



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

NOT REPORTABLE

Case no: C24/16

In the matter between:

THE STANDARD BANK OF SOUTH AFRICA

Applicant

and

LLEWELYN BENJAMIN

First Respondent

MICHAEL MARAWU N.O.

Second Respondent

CCMA

Third Respondent

Heard: 2 November 2016

Delivered: 10 February 2017

JUDGMENT

RABKIN-NAICKER J

- [1] This is an opposed application to review an arbitration award under case number WECT115098-15. The second respondent (the Commissioner) found that the

dismissal of the first respondent (Benjamin) was substantively unfair and ordered his reinstatement with effect from 7 December 2015, with no back pay, as well as the reinstatement of his operating licence.

- [2] Benjamin was employed as a Financial Advisor. Evidence was given at the Arbitration that Benjamin had acted in an irregular manner when he accessed a customer's account for personal reasons. He then phoned the customer (Executor of the Estate Late R Reynolds) and posed as an ordinary Standard Bank employee, concealing his true identity and asked the customer certain questions in order to report back to his cousins. The customer was upset when she discovered that it was Benjamin and instructed her attorney to correspond with the Bank and cancelled her account.
- [3] The Bank's Employee Relations Manager testified that Benjamin also wrote a long email to the customer's attorney after he became aware of the complaint received by the Bank, that had the potential of further bringing the Bank into disrepute.
- [4] The Bank had also ascertained that the Applicant had assessed the customer's account a number of times since January 15, and even processed the printing of statements and related transactions before that. Immediately after his dismissal, the company submitted a disbarment application to the Financial Services Board. The FSB acts per a bank's instructions in this regard, and may also reverse the debarment when instructed by a bank.
- [5] Benjamin did not dispute that he was guilty of the said conduct but submitted that he believed the sanction and disbarment was too harsh and unwarranted in the circumstances. He testified that he acted out of emotion when his uncle passed away after a very short illness. He felt obliged to assist his two cousins to follow up on their father's death benefit payment. He had grown suspicious of the Executor's (another relative) handling of the estate. He could not understand how he brought the Bank into disrepute as he did not disclose any details to the public domain. He made submissions on mitigation to the Commissioner.
- [6] The Commissioner reasoned as follows:

“ I am of the view that taking into account the totality of circumstances in this particular matter, including the Applicant's clean disciplinary record, mitigating factors, length of service (more than 11 years with Stanlib Group), and the potential effect of a serious warning on his future conduct. The fact that the Applicants ill-conceived actions were entirely focused on this one relative's (deceased uncle's) account, under emotionally charged conditions. I find the sanction of dismissal to be inappropriate in the circumstances.”

[7] One of the grounds of review in this matter is that the Award stands to be reviewed given the Commissioner's failure to consider material evidence before him when deciding whether dismissal was a fair sanction. These circumstances applicant submits, include the legislative and regulatory imperatives of the FAIS Act 37 of 2002 and the Protection of Personal Information Act 4 of 2003 in relation to the handling of clients information, and the confidentiality requirements surrounding it. Further, the reason why the Bank imposed dismissal for this kind of misconduct. The testimony before the Commissioner was that breaching confidentiality was a no-go for the Bank because “that hits at the heart of the trust relationship between the bank and its client”.

[8] In **Absa Bank Ltd v Peter Rogers and Others**¹ this Court dealt with the review of an award arising from the arbitration of a dispute between a bank and a financial advisor. The court stated:

“[9] The Commissioner, dealing with an unusual dispute in which the employee was effectively pleading guilty, and in which the commission of all the offences was common cause, proceeded to consider the issue of the fairness of the sanction without taking into account the interests of the employer, those of the persons the employer serves, as well as the bank's statutory obligations. This led the Commissioner to decide to reinstate Rogers which is, as averred in the founding papers, a decision that a reasonable decision-maker could not make.

¹ Absa Bank Ltd v Peter Rogers & Others C31/2014; delivered 20 March 2015

[10] When only mitigating factors occupy a decision maker's mind in considering the issue of the fairness of the sanction of dismissal, it is perhaps unsurprising that sympathy for an employee may become overwhelming. But as the court in **Sidumo** clearly sets out a consideration of the totality of circumstances must include the importance of the rule that had been breached; the reason the employer imposed the sanction of dismissal; and the harm caused by the employee's conduct, amongst other relevant circumstances....."

[9] In this matter, the Commissioner did not take the totality of circumstances into account and consider these in the balance. These circumstances included as submitted by applicant, that the FAIS Act requires a person occupying Benjamin's position to always exhibit honesty and integrity. I therefore consider the Award to be one that a reasonable decision-maker could not reach.

[10] The Award stands to be reviewed, set aside and substituted. I do not consider it apposite to make a costs order in this matter. I order as follows:

Order

1. The Award under case number WECT11509-15 is reviewed and set aside and substituted with the following order:

1.1 "The dismissal of the First Respondent was substantively fair."

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: Mervyn Taback Incorporated

First Respondent: Legal Aid-South Africa Justice Centre Cape Town

LABOUR COURT