THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1597/09

FIRST NATIONAL BANK (A DIVISION OF FIRSTRAND BANK LIMITED)	**Applicant**
and	
M NDUZULWANA *N.O*	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
NOMSA PATRICIA MAKI	**Third Respondent**

Delivered: 15 July 2015

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] In this application, the applicant seeks to review, set aside and/or correct the arbitration award dated 12 May 2010, issued under case number ECEL1343-09 by the first respondent (Commissioner), acting under the auspices of the second respondent (the CCMA). In the award, the Commissioner found that the dismissal of the third respondent (Maki) was procedurally and substantively unfair, and ordered her reinstatement with retrospective effect.

[2] The applicant further seeks an order to the effect that the dismissal of Maki was procedurally and substantively fair, alternatively a referral of the matter back to the CCMA for a fresh hearing with whatever directions the court deems appropriate.

Preliminary point:

[3] In her answering affidavit, Maki raised a preliminary point to the effect that the deponent to the founding affidavit, Tawanda Madzivadondo, who is the applicant's Industrial Relations Manager was not duly authorised to depose to the affidavit. At the initial hearing of this matter on 31 January 2014, Mr Mlonyeni on behalf of Maki persisted with this preliminary point despite Madzivadondo's assertions in the replying affidavit that he was so duly authorised, and also despite proof of such authority in the form of a resolution and certificate of delegation having been produced at the hearing. This had necessitated a postponement of the matter at the behest of Maki, in order for the applicant to properly formulate a response to this preliminary point and for Maki or her attorneys of record to analyse the documentation handed in support of Madzivadondo's authority.

[4] In seeking a dismissal of the review application on this ground, the essence of the preliminary point is that the applicant has never made a decision or passed a resolution authorising Madzivadondo to institute the review proceedings challenging the Commissioner's award. In this regard, the contention was that the applicant has not produced proof of any resolution passed by its board of directors or Shareholders authorising Madzivadondo to depose to legal documents on its behalf.

[5] Subsequent to the postponement of the proceedings, Madzivadondo filed a supplementary affidavit to further clarify his status. He is employed as a manager in FNB's Industrial Relations Department and is responsible for handling labour related litigation. He appears at the CCMA on behalf of the applicant, signs and deposes to affidavits on its behalf. Maki never questioned his authority to represent the applicant during the arbitration proceedings. In view of Maki's persistence with the preliminary point, he had approached Daniel Armstrong, the applicant's Executive Officer of People Governance

who has in terms of a certificate dated 10 September 2012, been formally delegated by FNB's Company Secretary to institute legal proceedings concerning the affairs of FNB. Armstrong in return has the authority to delegate such powers and authority to any officer of the FNB. Armstrong had then on 28 January 2014, signed a certificate in which Madzivadondo was formally delegated authority to sign and depose to all the necessary documents or affidavits, and to take all necessary steps on behalf of FNB in the review application.

[6] In response to Madzivadondo's supplementary affidavit, Maki had contended that the basis upon which she challenges Madzivadondo's authority is that upon receipt of the arbitration award and when she attempted to report back for duty she was informed that FNB intended to take the award on review. During discussions with some of her former colleagues she was also informed that FNB's Industrial Relations Department had a tendency of sometimes taking arbitration awards on review without first obtaining the necessary legal authority to do so. She contended that even if it were accepted that the decision to take the matter on review as was part of Madzivadondo's job function, that did not take away the legal requirement that he had to take a further step in obtaining a legally valid delegation or company resolution to initiate the review proceedings as well as prosecute them to finality.

[7] The suggestion from Maki in persisting with this preliminary point is that Madzivadondo in instituting these proceedings acted on a frolic of his own. This preliminary point raised clearly has no merit and I fail to appreciate the reason it was pursued with such vigour by Mr. Mlonyeni, to the extent that this necessitated a postponement on 31 January 2014 at great costs to his client and to the applicant.

[8] The persistence with this point is based on unsubstantiated discussions held with Maki's colleagues that Madzivadondo's department "sometimes took awards on review without first obtaining the necessary authority to do so from the board of directors either in the form of a company resolution or a properly conferred mandate". It was not in dispute that Madzivadondo in his capacity as Industrial Relations Manager of the applicant had represented it at the CCMA arbitration proceedings in this dispute. It does not appear that Maki

had taken issue with his representation at that level. It is therefore surprising that for the purposes of this review application, she should question Madzivadondo's *locus standi*.

