IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA107/2015

In the matter between:

HENK MOEN	**Appellant**
and	
QUBE SYSTEMS PROPRIETARY LIMITED	**First Respondent**
QUBE MANUFACTURING PROPRIETARY LIMITED	**Second Respondent**
QUBE TECHNICAL SERVICES PROPRIETARY LIMITED	**Third Respondent**
QUBE PROPERTY HOLDINGS PROPERTARY LIMITED	**Fourth Respondent**

Heard: **28 March 2017**

Delivered: **31 May 2017**

Summary: Review of arbitration award – employee dismissed for alleged gross dishonesty for activating the in-contact service SMS notification on the company's credit card without informing the employer and also to divert all company SMS notification to his cell phone– commissioner finding that dismissal

substantively and procedurally unfair. Labour Court setting aside award. Held that courts in review proceedings should avoid conflating review and appeal. The evidence on the probabilities not revealing that employee approached the bank to be placed in a position to receive communications pertaining to all financial movements on the account - Although, the evidence revealing that the employee did not notify the company that he was receiving information about the company's bank account it was insufficient to conclude that the commissioner's finding that the dismissal of employee was substantively unfair was unreasonable in the proper application of the review test. – Labour Court applying the incorrect test and that the decision of the arbitrator is not one of which it can be said that a reasonable arbitrator could not have reached on the material placed before him. Appeal upheld.

Coram: Waglay JP, Davis JA *et* Kathree-Setiloane AJA

JUDGMENT

DAVIS JA

Introduction

[1] This is an appeal against an order of Brassey AJ of 16 September 2015 made pursuant to a review application that had been launched by the first to fourth respondents in respect of an award made by a commissioner at the Commission for Conciliation Mediation and Arbitration ("CCMA") on 08 August 2011. In this award, the Commissioner found that the appellant had been procedurally and substantially unfairly dismissed by the first to the fourth respondents and they were ordered to pay appellant compensation in the equivalent of eight months' remuneration which amounted to a sum of R 936 000.00 within 14 days of the date of the award. In addition, the Commissioner ordered that certain statutory payments had to be paid to appellant. This issue was not taken on review nor has an appeal been lodged against the order.

[2] In setting aside, the award, Brassey AJ found that the first respondent's dismissal of the appellant was procedural unfair but not of substantively unfair. He ordered first respondent to pay appellant compensation equal to an amount of three months' remuneration being R 341 000.00.

Factual background

[3] Appellant was the joint managing director of first respondent and in this capacity was issued with a company credit card by First National Bank ("FNB") which he was entitled to use for business purposes. On 1 December 2009, he went into the Carswald Branch of FNB to activate what is known as the "in-contact" service on the credit card. This is an information service which, once triggered, ensures that the bank sends a SMS message to the credit card holder every time the credit card is used.

[4] Appellant activated this service on his company credit card because, according to his evidence, he and the joint managing director Mr Roderick Dyson travelled to Europe on business in 2009. During this trip, Mr Dyson's credit card was fraudulently used. According to appellant, he thought it prudent to activate this service on his company credit card to ensure that he could be notified of any transaction thereon and thus detect possible fraud at the earliest opportunity.

[5] On 1 December 2009, he was assisted in his request to install the in-contact service by FNB bank teller Mr Phenney Maleka. He handed Ms Maleka both his credit card and identity document and provided her with his cell phone number so that she could activate the service. She checked his documents and thereafter activated the services. It appears from appellant's evidence that his instruction to Ms Maleka was to activate the service only in relation to his own credit card. However, it later appeared that the in-contact detail on first respondent's cheque account had been so altered that information relating to the account only appeared on appellant's cell phone. Accordingly, he began to receive SMS notifications of transactions not only in relation to his own company credit card but also in respect of first respondent's cheque account.

[6] Some eight months after he had activated the service, that is on 31 August 2010, appellant was confronted by Mr Dyson who accused him of acting dishonestly and contrary to the interests of first respondent in activating the in-contact details of his company credit card. According to appellant, this was the first time he became aware of the fact that, when he activated the service on his credit card and began receiving information in relation to first respondent's cheque account, it meant that only he received these details as opposed to Mr Dyson who had previously received SMS messages in respect of banking transactions on the first respondent's cheque account.

[7] Following this development, appellant was charged with gross dishonesty in relation to the activation of the service and his failure to disclose this to first respondent.

