborated by Ms. Buys, who made a favourable impression on me. When a manager intervenes during a meeting and subsequently sends a well-drafted and professional e-mail for an employee to account for *compliance's inability* to manage a meeting properly, such actions do not constitute harassment, as a manager is not only entitled, but obliged, to manage poor work performance. In any event, the concern was directed at compliance. I have carefully read the e-mail of 7 March 2023 from the Employee addressed to Ms. Sithole and nothing untoward is contained therein, let alone does such constitute harassment. As to the Employee deciding that Ms. Sithole should not form part of a meeting where Ms. Chantal Maharaj Dhansam would be in attendance, such constitutes managerial prerogative and does not constitute harassment either. As to Mr. Malcolm Ryan being favoured, as alleged by Ms. Sithole, this allegation was also not proven in that the Employee could advance a reasonable explanation for the perceived difference in treatment. As to the Angola-portfolio being reduced, such allegation was also shown to be devoid of any truth.

5.4.16 As to the testimony of **Ms. Catherine Fury Blaize**, the immediate line manager of the Employee, very little value can be attached to her testimony, as such was mostly hearsay. Her evidence consisted of reading other people's emails into the record and relaying incidents she had been briefed on. As she conceded not to be involved in the daily running of the Employee's team, she could not really shed light on the alleged incidents of harassment.

5.4.17 As to incidents cited by **Ms. Teresa Wilson** or "T" as fondly referred to by the Employee, this witness relied on three separate incidents to show she had been harassed by the Employee, her immediate line manager at the time. She also did not lodge a grievance at any given time against the Employee, who happened to have recruited her and promoted her. The three incidents which allegedly constituted harassment pertained to a meeting where: "T" was allegedly humiliated and demeaned by the Employee in the manner she was asked to leave; the perceived lack of communication between her and her line manager; and an incident during which the Employee had said she hated it when she hovered over her.

5.4.18 The Employee denied having humiliated "T" in the manner she had asked her to leave the meeting when "T" was not required to attend at all. I have no reason not to accept her version as the Employee impressed me as a reliable witness. I therefore reject outright the version of "T" as to what transpired that day. Her recollection of events constitutes a complete exaggeration of events, to say the least. She testified at this arbitration that she was shaking, emotionally distressed and felt humiliated. This is highly improbable considering the type of personality I have observed during the course of the arbitration and also the tone of her e-mails, which formed part of the record. "T" certainly could stand up for herself. She also did not lodge a grievance around

this issue of having been asked by the Employee to leave a meeting. “T”, in my opinion, wrote an e-mail, bordering on insolence, to the Employee, who happened to be her line manager at the time, when she was seemingly not satisfied with her performance review. Such e-mail from “T” was written in bold. This conduct displayed by “T” even raised a valid concern from the Employee’s line manager, who had commented on such. Therefore, for the Employee to refer to “T” as *forceful* in circumstances where she spoke her mind, as is evidenced by other e-mail exchanges from “T” do not constitute harassment. To illustrate the manner in expressing herself, I quote from one of “T”’s own emails: *“When Selvan asked me why we were not proceeding with Laveshan I told the truth. Why is that wrong? I struggle to understand why it is a lack of judgment when I state that I’m very frustrated by the process which dragging on for months”* and yet, she wishes me to perceive her as a victim of harassment by the Employee when she was called forceful. To conclude, in circumstances where the Employee is accused of harassment by referring to “T” as forceful and not being able to provide examples at the time of making such an observation, which observation of “T” was supported by the Employee’s line manager too, cannot constitute harassment, objectively speaking. As to the Employee saying that she hates it when “T” hovers over her, although this particular choice of words could not be remembered by the Employee, I am nevertheless not convinced such constitute harassment. Nor does a lack of communication constituted harassment. Based on the above, I therefore find that the incidents relied upon by Ms. Theresa Wilson did not constitute harassment.

5.4.19 As to the testimony of **Aobakwe Maponyane – Ndou**, the fact that the Employee referred to her as lacking in emotional intelligence, such comment cannot, objectively speaking, constitute harassment either and, at most, should be perceived as constructive criticism. Nor is undergoing a psychometric test a form of harassment, as such is an accepted management tool. Also, I have carefully read the WhatsApp-exchange between the Employee and Aobakwe on Aobakwe not switching on her camera when she was requested to do so and found nothing untoward in such exchange and therefore cannot, objectively speaking, constitute harassment. Having a strained relationship is also not necessarily indicative of harassment.

5.4.20 In her testimony, Aobakwe, now an ex-employee, “ripped” into the Employee and referred to her interactions with the Employee during her tenure of employment, as being brainwashed, indoctrinated, feeling hopeless, that the Employee “manipulated the system”, used threats to instill fear, created a blame culture, that she was victimised, was gaslighted, and a hostile environment was created, was being watched and under surveillance by the Employee, made to feel paralyzed and inadequate, was ostracised and intimidated and such impacted on her health. However, none of this extremely strong terminology used by this witness (Aobakwe) at arbitration

was indeed supported by any concrete evidence. Reliance was placed on an incident where one Lebogang was disciplined and dismissed in 2019 *already* and threats of discipline in a meeting, the date of which could conveniently not be remembered. A manager is entitled to institute disciplinary action when the circumstances require such and, I may add, the Employee did not necessarily deny that she may have referred to warnings being issued.