[9] I am satisfied that Madzivadondo is duly authorised to act on behalf of the applicant in matters pertaining to this application. There is no basis for a conclusion to be reached that in instituting these proceedings, and deposing to affidavits, he had acted on a frolic of his own. A certificate signed by Armstrong was attached to the supplementary affidavit in support of Madzivadondo's authority, and on 31 January 2014, a copy of the resolution was furnished to Maki and her attorney of record.

[10] As already stated, I fail to appreciate what informed Maki that Madzivadondo had no *locus standi* to act on behalf of the applicant. This preliminary point was ill-conceived even if first brought about in the answering affidavit to the review application. It was clearly frivolous and vexatious on the part of Maki and her attorney of record to persist with this point merely on the basis of unconfirmed discussions surrounding the workings of the applicant's IR department. To this end, the preliminary point should be dismissed, and Maki should be burdened with the wasted costs of 31 January 2014, as that postponement was clearly unnecessary.

The review application:

Background:

[11] Maki was employed with effect from 1 October 2007. At the time of her dismissal on 31st of March 2009 she was employed as an external sales consultant. Part of her duties included opening new bank accounts which also involved compiling signature cards and obtaining signature mandates from new account holders. Maki was dismissed following upon a disciplinary enquiry into allegations that she had linked accounts on an entity called Nnite Trading CC which belonged to one Nyaniso Maqokolo to four different accounts without verifying the signature of the account holders against eGami, thus contributing to the loss of R355 000.00.

[12] According to the applicant, as a result of risks inherent to its business, it has in place, procedures designed to ensure the security of all monies and negotiable instruments in its custody. Key to that security is the set of prescribed internal rules known as the "Golden Rules". The linking of accounts has been identified by the applicant as a particular area of risk in that once an account is linked without authority, it is a licence to commit almost unlimited fraud. Fraudsters generally open accounts, linked them to other FNB customer accounts and are then able to access the linked accounts and transfer funds using internet banking. The fraudsters are then able to withdraw stolen funds from their accounts. It is in the light of these problems that the Golden Rules prescribe a strict verification process, prior to the authorising of the linking of accounts. The Rules require the employee to *inter alia;*

(a) request and obtain the customer's identity document and verify the face of the customer against the identity document.

(b) check the authenticity of the identity document.

(c) access CIS Efficiencies and ask the customer some security questions.

(d) access the eGami to view the customer's imaged signature card.

(e) if eGami is down or the image of signature card is not available, obtain customer file or signature card or mandate.

[13] Thus employees were required to verify the identity of the customer by checking his or her identity document, asking some security questions relating to the customer and his or her account and verify his or her signature. Where a customer cannot be identified in terms of the Golden Rules, an employee cannot continue with his or her instructions.

[14] The allegations against Maki followed investigations after a customer reported a number of fraudulent transactions having taken place on the account of Nnite Trading CC. The investigations had revealed that money had been transferred from that account into four different accounts. It was also established that Maki had processed the linking of the Nnite Trading account to these other four accounts, and that the signature verification procedure as

laid out in the Golden Rules had not been performed. It was further discovered that on examination of the signature card, it was apparent that the signature of the customer differed materially from that of the specimen signature. This had led to the charges against her as indicated above.

[15] According to the applicant, Maki had at the internal disciplinary enquiry admitted that she had failed to verify the signature of the customer in accordance with the Golden Rules and her only excuse was that she was not properly trained. Her further explanation was that she was trained to ask that the customer signs in front of her and that this would constitute signature verification.

The arbitration proceedings and the award:

[16] The parties had completed a pre-arbitration conference and submitted a signed minute in that regard. Evidence of two witnesses, Ms. Rosemary Quayle who was the chairperson of the enquiry and Mr. L Khoza was led at the arbitration proceedings. Maki did not call any witnesses.

[17] The evidence for the applicant as summarised by the Commissioner was that the signature verification is done by comparing the customer signature against the signature held by the bank either in the customer's card or files or signature reflected in the eGami system. If an employee is not sure of the procedure to be followed, that the employee must consult the Golden Rules for direction. This rule is accessible to all employees, and its paragraph 3.2.1 stipulate that the employee must identify the customer, and access eGami to view the customer's imaged signature card. If eGami is down or the image of signature card/identity document is not available the employee must obtain customer file of signature card or mandate.

[18] According to Quayle, the signature of the customer Mr Maqokolo which was signed on 15 October 2008 in front of Maki was different to that held by the bank. Had Maki compared the signature signed in front of her with the signature in the eGami, or card or customer file, she would have seen that the signatures were different and would have declined to link the two accounts. If Maki was in doubt she knew that that should have referred to the Golden

Rule. Even though Maki was an external sales consultant she was experienced coming from Standard Bank where the same rules had applied. According to Quayle, Maki's failure to refer to the Golden rules had resulted in the beach of the trust relationship between her and the employer.

