



**THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN**

Of interest to other judges/Not Reportable

Case no: C 332/2019

In the matter between:

**CLUB MYKNONOS LANGEBAAN
HOME OWNERS ASSOCIATION**

Applicant

And

ANTHONY RUGGIERO (N.O.)

First Respondent

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

Second Respondent

**AFADAWU obo CHARMAINE
WILLIAMS**

Third Respondent

Heard: 26 February 2025

Delivered: 05 June 2025

Summary: (Review – misconduct – breach of policy that all repair and maintenance work had to be referred to householder's association and that private work on householder's units was not permitted – policy overlapping with

contractual requirement prohibiting work in competition with the employer – employee guilty of breaching policy of referring maintenance requests to the company – Arbitrator's finding that dismissal was substantively unfair and substituting it with a final written warning not one that no arbitrator could have arrived at – principles governing pleading of review cases reiterated)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an opposed application to review and set aside an arbitration award in which the arbitrator found that the fourth respondent Ms C Williams ('Williams') was guilty of certain misconduct but decided that it would be unfair to uphold the dismissal. The arbitrator found that Williams's dismissal was procedurally fair following an inquiry and that she had an opportunity to obtain a representative if she wished.

[2] At the arbitration, Williams had been represented by the third respondent, a union ('AFADWU'). The union had also assisted her in launching an application to make the award an order of court and in opposing the review application, but by the time the matter was enrolled, no heads of argument were filed and neither the union nor Williams appeared at court.

[3] Owing to unsupported submissions made in argument as to why it was argued that the arbitrator failed to consider the evidence that the trust relationship between Williams and the applicant employer ('Mykonos') had broken down, the employer's representative was required to provide the relevant references to the record after the hearing. Had an opponent attended the hearing, I would have been disinclined to allow such a glaring omission to

be rectified this way. In any event, these references did not relate to facts pleaded in the applicant's founding papers.

[4] Arising from this, it must be mentioned that legal representatives do not always comply with the requirements of Rule 48 of the Labour Court Rules, in particular, by failing to provide proper references to the record of evidence. This makes the court's work unnecessary burdensome and is equally unfair to the opposing party. It is not for the court or the opponent to have to trawl through a transcript to try and identify which evidence a party is referring to. In this case, which involved a transcript of more than 350 pages, the applicant's heads contained not a single reference to the transcript.

Background

[5] Mykonos is a homeowner's association which services the residential properties of owners in a leisure housing complex, known as Club Mykonos. Williams was a supervisor of cleaning staff. She had worked more or less continuously at the site since 11 August 1990, employed by various labour brokers. From 2008, she was permanently employed by the applicant. She was dismissed on 29 November 2018.

[6] Williams was charged with a breach of fiduciary duty, competing with her employer and failing to act within the best interests of the company, all of which arose from the same series of events. The employer claimed this amounted to gross misconduct which irreparably damaged the trust relationship. The factual basis of the charge lay in Williams allegedly asking an employee who performed maintenance work on the properties of homeowners as part of Mykonos's services to them, to perform maintenance work for an owner of a unit in a leisure resort on a private basis.

[7] The company practice is that no repair or maintenance work can be done privately by owners of units and that all such work must be channelled through Mykonos. Such work provides a stream of income for Mykonos. Mykonos arranges for one of its staff to do the work and the unit owner will pay Mykonos.

It is a rule that employees had to refer any requests for such work to Mykonos and was confirmed by Mr A Le Fleur ('Le Fleur'), a witness of Williams, namely that the procedure was that the housekeeping department would refer requests for such work to the operations office which would assign a handyman to attend to this issue.

[8] Further, Williams's contract of employment also contained a provision which prohibited an employee from, directly or indirectly, being employed or involved in any other business or venture, for gain or otherwise, which might interfere with their responsibility or duties owed to Mykonos. There was much made in the cross-examination of Mykonos witnesses about whether this provision had been explained to Williams when she was employed. She claimed that there had not been a proper opportunity to read through the contract when it was issued to her, and described the non-compete provision as "groot, groot woorde" (big, big words).

[9] Sometime in April 2018, Williams had been approached by one of the house unit owners, a Mrs Goodman, who wanted someone to do some work at her unit. Williams contacted Mr A Le Fleur another employee of Mykonos who worked in its maintenance unit. In terms of the policy, she should have reported the request to Mykonos.

