REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no: JR 2259/09

In the matter between:

FIRST NATIONAL BANK, A DIVISION OF FIRSTRAND BANK LIMITED	**Applicant**
and	
MANDISA NARRIS LABASE	**First Respondent**
MONISE JACOB PONOANE	**Second Respondent**
COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**Third Respondent**

Heard: **12 October 2012**

Delivered: **24 January 2013**

Summary: Review application – commissioner finding that the first respondent was not dishonest by withdrawing money from her study loan account for purposes not related to studies – commissioner's award grossly irregular – arbitration award reviewed and set aside.

JUDGMENT

BOQWANA AJ

Introduction

[1] This is an application to review and set aside an arbitration award issued by the second respondent ('the commissioner') on 21 July 2009 under case number FS 533 – 09. The commissioner found that the dismissal of the first respondent was substantively unfair and ordered the applicant to reinstate the third respondent from the date of her dismissal without any loss of benefits.

[2] The commissioner further ordered the applicant to pay the first respondent arrear salaries in the amount of R53 232.90 calculated as follows: R7604.70 x 7 months arrear salaries = R53 232.90. The commissioner ordered that the said amount must be paid on or before 31 August 2009.

[3] This application was preceded by condonation applications in respect of the late filing of the review application as well as the late filing of the opposing affidavit. The applicant also sought condonation for its failure to attach the arbitration award to the review application at the time of the lodgement of the review application. I granted condonation on the respective condonation applications as good cause was shown by both parties.

Facts

[4] The first respondent was employed by the applicant on 5 August 2001 until her dismissal on 17 December 2008. At the time of her dismissal she was employed as a collections official earning an amount of R7604.70.

[5] On 19 June 2008 the first respondent applied for a study loan which was granted. The amount that was granted was R2150.00.

[6] On 27 October 2008, the first respondent withdrew an amount of R300.00 from her study loan account. The money was used for medicine for her child that was ill and it was never disputed by the first respondent that the money was not used towards her studies.

[7] The first respondent was charged with the following:

> 'fraud and dishonesty in terms of paragraph 4.2.1 of the Banks Disciplinary Code and Procedure, in that it is alleged that you have withdrawn R300.00 from your study loan account for personal use on 27 October 2008'

[8] She was then found guilty and dismissed on 17 December 2008. She subsequently appealed her dismissal but the appeal was also dismissed.

The arbitration award

[9] The commissioner preferred the first respondent's version to that of the applicant and found, *inter alia*, that the first respondent did not materially gain in that she was the one who reported the incident to her manager Lorna Martins ('Martins'), that she had taken R300.00 from her study loan account to buy medicine for a child. In the commissioner's view these set of facts did not amount to fraud or dishonesty because they did not translate to a misrepresentation as per the charges.

[10] The commissioner found that he could not accept Khoza's evidence which he gave during re-examination where he testified that it was discovered by the applicant that the first respondent had taken money from the study loan account because during his cross examination when it was put to him that the first respondent was the one who informed the applicant about the withdrawal of the said R300 he did not materially dispute that fact. Instead, he testified that the first respondent did not seek prior approval before she could withdraw the money.

[11] Because of this, the commissioner found that the respondent was not dishonest to the applicant. This was because she disclosed that she had taken money from her study loan account to buy medicine for her child and this fact was reported to the applicant by first respondent.

[12] The commissioner further stated that Khoza did not even know the name of the person who discovered the withdrawal of the money from the applicant. The reason for this, according to the commissioner could possibly be that Khoza was only involved in this matter at an appeal stage whereby he decided the matter solely on the documents that were before him. The

commissioner accordingly regarded Khoza's evidence in relation to the discovery of the withdrawal as hearsay evidence and rejected it.

[13] The commissioner further found that when the first respondent was asked why did she not ask Martins before she could take the money, the first respondent stated that she acted "abruptly" because she was panicking for her child who was sick. According to the commissioner this fact was thereafter not 'assailed' by the applicant.

[14] The commissioner also found that there was no written rule in existence stating that the first respondent may not use the study loan money for purposes other than for the study loan.