[19] Under cross-examination Quayle had confirmed that the money was transferred from Nnite Trading electronically by means of cell phone or internet transaction. She also confirmed that Maki did not change the mandate and that it was not practice before the introduction of eGami to go to the file each time she needed to compare signatures. Where the customer was known to an employee, she would authorise the transaction without comparing the customer signature with that held with the bank in the file.

[20] Maki's evidence as summarised by the Commissioner was that in linking the accounts of Maqokolo and Nnite Trading on 15 October 2008, the method she had used to verify the signature was to ask the customer for his/her identity document or driver's license. She would then ask the customer to sign in front of her to make sure that it was the customer's signature and then endorse it. She would further ask the customer some personal questions and details in order to ascertain that she was dealing with the correct person.

[21] In the analysis, the Commissioner made reference to section 188 (1) of the Labour Relations Act in regards to the question of the onus and the provisions of Schedule 8 – Code of Good Practice. In regards to procedural fairness, the Commissioner found that there was a procedural defect in that Quayle had conceded during cross-examination that she had informed Maki that she will refer the matter to the applicant's Johannesburg Industrial Relations Department, which will then decide whether she was guilty or not and then decide on the appropriate penalty. In this regard, the Commissioner concluded that since the Johannesburg IR department was not part of the disciplinary tribunal it could not have decided on the guilt of Maki, and that Quayle by deferring the decision to dismiss to the IR department neglected her duties as the chairperson of the enquiry, thus rendering the process defective.

[22] The Commissioner also found that the decision to deny Maki legal representation at the internal disciplinary enquiry rendered the process defective. The reasoning behind this finding was that Quayle refused to grant legal representation at the instruction of the IR department and she had accordingly failed to exercise her discretion as the chairperson of the enquiry.

[23] In regards to the substantive fairness of the dismissal, the Commissioner held that the applicant in this case had failed to prove that Maki was taught during her training that signature verification was done by comparing the customer's signature against the signature held by the bank either in the customer card/file or signature reflected in the eGami system.

[24] The Commissioner accepted as being common cause that Maki was trained in accounts linkage by Speelman, Leonard, Paterson and Gida. However these individuals had taught Maki something different to the Golden Rules, and she had not been in doubt about the procedures when effecting the transaction in question. The Commissioner further concluded that there was no need for her to refer to the Golden Rules or eGami.

[25] The Commissioner in the absence of contradictory evidence from the four individuals who taught Maki on the bank procedures, also held that the applicant had failed to prove that the said rule or standard as testified to by its two witnesses was correctly communicated to Maki. Essentially, the Commissioner held that the applicant's unchallenged evidence that that it had applied the rule consistently and that the dismissal was appropriate sanction for contravention of the rule was rendered superfluous as it had failed to prove that the rule concerning the procedures for linking accounts was communicated to Maki.

The legal framework in respect of review applications:

[26] The review test is that as set out in *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[1], and in this regard, the question to be posed is whether the decision reached by the Commissioner is one that a reasonable decision-maker could not reach on the material placed before him or her.

[27] The *Sidumo* test as explained by the Supreme Court of Appeal in *Herholdt v Nedbank Ltd*[2],

> "… involves the reviewing court examining the merits of the case 'in the round' by determining whether, in the light of the issues raised by the dispute under arbitration, the outcome reached by the Commissioner was not one that could reasonably be reached on the evidence and other material properly before the Commissioner. ... The reasons are still considered in order to see how the Commissioner reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether apart from those reasons, the result is one that a reasonable decision- maker could reach in the light of the issues and the evidence."

And.

> "In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2) (a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2) (a) (ii), the Commissioner must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable Commissioner could not reach on all the material that was before the Commissioner. 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."[3]

[28] The net effect of the interpretation of the *Sidumo* test in *Herholdt* is that even where the reasons given by a Commissioner may be wrong and there has

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[1] [2007] 12 BLLR 1097 (CC), held that [at par 110]:
[2] At para [12]
[3] 2013 (6) SA 224 (SCA) at para [25]

been some irregularity, the decision may not necessarily be set aside, if on the basis of the material placed before the Commissioner, the outcome was a reasonable one. However, in accordance with the *Sidumo* test, there will be cause to set aside the award on review, if that decision was "entirely disconnected with the evidence" or is "unsupported by any evidence" and involves speculation by the Commissioner[4].