[10] According to Le Fleur's testimony, he encountered the unit owner while he was shopping on his day off and she asked him to fix a cupboard and do some painting work in her unit. He claimed he refused to accept money from her, but she persisted by giving R 150 to Williams to pass on to him, because Williams lived near to him. He understood that the rule was that maintenance work requests had to be made using the procedure but believed this did not apply if he was working in his own time when he was off duty. Le Fleur did the work and Goodman then paid Williams R150 for the work done. Le Fleur was also dismissed on similar charges relating to his role in the incident.

[11] There was no evidence that Williams had advised the unit owner that she had approached Le Fleur to do the work, after she had conveyed Goodman's

enquiry to him. There was also nothing to gainsay her evidence that she only learnt afterwards that Le Fleur had done the work for the owner, when the owner gave her R 150 to pass on to Le Fleur. There was no suggestion that Williams herself had obtained any personal benefit from the arrangement.

The award

[12] The arbitrator found that Williams would have been aware of the procedure regarding arrangements for the performance of maintenance or repair work on homeowners' units, namely that requests made by owners for the performance of such work had to be reported to the employer who would arrange for it to be done.

[13] The arbitrator also found that Williams would have been aware of the rule in her contract that employees could not compete with the employer by soliciting or being involved in the soliciting of private work in competition with the employer. Further, the arbitrator found that the employer, as far as could be ascertained, had applied the rule consistently.

[14] On whether Williams had broken the rule prohibiting employees from competing with the employer the arbitrator reasoned as follows. Williams had merely mentioned to Le Fleur that Goodman was looking for someone to do private work at her unit, but that she did not actually solicit private work from Goodman, nor obtain any benefit from Le Fleur performing the work. He also found that there was no evidence that she had actually requested Le Fleur to do the work for Goodman, and there was nothing to contradict Le Fleur's evidence that Goodman had subsequently approached him directly to perform the work, when they encountered each other shopping. Accordingly, the arbitrator concluded that Williams had not broken the rule of engaging in competitive activity against the employer.

[15] Nevertheless, the arbitrator agreed that Williams had failed to inform the employer of Goodman's inquiry for private work at the unit and had failed to report the inquiry to Mykonos. She also should have reported the payment

made by Goodman to Le Fleur. Consequently, he accepted that Williams had not acted in the employer's best interest. It was reasonable to have expected that, as a supervisor of the cleaning staff, she would have executed Mykonos's policies and procedures promptly and diligently. However, he noted this was a once-off offence on her part. He substituted the sanction of dismissal with a final written warning.

[16] On the question whether the dismissal was fair, the arbitrator first turned his attention to whether the transaction had been maliciously reported to management by the cleaning supervisor of Goodman's unit, Ms U Farmer, after Goodman had complained about the cleaning of her premises. This occurred some six months after the work done by Le Fleur. The hospitality manager, Mr J Maree, had testified that when the cleaning complaint was investigated the lack of invoiced maintenance work at the unit was noticed, and Farmer disclosed that Le Fleur had done work in April. The delay in initiating disciplinary action, had been raised by Williams in the arbitration as evidence of malicious conduct towards her. The arbitrator found it inexplicable that Farmer did not come forward with the information in April and agreed with the allegation that Farmer's conduct was malicious.

[17] Secondly, the arbitrator found it was relevant that Williams did not commit the same conduct again between the incident in April and the launch of the disciplinary proceedings after October 2018. He reasoned that if Williams had been competing against the employer itself, she probably would have repeated the misconduct during that period. In this, he appears to have taken account of the fact that Williams only knew in October that she stood accused or what happened in April. He concluded that this demonstrated that Williams was not 'recalcitrant' and therefore continued employment would not be intolerable.

[18] In addition, the arbitrator took account of the fact that during Williams's years of employment, this was the only occasion when she had been found guilty of not informing the employer of a request for an outside party to do maintenance work on a unit and this once-off failure to do so did not make the

continuation of the trust relationship untenable. Moreover, even though there would have been an adverse impact on the employer's business, because it concerned a single incident, the harm was minimal. In passing, it should be mentioned that no evidence was tendered by Mykonos about what it would have charged Goodman for the work she paid R 150 for, which concerned fixing a cupboard and some painting.

[19] On the question of remorse, the arbitrator reasoned that in acknowledging that she had admitted being asked by Goodman if she knew someone who could do private work and admitting that she received the payment on behalf of Le Fleur, this was indicative of remorse. She had pleaded guilty in the disciplinary enquiry. If she had she not wanted to show any remorse, she could simply have denied any wrongdoing and placed all the blame on Le Fleur. Williams also had long service with the employer, was a primary breadwinner, and this was her first offense. The impact of the dismissal on her would 'eclipse' her misconduct. Accordingly, he found her dismissal was unfair.

