THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case number: JR: 2418 / 15

In the matter between:

FREE STATE GAMBLING AND LIQUOR AUTHORITY APPLICANT

and

JANA DELL N.O FIRST RESPONDENT

CCMA SECOND RESPONDENT

LEHLOHONOLO MOTSOASELE THIRD RESPONDENT

Hearing date: 9 January 2019

Judgment date: 15 August 2019

JUDGMENT

NORTON AJ

Introduction

[1] The Applicant is the Free State Gambling and Liquor Authority ("FSGLA"), a regulatory body established by the Free State Gambling and Liquor Act of 2010.

[2] The First Respondent is the commissioner who arbitrated an unfair dismissal dispute.

[3] The Third Respondent is Mr Motsoasele, the previous Finance Manager of the FSGLA.

[4] The Applicant dismissed Mr Motsoasele on 7 January 2014 for misconduct. In essence he failed to obtain permission from the current CEO to conduct business activities outside the FSGLA; he neglected his duties, and he displayed gross insolence for sending a disparaging email to his supervisor.

[5] Mr Motsoasele referred an unfair dismissal dispute to the CCMA in Bloemfontein and the matter proceeded to arbitration for 8 days expansively spanning from March 2014 to October 2015.

[6] The arbitrator found that the dismissal was procedurally fair but substantively unfair and order reinstatement retrospective to 1 December 2015 and 7 months backpay amounting to R557 570,58.

[7] The Applicant launched a review on the 11 December 2015 to set aside the arbitration award. The review was opposed by the Third Respondent, and he (through his attorneys) filed an Answering Affidavit and Heads of Argument.

[8] The matter was set down for argument on 9 January 2019. The Third Respondent did not attend. I satisfied myself that there had been proper service of the notice of set down on the parties, and then proceeded to hear the Applicant's submissions.

Factual Background

[9] Mr Motsoasele began employment with the FSGLA's predecessor, the Free State Gambling and Racing Board, (the "Racing Board") in 2000. At the Racing Board Mr Motsoasele performed the function of Manager: Compliance and Investigations.

[10] In June 2002, Mr Motsoasele approached the CEO of the Racing Board (Mr Moheko) for permission to conduct business activities outside of his employment. This was granted. The business activities were auditing, accounting, tax advice, investment, business plans and management advice. In his submission to the CEO he wrote, "*I will not render services to any licensee of the Free State Gambling and Racing Board and will declare all contracts / business that may be of a conflict of interest nature*."[1]

[11] In 2010 the Racing Board merged with the FSGLA and all staff from the Board

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[1] Bundle A1, pg 23

including Mr Motsoasele transferred by virtue of section 197 of the LRA to the FSGLA. Mr Motsoasele's job description and title changed to Manager: Finance.

[12] Between the period 2010 to 2013 Mr Motsoasele conducted private business activities through his company "*TM Squared*" with, amongst others, two entities of relevance to this case (Dipontsho Trading and Golden Mile Trading).

[13] The CEO of the FSGLA, Ms Gasela, testified that Mr Motsoasele never asked her for permission to conduct business activities outside of the FSGLA.

[14] Outside work is governed by policy at the FSGLA. Ms Gasela referred to section 8.14[2] of the Benefits Policy which prohibits such work except with the approval of the CEO, and provided it doesn't amongst other considerations, constitute a conflict of interest.

[15] Mr Motsoasele signed a financial disclosure form in 2013 which showed that he had shares, and that he was a member of numerous family trusts and that he received about R200 000 from various consultancies and retainers. [3]

[16] Supply Chain Management and the work of Mr Motsoasele as the Manager: Finance, fell within the same business division of Finance in the organisational structure of the FSGLA.