The grounds for review and evaluation:

(a) Finding on procedural fairness:

[29] In attacking the award, the applicant contended that the Commissioner's finding of procedural unfairness amounted to a gross irregularity on the grounds that the issue of procedural fairness was confined by the parties in the pre-arbitration minute to the question of the partiality of the chairperson of the disciplinary hearing. No other issue was raised in evidence or argument.

[30] In terms of the parties' signed pre-arbitration minute, the issue that the Commissioner was required to determine in regards to the procedural fairness of the dismissal was *"whether or not the disciplinary chairperson had approached the applicant's (Maki's) disciplinary proceedings with an open mind and/or impartiality or without bias"*

[31] In the award, the Commissioner had considered the question whether the chairperson of the enquiry was biased or not. It was Maki's contention at the arbitration proceedings that the chairperson was biased as she had asked the initiator to read statements in his possession and she (Maki) took that as an indication that the chairperson must have read or seen the statement. In this regard, the Commissioner concluded that there was no indication that the chairperson had prior knowledge of the matter. Effectively with this conclusion, the Commissioner had disposed of the question of procedural fairness he was required to determine and that should have been the end of the matter.

[32] By considering whether legal representation should have been allowed and whether the referral of the decision on the question of guilt and sanction to the

[4] At par [13]

Johannesburg IR department by the chairperson was procedurally fair the Commissioner clearly went beyond the mandate given by the parties in accordance with their signed pre-arbitration minute. A pre-arbitration minute serves a purpose of confining the issues a Commissioner is required to determine. The fact that the arbitration proceedings are not akin to normal Court processes does not imply that the Commissioner must consider issues not placed before him or her in accordance with a signed pre-arbitration minute. To allow Commissioners to go beyond the mandate given to him or her by the parties in accordance with that minute would render the process of holding pre-arbitration conferences superfluous if not futile. To a large extent then, the Commissioner by considering issues he was not mandated to consider committed a gross irregularity. To the extent that he had answered the primary question of procedural fairness in the negative, his finding that the dismissal of Maki was procedurally unfair is one that a reasonable Commissioner could not have reached.

(b) Finding on substantive fairness:

[33] The issues to be determined in this regard were whether or not the employer had adduced evidence at all and/or sufficient evidence to prove on a balance of probabilities, commission of the offences that the employee had been charged with, and whether or not the dismissal sanction imposed by the employer had been fair in the circumstances.

[34] In arriving at the conclusion that the dismissal of Maki was substantively unfair, the Commissioner found that the applicant in this case had failed to prove that Maki was taught during training that signature verification was done by comparing the customer's signature against the signature held by the bank either in the customer's card/file or signature reflected in the eGami system. The Commissioner had accepted Maki's version or sole defence to the charge that she was trained in signature verification in a different manner. Furthermore, the Commissioner had accepted that since Maki was not in doubt about the procedure for linking of accounts, it did not occur to her to refer to the Golden Rules or eGami at the time of authorising the transaction in question.

[35] The applicant attacked the above findings on the grounds that the process by which the Commissioner had reached that conclusion was grossly irregular in that firstly, the Commissioner failed to deal with the probabilities of Maki's version that she was trained to verify signatures when linking accounts by merely confirming that the person in front of her signed the documents. This version had been described by the applicant's witnesses as 'ridiculous' and 'illogical'. In this regard, it was contended that the Commissioner had merely accepted Maki's version on the basis that no rebutting evidence was led.

[36] The second ground of attacking the Commissioner's findings was that in dealing with the Golden Rules, the Commissioner committed gross irregularities in that it was found that these rules were only to be referred to when an employee was unsure of the procedures, yet there was no evidence before the Commissioner to this effect. Furthermore, it was submitted that in coming to the finding that the applicant had failed to communicate the Golden Rules to Maki, the Commissioner ignored the common cause evidence that she had access to these rules, and had given written commitment to familiarise herself with bank procedures.

[37] In defending the award, it was submitted on behalf of Maki that it should be accepted from the available evidence that the applicant had proven that there was a rule which provides that employees dealing with the transactions should refer to eGami when doing verification of clients' signatures. However, this was not the end of the enquiry in that the issue was whether the employee (Maki) was aware of the rule or could reasonably be expected to have been aware of the rule. In this case, Maki's defence was that she was not aware that she was supposed to refer to eGami when doing linkages.