5.4.21 As to an incident on 12 September 2019, where the Employee had cancelled a one-on-one meeting with this witness, then moved to another seat and thereafter called a staff meeting to discuss staff dynamics, cannot, objectively speaking, constitute harassment. The version of the Employee was that she had been advised to move seats and such version was never seriously challenged. The one-on-one meetings were also reinstated, on the Employee's version, and also not challenged. I am also not convinced that the purpose of the staff meeting was for the very purpose to single Aobakwe out, as alleged. In any event, calling a staff meeting to discuss group dynamics constitutes a positive intervention and can hardly be termed harassment. Likewise, to request employees to complete a peer review does not constitute harassment either. Having carefully perused the contents of this e-mail, which request was made by the Employee on 9 November 2020 for a peer review, I find nothing untoward in such. Also, none of the employees requested to do the peer review ever expressed their dissatisfaction at the time. I therefore fail to understand why this reasonable request made by the Employee could make Aobakwe feel uncomfortable. As to the Employee not wanting to hug Aobakwe, surely such cannot constitute harassment either. Also, it is very peculiar that Aobakwe would want to hug the Employee, in the first place, considering the serious allegations she made against the Employee at this arbitration, unless of course, such allegations were a complete fabrication, which is indeed my finding.

5.4.22 Then, importantly, Aobakwe also wanted me to believe that the Employee had shouted at her. Although the chairperson of the internal disciplinary hearing concluded that this incident did in all likelihood not taken place, Aobakwe persisted with this version at this arbitration. I therefore find Aobakwe not to be a credible witness bearing in mind that overwhelming evidence was led that the Employee had, in fact, considered Aobakwe an exemplary employee and had recognized her for such. On 16 August 2020, the Employee had thanked Aobakwe for doing a good job. In July 2020, the Employee gave the entire compliance team, including Aobakwe, a recognition day. On 23 May 2019, the Employee had given Aobakwe a recognition day as well and had rated her "right on track" in her mid-year performance review. The Employee also praised Aobakwe in her performance review.

5.4.23 As to Aobakwe's allegation that the Employee had placed under surveillance, such is not borne out by the evidence before me. Such was adequately refuted that the Employee was in the vicinity to get her morning coffee at Vida, as she did every morning, and this aspect was not denied.

5.4.24 As to **Mr. Hilton Packies**, he received an e-mail from the Employee, in 2019 already, enquiring as to the veracity of his reports, which the Employee, as a manager, was entitled to do, albeit in hindsight, she conceded at this arbitration that a different approach in dealing with the situation would have been more appropriate. Mr. Packies took great exception to this e-mail. Instead of him owning up to his mistake, he considered the approach of the Employee to constitute harassment. When an employee, such as Mr. Packies, is not performing his duties, his manager is perfectly entitled to make enquiries and request a detailed report. Such cannot constitute harassment, especially in circumstances where I formed the impression that Mr. Packies was less than honest and diligent in the performance of his duties, as was confirmed by the Employee under oath. Also, to state the obvious, this incident occurred in 2019 already, and the Employee had apologized for her approach at the time and from the content of the e-mail, her apology was accepted by Human Resources then, which should have dispensed with the entire situation. However, four years later, this incident is resuscitated and formed part of the harassment-allegations against the Employee. In **Makuleni (supra)**, Honourable Judge of Appeal Sutherland had the following to say, as well: "[26] The 'stupid' remark made to Sithebe, alluded to earlier, was dredged up a year after it occurred when, at the time it occurred, it had been reported to the regional manager, Blom, and his intervention had been refused. Why would the commissioner's take on this episode that there was a trawl for dirt to blacken the appellant's name be inappropriate? Indeed, how could it be unreasonable, especially when Blom's unchallenged evidence was that Sithebe told him that the spat was resolved between them? Moreover, why would an inference of mala fides be inappropriate which, in turn, contaminates the reliability of other claims the appellant refutes?"

5.4.25 In line with the reasoning articulated above, I have no doubt in my mind that this incident, which occurred during 2019 and which was settled, was merely resuscitated in an attempt to build a case against the Employee.

5.24.26 Furthermore, I am also not convinced that the Employee was the reason for Mr. Packies' emotional breakdown, as the Employee convincingly testified that she never made the utterances she was accused of by Mr. Packies at that time. She was also blissfully unaware that at the time he sought intervention of ICAS. The Employee impressed me as a credible witness and her recollection of events in that she was honest and made concessions when required to do so. Mr.

Packies also did not lodge a grievance against the Employee at the time, as would be expected, and, similar to the other witnesses who had testified for the Employer, I am not persuaded by the explanation in this regard. He struck me as a rather ungrateful person when it was common cause that the Employee had bought him and his family supper via Uber-eats when they were moving house and, instead of showing gratitude, all he did was to complain at this arbitration about the delivery being late.