[17] The CEO became aware of Mr Motsoasele's external business activities in mid 2013 when both Dipontsho Trading and Golden Mile Trading submitted tenders to the FSGLA. The CEO testified that Mr M's signature on the BEE certificates could

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[2] 8.14 OUTSIDE WORK BY OFFICIAL (OUTSIDE OF THE EMPLOYMENT WITH THE AUTHORITY)

1. No member of staff shall perform or engage him or herself to perform remunerated work outside his or her employment with the Authority, without the written permission of the CEO (the Authority in the case of the CEO). Such application be made in the form supplied (Form 08007)

2. Such permission shall be subjected to the following:

a. Must not constitute a conflict of interest in relation to the Authority;

b. Should not interfere with the Staff member's employment with the Authority;

c. Should not be performed using Authority resources in contravention with the Staff Policy resulting in financial loss to the Authority; and

d. Should comply with Section 12 of the Free State Gambling and Liquor Act, No 6 of 2010.

[3] Bundle A1, p 24

influence SCM staff adjudicating tenders.

[18] In May 2013 Mr Motsoasele responded insolently to his supervisor, Mr Skosana, when instructed to develop Standard Operating Procedures for the Finance Department, *"Do you serious expect me to do all this by the mentioned dates or which part are you or someone else going to do?"* This was after the initial instruction was given to him February, and he was provided with the existing policies for guidance in April.

The arbitration award

[19] With respect to the issue of whether Mr Motsoasele was required to obtain the current CEO's approval to pursue outside business interests, the arbitrator concluded, *"…I find that the applicant (Mr M) only had to apply for new permission from the CEO, Ms Gasela, if his activities in TM Squared resulted in a conflict of interest. The Respondent failed to prove on a balance of probabilities that they were unaware of the activities of the employee's business interests. The Respondent further failed to prove that the employee's interests in TM Squared was indeed a conflict of interest, for which he had to obtain permission in terms of paragraph 8.1.4 of the FSGLA Benefit Policy".*[4]

[20] The arbitrator found that Mr Motsoasele's terms and conditions of service remained unchanged by virtue of section 197 and he was entitled to continue his outside work. She wrote, "*Section 142(1)(b) of the Free State Gambling and Liquor Authority Act of 2010 stipulates that the transfer of employees amounts to a so-called section 197 transfer. In my interpretation of the above, I cannot find that the permission granted by the CEO in 2002 was nullified, as the Applicant's conditions of service remained unchanged*."[5]

[21] With respect to the email response, the arbitrator found that the employee was not disrespectful, that the parties were working under extreme pressure, and that the

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[4] Arbitration award, paragraph 101

[5] Arbitration award, par 91

Respondent had failed to prove that the actions of the employee were insolent.[6]I

The attack on review

[22] With respect to the issue of the lack of approval and the conflict of interest the Third Respondent submitted that the arbitrator failed to take into account material evidence, and misdirected herself. For example:

22.1. Ms Gasela gave evidence that an employee must ask and receive permission before making the disclosure on the financial disclosure form. She says, *"I need to say that the process is to apply first for doing remunerative work outside and thereafter once you have been given permission you must disclose in this form the work that you did."*[7]

22.2. When Mr Motsoasele applied for permission in 2002 he performed the function of Manager: Compliance and Investigations. In 2010, after the transfer he held a different position, Manager Finance. This change in position necessitated a new application for permission. The arbitrator appeared to appreciate this fact in the arbitration (but inexplicably found to the contrary in her award):

22.2.1. Commissioner: *"Now are you saying because his position changed to a Manager Financial Services, he has a duty to then again apply for permission because his duties and responsibilities changed them?*

22.2.2. Ms Gasela: *Yes Ma'm*

22.2.3. Commissioner: *Permission is needed as your position changes?*

22.2.4. Ms Gasela: *Yes Ma'm*

22.2.5. Commissioner: *All right, So whether the policy changed or whether the policy did not change, that aspect still remained the same.*

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[6] Arbitration award, para 116.