[15] Finally according to the commissioner the sanction of dismissal of the first respondent brought a sense of shock in light of the dictum reasoning by Ngcobo J in *County Fair Foods (Pty) Ltd v CCMA and Others.*[1]

<u>Grounds for review</u>

[16] The applicant raised the following grounds for review are that the commissioner fundamentally misconstrued the evidence presented before him and in doing so failed to properly apply his mind to the evidence.

[17] Further, the commissioner disregarded the evidence of Lot Khoza ('Khoza'), the applicant's witness almost in its entirety. Since Khoza was involved in the appeal stage, he gave evidence regarding the policies and procedures of the applicant, as well as his involvement during the appeal process.

[18] The commissioner rejected Khoza's evidence that the withdrawal of the amount from the first respondent study loan was discovered by her manager, one Martin. He states that the evidence amounts to hearsay, since Khoza was not present at the time that the withdrawal was discovered. The applicant submits that nothing much turns on this issue.

[1] [1999] 11 BLLR 1117 (LAC) at 1127 E.

[19] The finding of the commissioner that there was no dishonesty involved in the conduct of the first respondent and his acceptance of her version particularly in respect of her alleged disclosure of the withdrawal to Martin is untenable for a number of reasons including the following:

19.1 The parties had agreed at the arbitration, by way of the pre-arbitration minute, that the first respondent had R300.00 from her study loan account for a purpose not related to studies. According to the applicant this constituted a clear breach of the study loan policy, which constituted a serious offence regardless of whether the first respondent reported the matter to Martin after her withdrawal of the money, or whether Martin discovered the withdrawal himself.

19.2 In any event, Khoza testified that the first respondent’s withdrawal was discovered by an employee of the applicant, Martin, who approached the first the applicant to discuss the issue. Khoza indicated that prior approval was required before withdrawing from this study loan account. The first respondent did not disclose that irregularity before it was discovered by the applicant.

[20] During cross examination, the first respondent admitted deliberately misleading the applicant on the use of money.

[21] Also during cross-examination, the first respondent admitted that deliberately misleading the applicant on the use of the money constituted dishonesty and that dishonesty was a dismissible offence in terms of the applicant’s disciplinary code and procedure.

[22] According to the applicant it is patently clear that had the first respondent not been confronted by Martin, she would not have reported the withdrawal to the management of the applicant.

[23] The applicant submits that commissioner clearly misdirected himself and failed to consider the evidence of Khoza as well as closing argument submitted by the applicant in respect of the allegations of inconsistency.

Khoza testified that the applicant had dismissed employees for similar misconduct.

[24] The applicant contends that quantum was not the primary issue as the use of that money for an unauthorised purpose constituted material breach of trust on the part of the first respondent in respect of the failure to observe a fundamental principle governing the granting of the study loan account.

[25] The applicant raises an issue that commissioner relied heavily on the reason for the first respondent admitted breach of the study loan policy, but failed to appreciate that despite the reason advanced by the first respondent, the truth is that she had still breached the policy.

[26] Further, Khoza stated that the misconduct committed by the first respondent rendered the continued working relationship intolerable. Accordingly the relationship of trust had been broken and accordingly the appropriate sanction was dismissal.

[27] The applicant argues that the commissioner's interpretation of the evidence was so unreasonable so as to render the award reviewable.

<u>Analysis</u>

[28] The test applicable in cases like these is well known and established. The principles have been enunciated in various judgements interpreting the Sidumo[2] judgement. In *Herholdt v Nedbank Limited,*[3] Murphy AJA held that 'dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'[4]

[29] Murphy AJA went further to say that:

> 'In short if the conduct of the commissioner prevents a fair trial of the issues even if perfectly well intentioned and *bona fide*, though mistaken, then such

[2] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 12 BLLR 1097 (CC).
[3] (2012) 33 ILJ 1789 (LAC).
[4] *Herholdt* judgment at para 33.

> conduct will amount to a gross irregularity, and that would be enough successfully to found a review under section 145 (2) of the LRA. The court by necessity must scrutinise the reasons of the commissioner not to determine whether the result is correct; or for that matter substantively reasonable, but to determine whether there is a latent irregularity, that is, any regularity that has taken place was in the mind of the commissioner, which will only hearsay tenable from his or her reasons.'[5]

[30] It is common cause that the first respondent admitted to having withdrawn R300.00 from her study loan account without having been authorised to do so. It was admitted that by the first respondent that this amount was deducted and used for a purpose that was not related to her studies. That on its own establishes breach of the study loan policy.