[20] The arbitrator awarded Williams reinstatement subject to being issued with a final written warning valid for twelve months for failing to implement the employer's policies in respect of private work competing with the employer.

Grounds of Review

[21] In its grounds of review set out in the founding affidavit, the applicant makes certain general statements in paragraphs 19 and 20, but none of these were pleaded with any factual particularity.

[22] Mykonos also claims that the arbitrator misconstrued the case by finding Williams guilty of misconduct but then "embarking on a frolic of his own" by finding that dismissal was not an appropriate sanction. How he misconstrued the case is not explained, nor is it clear what it was the alleged 'frolic' he was referring to.

[23] Further, it attacked the arbitrator's conclusion that Williams showed remorse by pleading guilty. Even though she pleaded guilty at the disciplinary inquiry, Williams insisted she was not guilty of misconduct at the arbitration. Thirdly, Mykonos argues that the arbitrator failed to properly consider Williams role as a supervisor in the business and the potential impact her behaviour could have.

[24] In addition, Mykonos argues that Williams was in a position to facilitate private work being done and had acted as a "middleman" in the transaction involving Le Fleur. It claims she actively sought out Le Fleur to have the work done privately and received the money on his behalf from the resident. All of this indicated she had time to reflect on what she was doing but still actively pursued the transaction. The arbitrator failed to consider this aspect of the case.

[25] The abovementioned grounds were set out in the Founding affidavit and were not supplemented.

[26] Nevertheless, in its heads of argument, Mykonos did advance other grounds which had not been pleaded in the founding affidavit:

26.1 It now claimed that the arbitrator ought to have found that Williams had broken the rule prohibiting employees from engaging in competitive activities with the firm and that she was involved in the initial discussion about private maintenance work.

26.2 Contrary to what the arbitrator concluded, William's action informing Le Fleur of the private maintenance work required was a deliberate action taken with the intention that Le Fleur would engage with the owner on such work. Her initiation and facilitation of the unauthorized transaction placed her in direct violation of the company rules which explicitly prohibit employees from engaging in or facilitating external maintenance work outside the established internal process.

26.3 The applicant further submits that it is not necessary for the rule to be breached in an overtly competitive manner to constitute a conflict of interest; her facilitation of the transaction was sufficient regardless of whether she personally benefited from it.

26.4 The arbitrator failed to consider that the courts have held that where an employee's conduct results in a breakdown of trust, dismissal is justified even if there's no direct financial loss to the employer.

26.5 The arbitrator failed to appreciate that Williams actively facilitated unauthorised work, acting as an intermediary in the arrangement, thereby undermining the Applicant's operational policies and acted in conflict with the applicant's interests. [Not true but the arbitrator reasoned that it happened once and the impact was marginal]

[27] As mentioned in the introduction, when the matter was argued, the court was also invited to scrutinise the record, to find support for an argument that Williams's conduct during the arbitration hearing showed that the relationship was irreparable, an issue which had also not been pleaded.

Evaluation

[28] Regrettably, it seems necessary to reiterate some fundamental points about the need to set out the case for review properly in the founding papers. Incantations of general grounds of review in founding and supplementary affidavits do not convey the necessary factual basis for a review. A respondent can hardly be expected to respond thereto. It is necessary to set out in sufficient detail the facts on which a particular ground is raised¹. Secondly, a party cannot use heads of argument to advance grounds or review not raised in the application², with the exception of a jurisdictional issue.

[29] Consequently, any grounds advanced in argument which were not pleaded in the founding papers with sufficient factual particularity have not been considered.

¹ See e.g. *Comtech (Pty) Ltd v Molony NO and Others* (DA12/05) [2007] ZALAC 40 (21 December 2007) at paragraphs 15 – 18. The principles are conveniently summarized in *Mpe v Polokwane Local Municipality and Others* (JR101/2023) [2024] ZALCJHB 426 (7 November 2024) at paragraphs 9 – 15.

² *Commercial Workers Union of SA v Tao Ying Metal Industries & others* 2009 (2) SA 204 (CC); (2008) 29 ILJ 2461 (CC) at paragraph 67. See also *Mpe* at paragraph 16.