[8] The charges brought against appellant read as follows:

> '1 Gross Dishonesty and or Misconduct in that you arranged that the "in-contact" details on the company's FNB bank accounts were changed, during December 2009, so that you would be in a position to receive communication pertaining to all financial movement on the account or your cell phone since December 2009 until now, without permission or authorisation.
>
> 2 Gross dishonesty in that you failed to obtain permission or authorisation form Mr Rod Dyson to effect the abovementioned change on the "in-contact" details at FNB.
>
> 3. Gross dishonesty in that you failed to report either the Authorised Financial person or Mr Rod Dyson that you were able to receive communication pertaining to all financial movement on the account on your cell phone since December 2009.
>
> 4. Gross misconduct in that you acted without authority and outside the scope of your responsibilities when you effected the abovementioned changes to the company's bank accounts.'

A disciplinary hearing was convened and appellant was dismissed with immediate effect.

The Commissioner's findings

[9] Following this decision, the dispute was heard by the Commissioner. The Commissioner found it improbable that Ms Maleka would have activated the in-contact service had she not been satisfied that appellant was possessed of the necessary authority to do so and hence acted in a dishonest manner. As the arbitrator said in his award:

> 'I find it completely and utterly improbable that a banking institution of high repute such as Ms Maleka's employer probably would permit a transaction of the nature testified to by Ms Maleka to occur in the manner that she testified that it occurred without being alert to alleged dishonesty of such a palpable nature. I find that even if it were true that the applicant presented himself as the Financial Manager, Ms Maleka was duty bound to satisfy herself that he was who he purported to be. Her evidence suggests that she was aware that the applicant was not the Financial Manager at the time of the transaction because she accessed the respondent's account and, in my view, the transaction should not have gone much further than handing back the applicant's identity document and telling him, in no uncertain terms, that he could not perform the transaction that he desired which, of course, on her version, was to change the existing contact details on the respondent's business account. I simply cannot accept that an employee, even an employee of the applicant's standing on her version, could just walk up to a bank official and request changes even of the nature testified to by Ms Maleka, to be made on a business account, in the face of clear mandates at the bank regarding who the authorised financial person at the respondent was.'

He then concluded:

> 'I find that if Ms Maleka, whether by accident or design, then went on to effect different changes to the respondent's account than that which the applicant

requested, it can never be that the applicant can be said to have been dishonest as a result.'

[10] As a managing director of first respondent, appellant was not required to report to Mrs Dyson nor to inform her of the activation of an in-contact service on a business credit card which had been allocated to him for business purposes. In addition, the Commissioner found that, given his position in the organisation, appellant would, in any event, have had access to the information that he had received following the activation of the in-contact service. Furthermore, the Commissioner considered that it was troubling that Mrs Dyson had only detected that he was no longer receiving SMS messages on the first respondent's cheque account some months after appellant's visit to the bank. On this line of reasoning, either Mrs Dyson did not notice that she was no longer receiving the messages or she considered this to be of insufficient importance to raise the issue with the bank. The Commissioner thus found that the dismissal of appellant had been substantively unfair and awarded him the compensation indicated earlier in this judgment.

The finding of the court *a quo*

[11] Brassey AJ held that the fact that appellant received SMS messages in respect of first respondent's cheque account for eight months before Mrs Dyson found out about the termination of the service was of little consequence. In his view, appellant had a duty to obtain the consent of the Dysons before he altered the bank account details of first respondent. As a director, he owed a special duty to the first respondent and his co-directors to make the requisite disclosures and obtain the appropriate consent.

[12] Brassey AJ found that not only did he not solicit consent from Mr Dyson but he failed to make sure that he was only added as a recipient rather than as a substitute in respect of the in-contact service. Thus, he failed to deal with the potential consequences that flowed from the information generated on the SMS

amount. This negligence was bordering, in the learned judge's view, on recklessness.

[13] In summary, the basis by which Brassey AJ granted the application for review of the award, save for procedural unfairness, is captured in the following passages of his judgment:

> 'In my view, the arbitrator's reasoning on the merits was materially deficient. There was a fundamental failure by the learned arbitrator to understand what it is that he was expected to do. He was expected to evaluate the facts. He had two conflicting versions. The one tendered by the employer, principally through the mouth of the bank teller was that Moen misrepresented his reasons for wanting a change to the in-contact information. The second tendered by Moen was to the effect that he had made no misrepresentation and was certainly not wilfully dishonest when he acted in the way that he did.
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> …
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> On this version I have to consider whether there has been a material irregularity, and I come to the conclusion that there has been. What the learned arbitrator, having discovered that there was no dishonesty, should have done is to consider whether the facts disclosed a competent alternative conclusion that should have been adopted in the circumstances.
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> …
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> Moen was a senior man in the company. He was intimately connected with the Dysons. He was obliged to play totally open cards with them in the circumstances. He must have known what good corporate governance standards required of him. He must have known that what he was doing might, if not properly communicated, engender suspicion. It was matter of a few moments first to solicit permission and if he chose not to do that, at the very least to send an e-mail or some other communication to the Dysons, explaining what he had done and asking them to be alert to ensure that despite what his actions entailed, they continued to receive the necessary communications from the bank. He did none of that. In those circumstances he is guilty, it seems to me, of negligence, indeed

> such want of care as amounts to recklessness. To act in a way that is so pregnant with potential suspicion is to act in a thoroughly neglectful way.'

Appellant's contentions on appeal

[14] Central to the appeal was the argument that the court *a quo* had applied the wrong test for review. It is now trite law that the test for review is whether the Commissioner's decision is one that a reasonable decision-maker could not reach in the circumstances of the case. See *Sidumo and Another v Rustenburg Platinum Mines and Others* 2008 (2) SA 24 (CC) and the further explication of this judgment by this Court in *Fidelity Cash Management Services v CCMA and Others* 2008 (29) ILJ 964 (LAC).

[15] By contrast, the court *a quo* formulated the test thus:

> 'Of course, it is not my function as a judge sitting on review to pick my way through the arbitration award in order to discern elements of acts of misdirection; quite the reverse. My job is to ask whether, whatever, the misdirection may have been, they actually produced an outcome that was materially deficient… the test is whether, by reasoning as he did, the Arbitrator in effect went off the rails.
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> …
>
> …I have to consider whether there has been a material irregularity, and I come to the conclusion that there has been.'

[16] Regrettably, this test does not appear to be congruent with the proper approach to a review of a CCMA award. As Cachalia and Wallis JJA said in *Herholdt v Nedbank Ltd*[1]

> 'For a defect in the conduct of the proceedings to amount to gross irregularity as contemplated by s 145(2) (a) (ii), the arbitrator must have misconceived the nature of the enquiry or arrive at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the

[1] 2013 (6) SA 224 (SCA).

> material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'[2]

[17] This *dictum* emphasises that the significance of the arbitrator's reasons are less important than a careful examination by the reviewing court of the result arrived at by the arbitrator, after a consideration of all the materials placed before the arbitrator. This exercise does not entirely exclude an examination of how the arbitrator might have arrived at his or her conclusion, in that a review will still succeed if the conclusion reached is unsupported by or in conflict with the evidence read as a whole.

[18] By contrast, the approach adopted by Brassey AJ, in this case, raises the danger of a conflation between an appeal and a review, the latter which is obviously the mandated enquiry in the present dispute.

[19] The present dispute turned on a series of charges of gross dishonesty and/or misconduct and this must form the bedrock for any enquiry as to whether the commissioner arrived at an unreasonable result.

[20] In support of first respondent's case much was made of a company resolution of 15 October 2007 which read thus:

> 'We, the undersigned, being the members representing the total issued share capital of the company do hereby consent to the following banking arrangements:
>
> Resolved that a cheque account and a call investment account be opened at the First National Bank Limited.
>
> Reserved that the following restrictions are applicable to the banking facilities:
>
> - Signatures of N M Dyson and any other authorised director listed above are jointly required to amend any profiles or instructions on the account.

[2] At para 25.

- Signatures of N M Dyson and any other authorised director listed above are jointly required to amend any internet banking profiles or instructions on the internet banking service.

- Signatures of N M Dyson and any other authorised director listed above are jointly required to sign cheques in excess of R1,000-00 (one thousand rand only) to effect payment.

- Only one signature on a cheque is required to effect payment of R1,000-00 (one thousand rand only) or less.'

[21] It was contended that, as appellant had admitted that he knew of this resolution, he had breached it by way of his conduct when he requested the in-contact service on his business credit card. He had failed to inform his fellow directors and concealed his engagement with the bank for eight months until he was found out. This conduct was sufficient not only to justify a conclusion that charges brought against him were sustainable but so argued first respondent, no reasonable arbitrator could have come to a different conclusion. It was further contended that appellant's failure to correct this situation constituted a deliberate breach of duties, alternatively gross negligence, sufficient as Brassey AJ had said to justify the conclusion that "such want of carelessness … amounts to recklessness."

