THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1807/20

In the matter between:

EVELYN BAILE KGOMO Applicant

and

COMMISSIONER SELLO *NO* First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

STANDARD BANK SA Third Respondent

Heard: 19 November 2024

Delivered: 21 November 2024

Summary: Application to review and set aside arbitration award. Application dismissed. Outcome falls within a range of reasonable outcomes.

JUDGMENT

DANIELS J

Introduction

[1] This is an application to review and set aside the arbitration award issued by the first respondent under CCMA case reference GATW5758-20 and dated 15 October 2020 (the "award"). The first respondent (the "commissioner") found the dismissal of the applicant to be substantively fair.

Material facts

[2] Many of the facts were common cause.[1] The evidence presented to the commissioner may be summarized as follows:

2.1 On 1 November 1999, the applicant was employed by the third respondent as a business banker, a fairly senior and well remunerated position.

2.2 The applicant was charged with the following:

> *"Charge 1: It is alleged that you acted in breach of clauses 3.3.4, 3.4.1, 3.7.4, 4.3 and 4.3.5 of the Outside Business Interest Policy ("OBI") in that during April 2019 you failed to inform your line management regarding the change in status of your OBI and to ensure that the information regarding your OBI was current and accurate. Your conduct goes against the bank's policies and its Code of Ethics.*

[1] In addition, at paragraph 38.1 of the founding affidavit, the applicant notes that the commissioner "*fairly summarized the parties respective evidence presented before him*."

Charge 2: It is alleged that you acted in breach of clause 3.7.4 of the OBI Policy and clause 3.2 of the Conflict of Interest Policy in that you failed to declare your business relationship with a client (Mr Sthembiso Msibi of HMN Group) in your portfolio management and to obtain explicit approval from your line manager to conduct business with the client.

Your conduct has brought the bank's name into disrepute and is in conflict with the bank's policies."

2.3 In essence, the applicant was charged with doing business with a bank client without following the proper procedures and without receiving the proper authorisation. The applicant was found guilty of the charges and dismissed. Aggrieved by her dismissal the applicant referred a dispute to the second respondent. When conciliation failed, the applicant requested arbitration. The resulting arbitration award is the subject of this review application.

<u>The Arbitration</u>

2.4 At arbitration, the third respondent called several witnesses:

2.4.1 Mr Yoganaghan Reddy ("Reddy"), the Manager of Group Investigations, testified that the applicant entered into a business relationship with a bank client but failed to update her declaration of outside business interests ("declaration") with approval of her line manager, Ms Wilma Pombo. The applicant contended that she had made a verbal declaration to the Business Manager, Mr Richard Fay, but Reddy testified that Mr Fay was not the applicant's line manager. Reddy testified that, during the investigation, the applicant never stated that she had declared her outside business

interests to Mr Fay and that he had approved the declaration. Reddy testified that the applicant had attended the training[2] conducted annually in relation to Conflicts of Interest and Outside Business Interests policies. The misconduct of the applicant was serious and had resulted in a breakdown of the trust relationship.[3]

2.4.2 Ms Johanna Wilma Pombo ("Pombo"), the Manager of Small Enterprises, testified next. She testified that she was the line manager of the applicant until 1 May 2019. Mr Fay was not the applicant's line manager[4] and he had never acted in her position.[5] In fact, Mr Fay also reports to her (Pombo). The applicant should have declared any change to her outside business interests, in writing, and this should have been approved by her as line manager. Pombo testified that she did not give approval for the applicant's conduct of outside business with the bank's client. Any changes to the applicant's declaration, and the approval of such changes, were required to be recorded in writing. The changes and the approval should have been made on the automated system.

2.4.3 Ms Lebogang Nthodi testified that she was employed as the Team Leader: Director Customer Teams. She was the applicant's line manager effective from 1 May 2019. The applicant had never declared her outside business interests to her. Employees are supposed to declare their outside business interests as soon as any change occurs.

[2] Transcript Vol 2 pp 19

[3] Transcript Vol 2 pp 71 – 72

[4] Transcript Vol 3 pp 192

[5] Transcript Vol 3 pp 192 lines 11 – 16; pp 197 lines 6 – 10; pp 198 lines 1 – 15

2.4.4 Mr Ben Van der Merwe, the Risk Mitigation Manager, testified that the policies are important because non-compliance could lead employees to favouring clients' interests over the banks.[6] In addition, external interests could influence the banker's performance and undermine the rendering of an unbiased service to clients or customers.[7]

2.5 The applicant testified on her own behalf. She testified that the window to complete the OBI declaration each year was from January to March. She completed the declaration in January 2019 and declared that she owned a company, which was dormant. During March or April 2019, a client in her business portfolio, Mr Sthembiso Msibi ("Msibi") engaged with her with a view to doing business with her. She spoke to Mr Fay ("Fay") - who she said was acting as her line manager - and he had given her approval to do business with Msibi. She had previously approached Fay on work matters in the absence of Pombo. The applicant agreed that she had previously submitted her earlier declaration through the automated system.

