

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: JR 2973/09

Not reportable

In the matter between:

PHUMELELE NEBE

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER M PHALA N.O

Second Respondent

STANDARD BANK OF SOUTH AFRICA

Third Respondent

JUDGMENT

BHOOLA J:

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 (the Act), to review and set aside the award of the second respondent (“the arbitrator”) dated 24 September 2009 issued under case number GAJB20333-09 in which he found the dismissal of the applicant to have been procedurally and substantively fair.

Background

[2] The applicant was employed by the third respondent as a Business manager in June 2007. The third respondent operated two types of business accounts – optima accounts which are small accounts for businesses with a turnover of under five million rand and focus accounts where the minimum turnover was five million rand. The bank's customer value proposition (CVP) set out the differences between the two types of accounts. It also ranked managers according to their performance in terms of the CVP and this in turn determined their performance bonuses. The applicant as business manager was responsible for opening the high value focus accounts. In 2008 he was under informal counselling for poor performance and did not receive a performance bonus for that year. Thereafter it was discovered that he had opened optima accounts but passed them off as focus accounts in order to reflect an increase in his sales performance. This constituted dishonesty and he was charged as follows : “[a]lleged dishonesty in that you falsified your sales figures when you opened optima accounts and recorded them as focus accounts and received credit for this. In doing so, you were given credit for sales that should not have been allocated to you”.

[3] On 24 June 2009, a day before his disciplinary enquiry, the applicant submitted his letter of resignation, giving the requisite 30 days' notice. At his disciplinary enquiry the following day he was found guilty of the charge of dishonesty and the sanction of dismissal was imposed. The applicant referred a dispute arising from his alleged unfair dismissal to the first respondent but it could not be resolved at conciliation and proceeded to arbitration. The arbitrator issued an award in which he found the dismissal to have been procedurally and substantively fair.

Grounds of review

[4] The applicant relied in his founding affidavit on the following two grounds of review :

- a) The arbitrator has unjustifiably and /or incorrectly committed a gross irregularity in failing to listen to the applicant's evidence concerning an example of business practice and accountability which would have enabled him to understand the conventional practice of opening accounts; and
- b) The arbitrator failed to provide guidance to the applicant and in so doing failed to comply with a duty to guide and assist lay litigants.

[5] These grounds were supplemented by the following :

- c) The arbitrator unjustifiably and/or incorrectly committed a gross irregularity in finding that his dismissal was both procedurally and substantively unfair notwithstanding the fact that the third respondent failed to call crucial witnesses, namely Riaan Visser, the current team leader and Joelene Gordon, the former branch manager, both of whom were aware of the conventional practice of opening optima and focus bank accounts at the branch where the applicant was employed. The third respondent advanced no explanation for its failure to call them at the arbitration despite having called them as witnesses in the disciplinary hearing.
- d) The arbitrator unjustifiably and/or incorrectly committed a gross irregularity in not finding that the third respondent has failed to prove its case on a balance of probabilities notwithstanding the fact that its only witness, Koen, gave evidence of a poor quality in that he was not conversant with the conventional practice as applicable to the opening of the optima and focus accounts since he had only recently joined the third respondent and testified that he had only "worked with the applicant as a business manager for about a month".
- e) The arbitrator unjustifiably and/or incorrectly found and/or committed a gross irregularity by finding that the third respondent has led sufficient evidence to show that the applicant's dismissal was both procedurally and substantively fair notwithstanding that each and every account that was initiated by the applicant was properly checked and approved by Visser, who never found any

falsification of bank records by the applicant before the account was opened by the support officer.

- f) The arbitrator unjustifiably and/or incorrectly found and/or committed a gross irregularity by finding that the applicant's explanation defied logic and it was highly improbable that the third respondent could have allowed the applicant to effectively reduce its potential to earn a fee through a particular type of account but still allow him to benefit from the same unfortunate situation, notwithstanding the fact that there was not a shred of evidence to show exactly how much the applicant benefited from such a situation.

Analysis

[6] The applicant submitted that the "common practice" defence emerged for the first time in the arbitration and must therefore be held to be an afterthought which borders on dishonesty. It had not been mentioned in the applicant's explanatory statement nor in his evidence at the disciplinary enquiry, and was opportunistically mentioned at the arbitration where Visser and Gordon were not called and could not rebut it. In any event the applicant bore the evidentiary burden of adducing proof of the "common practice", particularly in light of Koen's evidence that other employees who conducted themselves similarly were dismissed. The arbitrator's conclusion therefore that the third respondent had adduced sufficient evidence to show that the dismissal was procedurally and substantively fair is not an unreasonable one in this context.

