



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG)

JUDGMENT

Not reportable

Case No.: JR2447/11

In the matter between:

SOLLY MLONDOBOZI

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION ("CCMA")**

First Respondent

**COMMISSIONER MOHAMED RAFFEE
("THE ARBITRATOR")**

Second Respondent

ABSA BANK LTD

Third Respondent

Heard: 9 January 2014

Delivered: 27 October 2015

JUDGMENT

PILLAY, AJ:

- [1] This is an application to review and set aside an arbitration award issued by the Second Respondent dated 22 September 2011, which found that the dismissal of the Applicant was both procedurally and substantively not unfair.
- [2] The Applicant challenged these findings. The challenge appears to be on the following grounds:
 - 2.1 The Second Respondent's findings evince a failure to apply his mind, gross irregularity, misconduct in his duties and unreasonableness. For this he relies on items such as taking into account his seniority and earnings, which the Applicant considers to be irrelevant considerations.
 - 2.2 The Second Respondent committed a gross irregularity that rendered the arbitration hearing unfair in a latent manner. The Second Respondent ignored the issues to be decided upon and speculated on issues more than making factual findings. In doing so, the Second Respondent failed to consider whether the Applicant was guilty of any offence.
 - 2.3 The Second Respondent committed gross misconduct by failing to consider whether the appropriate sanction was dismissal. The contention is that the Second Respondent, in doing so, deferred to the Third Respondent. This, he contends, is not the decision of a reasonable decision-maker.

Facts

- [3] The Applicant was employed as Group Consultant: Equality and Diversity
- [4] The Applicant sent a document titled a *letter of guarantee* to the amount of approximately R3 900 000.00 to Mr Marais of Opmar Trading CC. This was done on the Third Respondent's letterhead. This was in response to a letter from Mr Marais where he stated, *inter alia*:

'The amount including the return on your money, the transport that I am paying for, the cost of the bag and my share equal R3 856 560 (this is the amount that I need a (guarantee letter) for). You can round this amount if you wish to do so.

My company name: Opmar Trading CC, that need to appear on the Absa letter'.

- [5] The Applicant instructed his secretary to put this information on an Absa letterhead and send it to Mr Marais. The content of the letter reads as follows:

'This is to confirm that Mr Solly Mlondobozi will be providing investor funding initially to the tune of R3 900 000 covering the period July and August 2010, then thereafter the necessary adjustment will be made as and when needed'.

This funding will be provided for OPMAR TRADING CC."

- [6] The Applicant wrote a further letter/email dated 30 June to Mr Marais where he made the following material statement:

'I have asked my partner who you spoke to last Friday, Dr Enos Banda to also engage with you directly on both deals. This would also help to sort things out in case I am not around. He has also asked that you tell us the minimum so that we know the highs and lows of the VITO deal. I asked him to meet up with you on Monday when he returns from holiday. His contact details are..., I will also give him your contact details. Let me know how it goes with your lawyer, and when we will progress from there. Dr Banda might also be able to assist with this process'.

- [7] The Applicant was found guilty of various charges and dismissed in absentia. The Applicant was aware, on 15 October 2010 that the hearing would resume on 25 October 2010. The Applicant did not arrive on 25 October 2010. The matter proceeded.

- [9] The Applicant testified that in the letter dated 29 January (which was on the Third Respondent's letterhead) his contention was that the letter/guarantee was done in his personal capacity. He used his personal assistant to draw up this letter. There was no policy that an employee could not use the Third Respondent's letterhead.

[10] The Applicant contends in his first ground of review that the Second Respondent identified an incorrect issue as the issue in dispute. He alleges that, in stating in general terms that any letterhead holds a representation, the Second Respondent made speculations and ignored the true dispute.

[11] He contends that irrelevant considerations, such as his level of sophistication and earnings, were considered in determining the true issues before the Second Respondent. This evidence, as the founding affidavit goes, resulted in the Second Respondent failing to apply his mind to the issue of determining whether there was misrepresentation and lack of authority.

[12] The Applicant deliberately instructed his personal assistant to prepare the email/letter in which he stated:

‘...Solly Mlondobozi will be providing investor funding...’

[13] In my view, it is significant that this letter was prepared on the Third Respondent's letterhead. It is also significant that the instruction to prepare the letter was given to a personal assistant. The personal assistant is an employee of the Third Respondent. She ought not to be doing any work for the Applicant that was related to his personal affairs. The instruction to the personal assistant had to be an instruction that related to his tasks as an employee of the Third Respondent. She had to accept it as a work related instruction. If anything, there had to be a direct instruction that the content was not to be on the Third Respondent's letterhead if this was the Applicant's intention.

[14] Furthermore, the Applicant ought to have known that the use of a letterhead of his employer would reasonably create the impression in the mind of any reader of that document that the content of the letter would be read on the basis that it came from the entity whose letterhead held the content of that letter. A letterhead is for the purpose of identifying the sender of a document.

[15] The content of any letter that is disseminated on the letterhead of an entity would reasonably cause that reader to conclude that the author of the letter is authorised to disseminate its content.

[16] The findings falls within a band of reasonableness. There is nothing unreasonable in finding that disseminating content on a letterhead would cause a reasonable reader to conclude that the letter comes from that entity and that the writer is authorised to disseminate its contents. There was a misrepresentation.

[17] The Second Respondent's finding that the Applicant is guilty on Charge 1 is not a decision that no reasonable decision-maker could arrive at.

[18] For the Applicant to demonstrate that there is a reviewable irregularity, he had to demonstrate that the decision reached by the commissioner is not the decision of a reasonable decision-maker. I cannot find that the Second Respondent failed to apply his mind to the true issue, which was whether there was misrepresentation and/or authority.