2.6 Ms Witney Mareira testified that she had previously been employed by the third respondent as a Business Banker. Her line manager was Pombo, but in her absence she would report to a Business Manager. She testified that an Outside Business Interest is declared and approved on the automated system.[8]

2.7 Fay testified that he was employed as a Business Manager. He testified that Business Bankers used to ask Business Managers for directions when Pombo was not available. He was approached by the applicant and informed by her that she wished to engage in

[6] Transcript Vol 3 pp 245 – 246

[7] Ibid.

[8] Transcript Vol 5 pp 420 lines 12 – 15

business with Msibi. Fay gave the applicant his approval *provided she declared it*.[9] Fay testified that he was not the applicant's line manager though, in practice, he was part of line management.[10]

Grounds for review

[3] The principal ground of review, and the only ground developed in argument, is found in paragraph 38.1.1 of the founding affidavit where the deponent states that the commissioner: "*unreasonably without justification found that Mr Richard Fay did not have authority to grant the applicant approval, completely ignored and/or chose to ignore corroborated version that in the absence of the line manager, Business Bankers reported respective work related issues as second in command longer before including after Ms Wilma Pombo too over and upheld dismissal*."

Legal principles

[4] The legal test in review applications is trite. In *Sidumo and another v Rustenburg Platinum Mines Ltd and Others*[11] ("*Sidumo*") the Constitutional Court held that '*the reasonableness standard should now suffuse s 145 of the LRA*', and that the threshold test for the reasonableness of an award was: *'… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'*[12]

[9] Transcript Vol 5 pp435 lines 13 – 15; Thus, even on this version, the applicant committed misconduct because she never submitted a formal declaration.

[10] Transcript Vol 5 pp 449 line 25

[11] (2007) 28 ILJ 2405 (CC).

[12] See also *CUSA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 134; *Fidelity Cash Management Service v CCMA and others* (2008) 29 ILJ 964 (LAC) at para 96.

[5] This means that the award must be tested against all the evidence before the arbitrator to ascertain if it meets the requirement of reasonableness.[13] It is necessary for the court to consider the merits and the evidence on record to determine what is reasonable. In *Herholdt v Nedbank Ltd and another*[14] the court said:

> "*A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable*." (own emphasis)

[6] In *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others*[15] the court stated:

> "… *the reviewing court must consider the totality of evidence with a view to determining whether the result is capable of justification. Unless the evidence viewed as a whole causes the result to be unreasonable, errors of fact and the like are of no consequence and do not serve as a basis for a review* …" (Own emphasis)

[7] The third respondent contended that Fay was not authorised to approve any declaration of interests by the applicant. The third respondent contended that Fay was not senior to the applicant. The applicant and Fay disputed this. The commissioner was required to resolve this factual dispute. To do so, the commissioner was required to evaluate the evidence holistically. In *Stellenbosch Farmers' Winery Group Ltd. and*

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[13] See *Duncanmec (Pty) Ltd v Gaylard NO and others* (2018) 39 ILJ 2633 (CC) at para 43.

[14] (2013) 34 ILJ 2795 (SCA) at para 25. *National Union of Mineworkers and another v CCMA and others* (2015) 36 ILJ 2038 (LAC) at para 16.

[15] (2015) 36 ILJ 1453 (LAC) at para 12.

Another v Martell & Cie SA and others[16] the test for the resolution of conflicting evidence was formulated as follows:

> '*[5]* *To come to a conclusion on the disputed issues a court must make findings on: (a) the credibility of the various witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box,(ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version,(vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events*.'

[8] In *Sasol Mining (Pty) Ltd v Ngqeleni and Others*[17] the court held that:

> "*[9]* *The commissioner was obliged to at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought also to have considered the probability or improbability of each party's version. The commissioner manifestly failed to resolve the factual*

[16] [2002] ZASCA 98; [2003] (1) SA11 (SCA) at para 5.

[17] [2010] ZALC 141; (2011) 32 ILJ 723 (LC) at paras 9 and 13.

dispute before him on this basis. Instead, he summarily rejected the evidence of the applicant's witnesses on grounds that defy comprehension.

…

[13] *… the arbitrator failed to have any regard to the credibility and reliability of any of the witnesses, nor did he have regard to the inherent probabilities of the competing versions before him. That failure, and the fact that the award clearly may have been different had the commissioner properly acquitted himself, renders the award reviewable on account of a gross irregularity committed by the commissioner in the conduct of the arbitration proceedings*." (own emphasis)

Analysis

[9] The commissioner was required to grapple with the conflicting versions of the parties. The commissioner found that Fay had no authority to grant approval but gave no reasons for rejecting the applicants' version (even though that version was corroborated by Fay) and accepting the third respondent's version. While the commissioner's failure to justify his rejection of the applicant's version is problematic, the question remains whether the commissioner's finding can be justified on the evidence. If the finding cannot be justified, the court must still consider whether the outcome was reasonable in light of all the evidence.