[7] Transcript, pg 19

22.2.6. Ms Gasela; *Yes Ma'm*

22.2.7. Commissioner: *Do you guys agree with me?*

22.2.8. Mr Morobane[8]: *Yes*

22.2.9. Mr Joai[9]: *Fine…Yes*[10]

22.3. A conflict of interest did arise. Two of Mr Motsoasele's clients, (Dipontsho Trading and Golden Mile Trading) who benefitted from a BEE accreditation provided by his company, and personally signed by himself, tendered for the supply of goods and services at the FSGLA. This carried the risk that his colleagues in procurement / SCM may have been unduely persuaded to unfairly privilege those entities, to the disadvantage of the other competitors.

22.4. The arbitrator assumed that when the transfer happened the employee's conditions of service remained unchanged, and presumably by virtue of this, according to the arbitrator's logic, the permission to conduct external work, granted in 2002 remained.

[23] With respect to the disparaging email, the Third Respondent submitted that the arbitrator's finding that there was no insolence was not rationally connected to the evidence before her.

23.1. Skosana testified that the employee was not under pressure and had sufficient capacity to carry out the instruction. Mr Skosana said that "*there was adequate time for him to formulate these SOP's*", that "*in most instances we were battling to get hold of him*", and "*everyone was inundated with work except him*"[11]

Discussion and analysis

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[8] Representative for the employer

[9] Representative of the employee

[10] Transcript, pg 93 and 94

[11] Transcript pg 260 and 261

[24] The arbitrator concluded that the employee was not obliged to obtain permission to continue remunerative work outside the FSGLA despite the fact that the original permission had been obtained 8 years prior to the transfer; his job description and job title had changed; he reported to a new employer; there was a new CEO; and his private business had led to a conflict of interest in the finance department. Furthermore the arbitrator found that the permission transferred by virtue of section 197.

[25] An exception to policy, to perform work outside the employment relationship cannot reasonably be construed as a term and condition of employment transferred to a new employer. The permission granted to Mr Motsoasele did not convert into a legal entitlement operative in perpetuity. The old employer exercised a discretion in Mr Motsoasele's favour. It could have been withdrawn at any time, and Mr Motsoasele could not have triggered a valid contractual claim for enforcement. In law the agreement between the previous CEO and Mr Motsoasele lacked animus contrahendi (intention to contract).

[26] It would be unreasonable for a new employer (such as the FSGLA) to be bound by an exception granted gratuitously by an old employer, especially one that potentially runs counter to the new employer's business interests. In this case the arbitrator endorses the position that the new employer will be bound by an exception to policy, even one to which the new employer knows nothing about. That simply cannot be correct. In my view the arbitrator has committed a material error of law to assume that an agreement between an old employer and an employee, which lacks the necessary quality of *animus contrahendi* survives a section 197 transfer.

[27] Returning to the remaining ground of review, the arbitrator materially misconceived the evidence. The wording of the email is clearly disrespectful, and the context within which the employee sent it to his superior was not one of undue pressure. The distinct impression gleaned from the transcript is that the employee failed to take his responsibilities seriously, and absented himself from work.

[28] The threshold to succeed in a review is set out in section 145 of the Labour Relations Act – misconduct, gross irregularity, exceeding of powers or an award improperly obtained. These grounds have been suffused by the standard of reasonableness, and an arbitration award is reviewable if the decision reached by the arbitrator is one

that a reasonable decision maker could not reach. Expressed differently, an award is reviewable if the defect is material such that the outcome of the award is not sustainable on the facts and the evidence led at the arbitration.

[29] This is one such case.

Conclusion

[30] The Applicants have passed the review threshold.

[31] The arbitration spanned 1.5 years, the dismissal occurred over 5.5 years ago, the transcript and documents are voluminous. To send the matter back to the CCMA to be heard before a different commissioner would be unduly and unnecessarily burdensome. I am in a good position to decide the matter.

[32] The Third Respondent did not attend the hearing of this matter. There is no continuous relationship between the parties and this has a bearing on costs.

[33] Accordingly I make the following order

33.1. The arbitration award is reviewed and set aside

33.2. The dismissal was fair

33.3. The Third Respondent is to pay the Applicant's costs.

Norton AJ

Acting Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Adv T Govender representing Sunil Narian Incorporated Attorneys

For the Third Respondent: No Appearance