[31] It is immaterial, in my view, whether or not the first respondent reported it or was discovered by Martin. The commissioner made much of this and devoted almost his entire award on the fact that the first respondent had reported the incident. The point is even if she reported it, she did so after she had already taken the money. It cannot be an excuse that she acted 'abruptly' by not first getting permission from the employer.

[32] It does not help the case of the first respondent either to suggest that a loan is a loan, which means she was still to pay it back. This was in any event not the basis of the commissioner's award.

[33] It is quite telling that the first respondent admitted during cross examination to have misled the applicant deliberately. She then changed her testimony later on to say she did not deliberately mislead the applicant.

[34] I accept the applicant's submission that nothing much turns on Khoza's evidence that an employee of the bank discovered the withdrawal, which evidence is said to be hearsay. The issue is Khoza testified that there was a study loan policy which formed of the HR manual which it was established

[5] *Herholdt* judgment at para 40.

that the applicant was aware of, which specifies the purpose of the study loan policy.

[35] The fact that the policy does not specifically prohibit withdrawal of the money for other purposes does not make the conduct excusable. There need not be a written rule in every situation prohibiting a certain conduct. If a policy states the purpose of the policy, it follows that conduct outside that purpose, like in this case, is prohibited and should be viewed as misconduct, if not specifically authorised by management.

[36] Using money for purposes not allocated for, in my view goes to the heart of the employment relationship especially in the banking environment. In *Standard Bank of SA Ltd v CCMA* [6] , Tip AJ held that:

> 'The existence of the duty upon an employee to act in good faith towards his or her employer and to serve honestly and faithfully is one of long-standing in the common law. It has been regularly and strongly opposed by our courts. There can in my view be no discounting of these principles in an environment such as the conduct of banking, every level and every transaction of which must be permeated with unqualified good faith and honesty.'[7]

[37] In essence whether or not the first respondent reported the withdrawal after the event is of no purpose as she knew or ought to have known that she had infringed the study loan policy, which in my view qualified as a serious offence.

[38] In the case *Zeelie v Price Forbes (Northern Province)*[8] Jali J held that: 'Disciplinary charges are not intended to be a precise statement of the elements of an offence. The charges need only sufficiently precise to allow the charged employee to identify the incident which forms the subject-matter of the complaint in order for him or her to prepare suitable defence.'[9]

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[6] (1998) 19 ILJ 903 (LC) para 42

[7] *Standard Bank of SA Ltd v CCMA* supra para 42

[8] (2001) 22 ILJ 2053 (LC)

[9] *Zeelie v Price Forbes (Northern Province) supra* at para 37.

[39] To this end, charges brought against the first respondent were sufficiently clear as they captured what took place and when.

[40] In my view the changes in this case is sufficiently particular for the first respondent to identify what case she was called upon to answer. In her own version the first respondent had admitted to have breached the study loan policy that on its own in my view points to the finding of guilt.

[41] I have already found that this conduct went to the heart of the employment relationship especially the first respondent was employed in a banking environment where she dealt with money. It is important for good faith and honesty to be maintained in this environment. Dismissal was therefore the appropriate sanction.

[42] The commissioner, therefore, committed gross irregularity by holding that there was no dishonesty in these circumstances. Accordingly, his arbitration ward must be reviewed and set aside.

[43] Whilst part of the record had to be reconstructed, the Court is of the view that it has sufficient facts before it to come to a substitute the decision of the commissioner with its own decision. This is largely because the material facts informing the crux of the case were largely common cause. It would therefore be a waste of time to remit the matter back to the CCMA for a fresh hearing before another commissioner.

[44] I do not to award any costs against the first respondent.

[45] I therefore make the following order:

45.1 The arbitration award issued by the second respondent ('the commissioner') on 21 July 2009 under case number FS 533 – 09 is reviewed and set aside.

45.2 The commissioner's award is substituted as follows:

The dismissal of the first respondent was substantively fair.

45.3 There is no order as to costs.

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Boqwana AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:	Advocate F Venter Instructed by Cowan-Harper Attorneys, Sandton
FOR THE FIRST RESPONDENT:	Advocate P Venter Instructed by Mabalane Seobe Attorneys, Bloemfontein