[7] Despite Koen having only worked with the applicant for a month he was able to testify that the practice related to the value of accounts as contained in the CVP was standard across the bank. In these circumstances there was no need for the arbitrator to have applied the cautionary rule to his evidence as a single witness. Furthermore the applicant did not contest Koen's evidence that:

- a) he was responsible for focus accounts with a turnover of five million;
- b) he opened optima accounts and passed them off as focus accounts and he benefited from such conduct;

- c) he was undergoing a performance review when this occurred;
- d) in his explanation he did not mention that this was a common practice in the bank or at the branch; and
- e) the bank had dismissed other employees who engaged in similar conduct.

[8] Koen testified that the applicant, as a manager, was expected to behave with integrity and honesty and the checking of accounts by his team leader was mainly to determine compliance with FICA and did not extend to whether the account was allocated to the correct segment. The applicant moreover had a clear understanding of his job description. This had also been the effect of Visser's testimony at the disciplinary enquiry.

[9] It is not correct to state that no evidence was led as to how the applicant could have benefited from the inflated account figures. The arbitrator found that direct evidence was led that bonuses paid to managers were based on the number and value of accounts opened. The arbitrator specifically found that the applicant did not dispute that he opened accounts on a lower segment, and if he passed them off as optima accounts this would increase his sales figures and improve his chances of earning a bonus. In his explanatory statement moreover he expressed resentment about not getting credit for opening lesser value accounts.

[10] The arbitrator, in determining whether the third respondent had proven the fairness of the dismissal, was in essence making a value judgment on the evidence before him. Unless he reaches a conclusion that is so unreasonable that it could not have been reached by a reasonable decision maker on the material before him, this court cannot interfere with the decision. It certainly is constrained from interfering on the basis that it might have come to a different conclusion. This principle was eloquently expressed by Patel JA in *Palaborwa Mining Co Ltd v Cheetham & Others* (2008) 29 ILJ 306 (LAC) at [13] as follows :

"Sidumo enjoins a court to remind itself that the task to determine the fairness or otherwise of a dismissal falls primarily within the domain of the commissioner. This was the legislative intent and as much as decisions to different commissioners may lead to different results, it is unfortunately a

situation which has to be endured with fortitude despite the uncertainty it may create. I have to remind myself that the test ultimately is whether the decision reached by the third respondent is one that a reasonable decision-maker could reach in all the circumstances. On this test I cannot gainsay the decision of the third respondent.”

[11] It is not correct moreover that the arbitrator prevented the applicant from leading evidence on an example of accountability at the bank. He simply chided him about using an example inapplicable to the situation in order to detract from the question. He then ventured an example which was more pertinent which the arbitrator permitted. This portion was however inexplicably excluded from the extract from the evidence quoted in his heads of argument. The applicant had explained : “Okay, opening of accounts, if you give me an application I check everything, If I sign authorising it, I sign that I have checked it. I will sign that it is correct and I release it on the computer for use by the customer. Should something be wrong, if something wrong is found then I am accountable and not my subordinate because I have a chance to give it to him or her to say correct here”. The arbitrator correctly determined the fact that it was improbable that the third respondent would create segments and reward performance of employees based on specific segments only to allow the applicant from benefitting from opening accounts in any segment outside his job functions.

[12] Insofar as he relies on the failure to assist him as a layperson there is no indication from the record of the arbitration proceedings that he required any assistance or did not understand the process or issues. Insofar the duty to assist his representative in presenting his case, this ground of review is not sustainable. There is no indication from the record that the applicant’s representative required assistance or sought it, or that the applicant was in any manner prejudiced by the manner in which he was represented. Aligned to this ground the applicant raises a new ground of review in his heads of argument for the first time, to the effect that the arbitrator committed a gross irregularity by cross examining him. This does not appear from the record to constitute a justifiable ground for criticism of the award. In any event a commissioner has a discretion, afforded to him or her by section 138 of the Act, as to what mode of hearing to adopt and his robust questioning of the

applicant, which appears to have been done in order to elicit clarity on certain issues and resulted in a confirmation of evidence already tendered rather than eliciting new issues, cannot be said to constitute a gross irregularity.

Order

[13] In the premises, I make the following order:

The review application is dismissed. There is no order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

Date of hearing: 10 August 2011

Date of judgment: 18 August 2011

Appearance:

Mr Nebe represented himself.

For the Third Respondent: Mr Cithi, Perrott, Van Niekerk Matyolo Inc.