Evaluation

[22] The evidence, as analysed by the Commissioner, did not, on the probabilities, reveal that appellant had approached FNB to ensure that he be placed in a position "to receive communications pertaining to all financial movements on the account." (charge 1) The fact was that these further communications, other than those which related to his own business credit card, could not be sourced, on the evidence, in any request that was made by appellant to the bank. The probabilities are that this was a bank error and not one which could be attributed to him. Accordingly, it was not an unreasonable result to conclude that the charges of gross dishonesty and misconduct pertaining to the bank providing

appellant with communications on all the financial movements of first respondent could not be justified on the evidence available.

[23] Regarding the additional charges, the resolution of October 2007, upon which first respondent placed so much emphasis, clearly related to a cheque account and a call investment account of first respondent. It was not unreasonable to conclude that the resolution did not cover the in-contact facility available on credit cards. Accordingly, it was not unreasonable to conclude that appellant had not exhibited gross dishonesty in failing to obtain permission from Mr Dyson in respect of this SMS facility. Appellant's evidence that he required the facility because he was concerned about fraud on the credit card was not disturbed under cross-examination and it is difficult to discount it as the justification for his approach to the bank.

[24] I accept readily that appellant's excuse for not correcting the bank communication which enabled him to receive communications on all of first respondent's accounts, namely that it was tiresome to stand in a queue at the bank, is not reflective of the kind of conduct that one would expect from a managing director of a company. I also accept that, in terms of his fiduciary duties, appellant should have spoken to his fellow directors about the additional information that he received in terms of the in-contact system. But it is, in my view, not unreasonable to conclude that this conduct did not amount to the kind of gross dishonesty as formulated in the charges brought against him.

[25] First respondent's counsel sought to justify his client's case by submitting that the appellant had engaged the bank without authorisation regarding the lifting of the credit card limit. With the exception of a single comment made by Mr Dyson in passing, the evidence amounted to no more than a suspicion on the part of Mr Dyson. This issue was not canvassed by either party in evidence during the arbitration hearing. No evidence was led that the appellant had acted in this manner nor was the issue canvassed when the relevant bank officials testified at the hearing. More significantly perhaps, is the fact that this was not an issue

raised by first respondent as a ground of review in respect of the Commissioner's decision to justify first respondent's contention that the Commissioner had erred in finding that the appellant's dismissal was substantively unfair.

[26] Viewed in its totally, the evidence does reveal that the appellant did not notify anyone at first respondent, in particular, Mr Dyson, that he was receiving information about first respondent's bank account or that he took steps to rectify the position. But alone this is insufficient to conclude, on the evidence that was placed before the Commissioner, that the result reached, namely that on the charges brought by first respondent, the dismissal of appellant was unreasonable in terms of the proper test for review which must be applied.

The amount of compensation to be awarded

[27] In light of the finding that Brassey AJ's order stands to be set aside on the basis that the learned judge applied the incorrect test and that the decision of the arbitrator is not one of which it can be said that a reasonable arbitrator could not have reached on the material placed before him. The further question arises as to whether there is any basis for an alteration of the amount of compensation awarded by the arbitrator. The question arises as to whether eight months' salary as compensation constituted a capricious exercise of a discretion, based upon a wrong principle without reason or stands to be classified as a biased decision. See *Kukard v GKD Delkor* [2015] 1 BLLR 63 (LAC). Again, it must be emphasised that this is a case brought on review. This test emphasises that the particular view of the reviewing judge is not to be equated with the proper test which entails an analysis of whether any of these specified factors have been shown to be present in the award of compensation. On these facts, it cannot be said that compensation in the amount of eight months' salary is a decision that stands to be reviewed.

[28] In the final result, the finding that the dismissal was both substantively and procedurally unfair must stand. Viewed accordingly, an award of compensation amounting to eight months' remuneration cannot be considered to unreasonable.

Conclusion

[29] For all of these reasons, the appeal must succeed and thus the following order is made:

1. The appeal succeeds with costs.

2. The order of the Court *a quo* is set aside and replaced with the following order: “The application is dismissed”.

3. First respondent is to pay the appellant compensation in the amount R936 000.00 (nine hundred and thirty-six thousand rands) within 14 (fourteen) days of the date of this judgment.

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Davis JA

I agree

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Waglay JP

I agree

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Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv A Redding SC
	Instructed by Edward Nathan Sonnenbergs INC
FOR THE RESPONDENTS:	Adv N Smythe
	Instructed by Howard S Woolf Attorneys