[10] In my view, the finding by the commissioner that Fay was not authorised to approve the applicant's intended external business relationship with a client was, in all the circumstances, reasonable. The evidence reflected that Fay was not senior, or significantly senior, to the applicant. Fay himself testified that he was not the applicant's line manager and the OBI policy permitted only line management to approve the OBI declaration.

Fay did not testify that he had previously approved an OBI declaration (the applicant's previous declaration was submitted to Pombo and approved by her). In any event, Fay's evidence was that he gave the applicant permission to proceed with the business but this permission was "subject to a declaration". Thus, the probabilities support the finding that Fay was not authorised to approve the applicant's external business interests.

[11] For the purposes of what follows, I accept that the applicant spoke to Fay and that he agreed that the applicant may pursue outside business interests. However, by itself, this does not exonerate the applicant.

[12] The following evidence and factors are key to a fair and reasonable outcome:

12.1 It was common cause that the Conflict of Interest and Outside Business Interest policies served an important function - preventing senior employees of the bank from becoming conflicted and placing the interests of the bank's customers before that of the bank.

12.2 The Outside Business Interest declaration, just above the space where employees are required to sign, specifically states: "*I understand that the contents hereof and agree that I have made full disclosure of all business interests or activities and acknowledge that a failure to disclose actual or potential conflicts of interest may lead to disciplinary action and possible dismissal*." This was a clear indication that the employer treated compliance with these policies seriously, and employees must have been aware of the importance of such rules.

12.3 Clause 3.3.2 of the OBI policy required the applicant to submit a *written declaration* to her line manager for approval 10 days prior to

initiation, or as soon as the applicant decided to become involved in an outside business interest, and before any binding commitment is made.

12.4 Clause 3.4.1 of the OBI policy states: "Once approval has been obtained for an Outside Business Interest, *it is the Employee's responsibility to ensure that the information regarding their Outside Business Interest remains current and accurate. Any changes require line management approval and submission to Human Capital*."

12.5 Clause 3.7.4 of the OBI policy states: "*Employees are not permitted to enter into any form of business relationship with a Client even if the nature of the proposed relationship is unrelated to the current bank client relationship for services and/or products <u>except when line management has explicitly approved that they may transact with a Group Client</u>*."

[13] On the common cause facts, the applicant did not comply with the OBI policy and committed the following misconduct:

13.1 The applicant failed to submit a *written declaration*, as required by clause 3.3.2 of the OBI policy.

13.2 The applicant failed to ensure that the outside business interest was "*explicitly approved*".

13.3 The applicant failed to ensure that Human Capital was made aware of her outside business interest.

13.4 The applicant failed to ensure that her written declaration (which she submitted in January 2019) was *corrected and updated*.

[14] In light of what is set out in paras 12.1, and 12.2 above, there can be little doubt that breaches of the OBI policy constitute serious misconduct. The employer cannot be faulted for this approach. It was entitled to take strong measures to protect its business and its reputation.

[15] The Conflict of Interest and the Outside Business Interest policies was designed to protect the interests of the bank, but they are also bound up with the professional and ethical standards expected from employees. Thus, breach of such policies reflected directly on the breakdown of the trust relationship.

[16] The applicant had lengthy service with the third respondent, and held a senior position. While traditionally long service is considered to be relevant to mitigation[18] here it also suggests that the applicant was intimate and familiar with the policies of the company, particularly the Conflict of Interest and the Outside Business Interest policies. In any event, the third respondent presented evidence that the applicant was trained in these policies.

[17] On the evidence before the commissioner, the applicant was guilty of acting in breach of the Conflict of Interest and the Outside Business Interest – key policies designed to protect the employer. The misconduct was viewed and treated by management as serious. When determining a fair sanction, the commissioner must consider the totality of circumstances.[19] The commissioner must consider the importance of the

[18] This was recognized in *Toyota SA Motors (Pty) Ltd v Radebe and others* (2000) 21 ILJ 340 (LAC) at para 15 where the Court said: "Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal …"

[19] *Sidumo* at para 78

rule that had been breached, the reason the employer imposed the sanction of dismissal, and the basis of the employee's challenge to the dismissal. In addition, the commissioner will consider the harm caused, whether additional training and instruction may result in the employee not repeating the misconduct, and the effect of dismissal on the employee and his or her long-service record.

[18] Here, on the evidence, it appears that no harm resulted from the misconduct. However, the misconduct remained serious because of the risk, including reputational risk, to which the bank was exposed. The rules breached were important *inter alia* because they related to ethical and professional conduct on the part of senior employees. Furthermore, additional training or instruction would not have assisted.

[19] In the circumstances, despite the applicant's lengthy service, dismissal was a fair and reasonable outcome. Our courts have pointed out that "*dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise*. …"[20] In the present circumstances, dismissal was a fair response to the operational risk.

[20] In the circumstances, the award falls within a range of reasonable outcomes.

Conclusion

[21] In the result, the application is dismissed.

[20] *De Beers Consolidated Mines Ltd v CCMA and others* (2000) 21 ILJ 1051 (LAC) at para 22.

RN Daniels

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:
Mr Wilson Khoza
Union official

For the Respondent:
Mr D Cithi (Tabacks Attorneys)