5.4.27 In addition to finding that some of the incidents relied upon by the witnesses for the Employer did not occur at all, or did not constitute harassment, objectively speaking, when relied upon, it is worth mentioning that in the same ***Makuleni (supra)*** the Court expressed strong views that the court *a quo* was misdirected in its notion that it could accept that the appellant's subordinate staff, who were witnesses against her, had no motive to lie. This is plainly wrong on two grounds, the LAC cautioned. "The first ground is that the absence of an apparent motive to lie is not a helpful tool with which to determine either credibility or reliability. The once too frequent observation, long ago, by courts that a policeman had no motive to lie has been discredited for generations; it cannot be allowed to leak back into our forensic toolbox in diluted form". "The second ground is that the Labour Court held, on the facts, that there was no evidence of a motive to lie or to distort what had truly occurred and to catastrophise an incident to paint the appellant in a bad light; ergo, the nine witnesses were to be believed." This is an untenable conclusion too, the LAC further cautioned as overlooks where the onus lay. Furthermore, according to the LAC, this is another example of fallacious forensic analysis - a variation of where there is smoke there must be fire. Although it is a valid consideration that where similar fact evidence exists it must be considered and, where appropriate, given enough weight, it cannot of itself be taken as dispositive of the truth.

Therefore, the mere fact that the witnesses for the Employer all say the same, more or less, does not necessarily mean such is the truth.

5.4.28 As to the allegation that the Employee's management style was so overbearing and riddled with toxicity that it caused a high turnover in staff and therefore placed the Employer at risk, I am not convinced that the Employee's management style was indeed the cause of employees leaving/resigning/requesting transfers, based on the evidence before me and with reference to my findings above as to the complete lack of evidence to show harassment. I am persuaded to find that the vacancies in her department, which I may add was not an isolated concern pertaining to her department only, was adequately explained by her. I therefore find that the Employer failed to discharge the onus on a balance of probabilities that under the Employee's leadership the employees adopted patterns of behaviour detrimental to the Employer

and could therefore pose a risk to the Employer and as a result of the Employee's leadership style, there was a loss of skilled employees in her team as a direct result of her conduct.

5.4.29 As to the allegation of favouritism displayed, nothing concrete was placed before me that such had indeed occurred. Although the Investigator had concluded that favouritism had occurred, in particular the Employee's relationship with Malcolm, such theme/finding is reached without interviewing either Malcolm or the Employee. I therefore reject this observation, as such is simply clutching at straws. To refer to the Employee in the Investigation Report, for not having great relationships with females, was certainly bordering on the bizarre. The Investigator says and I quote: *"In business she doesn't have great relationships with the females in comparison to the male stakeholders. It can be perceived as wanting to be part of the "wolfpack".* I am perturbed by the reference to "wolfpack", considering that it was the case of the Employer that Mr. Hilton Packies too, was a victim of the so-called harassment. This is therefore another indication of the Investigation not being objectively conducted.

5.4.30 Based on the totality of evidence, and I am acutely aware that I should not focus on isolated events only, as such may be seen as trivial on its own, I am not convinced that the Employee caused psychological and emotional distress for her subordinates and that the Employee's treatment of her subordinates caused a hostile working environment in which employees experienced undue stress.

5.4.31 As to whether the Employee publicly addressed her employees in a hostile and intimidating manner, such was not borne out by the evidence, as I reject the testimony of both Ms. Wilson and Ms. Aobakwe Maponyane – Ndou in this regard, in that I previously found that the Employee never resorted to public discipline by shouting at them, for the reasons provided above.

Was dismissal the appropriate sanction?

5.4. 32 As previously stated, I have applied my mind to the totality of evidence before me and, based on such, I am not persuaded that the misconduct was indeed committed and, accordingly, it follows that there was no breach of the relevant Policies, and accordingly, dismissal was not the appropriate sanction.

Relief:

5.4.33 Although reinstatement is the primary remedy, the Employee sought compensation. In deciding on the quantum thereof, with reference to the CCMA Guidelines on Misconduct Arbitrations (item 134 thereof) I took into consideration the Employee's length of service (9 years); with a clean disciplinary record; and her exemplary performance reviews; the overall substantive unfairness of the dismissal; and the fact that the Employee at the time of arbitration had not managed to secure permanent employment. I

therefore considered compensation in an amount equal to nine (9) months' remuneration to be just and equitable. Such amount equates to 188 680-00 x 9, which equals R 1 698 120-00.

6. **AWARD:**

- 6.1. I find the dismissal of the Employees to be substantively unfair and, accordingly, award compensation in an amount equal to nine months' remuneration (R 1 698 120-00) – one million, six hundred and ninety-eight thousand, one hundred and twenty Rand.
- 6.2. Such compensation must be paid by the Employer to the Employee on or before 30 June 2024.

Signature:	
	
Senior Commissioner:	<u>Eleanor Hambidge</u>
Sector:	<u>Banking</u>

APPROVED