[19] The Third Respondent was prejudiced by the misrepresentation.

[20] The Second Respondent took into account relevant considerations. This included the seniority of the employee. This is a relevant consideration in determining whether, as a reasonable person at that level, the Applicant ought to have known that his use of the letterhead would create the impression in the mind of a reader that the letter was disseminated by the Third Respondent. The Second Respondent did not commit misconduct in his duties.

[21] The conclusion that the Applicant was guilty on Charge 1 was not a conclusion that no reasonable decision-maker could have arrived at.

Second ground of review

[22] The second ground of review is that the Second Respondent's finding that the use of the term "*partner*" was deliberate and gave an impression that Dr Banda was a partner and nothing else. The charge was about misrepresentation, dishonesty, and engaging in a relationship that constitutes a conflict of interest and a breach of policies.

[23] Charge 2 relates to dishonesty and/or misrepresentation and/or engaging in a relationship that constitutes a conflict of interest. As I see it, the thrust of the charge relates to a conflict of interest. In particular, it relates to the Applicant's reference to Mr Banda as a "*partner*". The material portion of the letter, which was addressed to Mr Marais, states as follows:

'I have asked my partner who you spoke to last Friday, Dr Enos Banda to also engage with you directly on both deals'.

[24] It was the Applicant who referred to the relationship with Mr Banda as a partnership. He went on to refer to two deals in relation to this partnership. This partnership involved various entities that have a relationship with the Third Respondent. The Third Respondent's policy on this issue of a conflict of interest is clear. The Applicant was not entitled to engage in any activity, practice, act or omission that conflicted with or could potentially conflict with the interests of the Third Respondent, its stakeholders, vendors and/or suppliers.

[25] In particular, the Applicant finalised Freetel's appointment as a vendor of the Third Respondent. Dr Banda is a majority shareholder in that company. The Applicant's reference to "*two deals*" demonstrates that the relationship with Dr Banda was a partnership. The use of the word "*deal*" demonstrates that this partnership was not a matter of seeking advice.

[26] The conclusion that there was a partnership that gave rise to a conflict of interest is not unreasonable. The decision by the Second Respondent is not a decision that no reasonable decision-maker could have arrived at.

Third ground of review

[27] The Applicant alleges that there was a gross irregularity in that the Second Respondent speculated on what the issue was rather than making a factual finding. As it goes, the Applicant suggests that the Second Respondent did not consider whether the conclusion he arrived at in fact made him guilty of any offence. It is not clear what factual findings the Applicant relies on for this ground of review.

[28] At paragraph 15 of the founding affidavit, there is a reference to the Second Respondent taking into account the Applicant's seniority and earnings. The Applicant alleges that these are irrelevant considerations. He also relies, when he summarises the facts, on the Second Respondent finding that he had to have an unblemished record and conduct himself in a way in which integrity would not be called into question taking into account his position and earnings.

[29] The Applicant was in a senior position with the Third Respondent. Consideration of his seniority allows a fact finder to, on a balance of probabilities, consider the accepted principle that, in general, there are higher standards of performance and competence that are expected of senior or managerial employees than of the ordinary worker.¹ The Second Respondent's reliance on the Applicant's seniority is not unexpected. It is a relevant consideration that would impact on the balance of probabilities, more so in the banking industry.

[30] The Applicant's allegations on his third ground are vague. He has also not demonstrated that the conclusion that the Second Respondent came to are not conclusions that no reasonable decision-maker would arrive at. He has not also demonstrated that he is prejudiced by any finding by the Second Respondent.

Fourth ground of review

[31] The Applicant alleges that the Second Respondent committed gross misconduct in his duties as an arbitrator by failing to consider whether the conclusions he came to justify dismissal as a sanction. The Second Respondent found the applicant guilty of misrepresentation and dishonesty-related offences. The Applicant is in the banking industry. The misrepresentation was to the tune of R3 900 000.00.

[32] A finding that dismissal is an appropriate sanction is not a finding that no reasonable decision-maker could arrive at. The Supreme Court of Appeal has found, in *Herholdt v Nedbank Ltd and Another* (2013) 34 ILJ 2795 (SCA), that: 'material errors of fact, as well as the weight and relevance to be attached to the

¹ Grogan, Workplace Law, pp 305 - 306

particular facts, are not in and of themselves sufficient for an award to be set aside but are only of consequence if the effect is to render the outcome unreasonable’.

[33] I agree that the absence of a decision on what the appropriate sanction is amounts to gross misconduct in his duties as an arbitrator. This, however, is not sufficient to render the outcome that the dismissal was substantively fair as one that no reasonable-decision maker could arrive at.

[34] The Applicant, in a senior position in the banking world, was found guilty of dishonesty-related offences. No reasonable bank could retain him in their services. A decision that the sanction is fair is not a decision that no reasonable decision-maker could arrive at. The decision that the Applicant’s dismissal was substantively fair is not a decision that no reasonable decision-maker could arrive at.

[35] The Applicant seeks an order setting aside the decision by the Second Respondent that his dismissal was both procedurally and substantively fair. He, however, in his founding papers, makes no case to conclude that the decision that the dismissal was procedurally fair is one that no reasonable decision maker could arrive at. For this reason, I am not required to apply my mind to this enquiry and/or portion of the prayer.

Conclusion

[36] In the circumstances, I make the following findings:

- (a) the application is dismissed;
- (b) there is no order as to costs.

Pillay AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Mr Moshwana

Instructed by: Mohlaba & Moshwana Inc.

For the Respondent: Cliffe Dekker Hofmeyr Inc.

LABOUR COURT