[38] Amongst the issues agreed upon as being common cause as per the parties' pre-arbitration minute were;

(a) before performing any transaction, all the employees have to be aware of the applicable rules regulating the performance of any transaction that they are required to perform;
(b) that a signature of the account holder or customer is an important security mechanism in the banking sector;

(c) that the purpose of having a signature mandate is to have the signature of the account holder in the bank records and to know the signing arrangements where the account is a business account, in applicable transactions/circumstances;

(d) Maki had on 15 October 2008 without accessing eGami to view the customer's Imaged Signature, linked Nayaniso Maqokolo's Nnite Trading CC account to four other accounts belonging to Golden Rewards, Zintle Nogela, Sakhiwo Bululu and Phumlani Pub and Restaurant.

[39] In the light of the common cause facts as illustrated above, it is my view that the decision arrived at by the Commissioner cannot be said to be one that a reasonable decision maker would have arrived at. Maki's sole defence to the allegations was that she was taught to perform the verification procedures differently, and the Commissioner bought into that argument on the basis that the applicant had not called upon the individuals who had purportedly trained Maki differently in relation to the established and standard procedures.

[40] In dealing with matters where a Commissioner is confronted with disputing versions, the proper approach, as set out by Van Niekerk J in *Sasol Mining (Pty) Ltd v Ngqeleni NO & Others*[5] is to conduct an

> '. . . assessment of the credibility of the witnesses, a consideration of the inherent probability or improbability of the version that is proffered by the witnesses, and an assessment of the probabilities of the irreconcilable versions before the commissioner. As Cele AJ (as he then was) observed in *Lukhnaji Municipality v Nonxuba NO & others* [2007] 2 BLLR 130 (LC), while the LRA requires a commissioner to conduct an arbitration hearing in a manner that the commissioner deems appropriate in order to determine the dispute fairly and quickly, this does not exempt the commissioner from properly resolving disputes of fact when they arise.'[6]

[41] In this case, the Commissioner not only blatantly disregarded the common cause facts as pointed out above, but also failed to consider the inherent probability or improbability of the version that was proffered by Maki. Furthermore, the Commissioner failed to assess the probabilities of the irreconcilable versions before him. As it was correctly pointed out on behalf of

[5] (2011) 32 ILJ 723 (LC)
[6] at 727C-F.

the applicant, if Maki's version was to be believed, the signature verification procedure she had adopted as allegedly trained would not have served any purpose insofar as its security measures were concerned. Furthermore, it would not have made sense for Maki to have been trained in any different manner as opposed to other employees, and the fact that those who had allegedly trained her were not called upon to testify otherwise was not a basis for the Commissioner to accept her version. On the contrary, since she had alleged that she was trained differently by those individuals, the onus was upon her to call upon them to corroborate her version. To this end, the Commissioner also misconstrued the issue of onus.

[42] The Commissioner further failed to take into account the common cause fact that Maki had access to the Golden Rules, and the conclusion that these rules were not properly communicated to Maki were not supported by evidence. It is inexplicable that the Commissioner could have come to this conclusion in the light of the common cause fact that the only way that verification worked was to compare signatures in accordance with the eGami, and further that employees should be aware of all transaction procedures prior to effecting any.

[43] It therefore follows that contrary to submissions made on Maki's behalf, she was indeed aware of the rules, and the issue of her having been trained differently is mere red herring. It is accepted that the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside. In this case however, the failure to attach weight to the common cause facts and to assess the improbabilities in Maki's version as against the material placed before the Commissioner and the common cause facts had the consequences of rendering the outcome arrived at unreasonable.

[44] It is apparent that the Commissioner failed to apply his mind to all the material before him and as a result he committed gross irregularities in the conduct of the arbitration. The conclusion he had arrived at that the applicant had not proven the charges on a balance of probabilities is not one which can be said to fall within a range of reasonableness.

[45] It was submitted on behalf of the applicant that the record before the Court is sufficient for a substitution to be made and there was no need to refer the matter back to the CCMA in view of the dismissal being substantively and procedurally fair. I am in agreement with these submissions in the light the totality of the circumstances of this case, and the harm caused to the applicant as a consequence of the misconduct in question. In the circumstances, the following order is made:

Order:

i. The preliminary point raised on behalf of the third respondent is dismissed.

ii. The third respondent is ordered to pay to the applicant, wasted costs occasioned by the postponement of this matter on 31 January 2014.

iii. The arbitration award dated 12 May 2010 and issued under case number ECEL1343-09 by the first respondent is reviewed, set aside, and substituted with an order that;

> "The dismissal of Nomsa Patricia Maki by First National Bank (A division of First Rand Limited) was procedurally and substantively fair."

iv. There is no order as to costs in respect of the review application.

Tlhotlhalemaje

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:	Adv. C Orr
Instructed by:	Webber Wentzel
On behalf of the Respondent:	Mr SS Mlonyeni of Mlonyeni & Lesele Inc