Finding on remorse

[30] The applicant attacks the arbitrator's conclusion that Williams showed remorse by pleading guilty. Even though she pleaded guilty at the disciplinary inquiry, Williams insisted she was not guilty of misconduct at the arbitration. Presumably, this is intended to be an argument that the arbitrator could never have concluded that she was remorseful. It is true that during the course of the hearing, Williams appears to have adopted a defence similar to that which Le Fleur had advanced in his own defence, namely that work performed for a homeowner during an employee's free time was not prohibited and did not have to be reported. However, she did concede in the course of her evidence that she had broken the rule requiring all maintenance or repair work requests to be directed to Mykonos.

[31] In so far as the arbitrator relied solely on Williams's initial admission of guilt it is fair to say this approach did ignore the more defensive stance she adopted during the arbitration, relying on Le Fleur's interpretation of what constituted the offence. Even so, it cannot be said that she tried to repudiate her own factual version by denying her role in the incident, nor did she dispute she had pleaded guilty at the hearing. She admitted that the rule did not make an exception for maintenance work done during an employee's own time. She did not try to defend her actions or dispute the validity of the rule. In any event, the arbitrator's oversight, if corrected, does not ineluctably lead to a conclusion that Williams failed to accept she had been wrong, was defiant and likely to do it again.

Williams supervisory function and the risk of retaining her

[32] Mykonos argues that the arbitrator failed to appreciate that in her position Williams was well placed to facilitate private work and, having breached her duty towards it by facilitating such an arrangement, the employer could not be confident it could not recur. The fact she had not transgressed the policy in a six month period since the incident involving FL was no basis for inferring she

probably would not do it again. Implicitly it argues that retaining her in employment given her position, entails an unacceptable assumption of risk. Further, Mykonos contends that the arbitrator failed to properly consider the position of Williams as a supervisor in the business and the potential impact her behaviour could have.

[33] In Mykonos's heads, it expanded on the last-mentioned point, adding that the arbitrator failed to consider that her conduct amounted to a breach of the trust which is fundamental to her role as a supervisor responsible for enforcing company policy, and the arbitrator failed to appreciate that trust was a fundamental component of her role, so that her misconduct made the restoration of the relationship untenable.

[34] Considering the arbitrator's own reasoning, it is simply inaccurate to say that he did not consider Williams' role as a supervisor who had a responsibility to adhere to Mykonos's policies. He expressly alluded to it. However, he discounted the significance of this factor on the basis that it was a once-off breach and that a final written warning ought to be sufficient to correct this failure. It might be so that he could not reliably infer she would never reoffend, merely because there had been no recurrence of the misconduct between April and October 2019, but on the other hand there was no evidence that during the preceding 10 years of her employment of any misconduct nor, for that matter, during the eighteen odd years she had rendered service to it, as an employee of a sub-contractor. In the circumstances, it cannot be said the arbitrator's evaluation of the fairness of her dismissal was an entirely implausible one to arrive at. Not every serious act of misconduct automatically justifies dismissal as fair. It is true another arbitrator might have come to a different conclusion and upheld the dismissal, but that does not mean the arbitrator's approach to the matter was plainly untenable.

The extent of Williams role in facilitating the private work performed by Le Fleur

[35] Essentially, Mykonos's argument is that the arbitrator adopted an irrationally indulgent view of the Williams's involvement in facilitating the private

work done by Le Fleur. She had approached Le Fleur and when he had done the work she still accepted the money on his behalf, all of which showed her extended involvement in the impugned transaction from beginning to end. It contends she actively sought out Le Fleur to have the work done privately and received the money on his behalf from the resident. All of this indicated she had time to reflect on what she was doing but still actively pursued the transaction.

[36] Mykonos's argument strains to suggest that the arbitrator ought to have been compelled to conclude that she was actively soliciting work and that the Le Fleur's engagement was part of a seamless process she managed. At best her involvement in the sequence of events was sporadic and she did nothing to ensure that the private transaction between Le Fleur and Goodman was concluded. She conveyed Goodman's request to Le Fleur. The fact that Goodman and Le Fleur came to an arrangement was not a result of her involvement and might even have happened without her having passed on the request to Le Fleur. There was no evidence that she had arranged to insert herself into the payment of R 150 by ensuring that the money came through her. On the uncontested evidence, that was something arising from the interactions between Goodman and Le Fleur. Had Williams been in the habit of making such arrangements, it might be reasonable to expect she would have exercised more control over how it unfolded. Although it is possible that it might have been a process contrived to appear happenstance, in the absence of evidence of any similar transactions, it is quite plausible to conclude it occurred as she related it. It would be tenuous to conclude on that basis that she was actively engaged in a scheme of soliciting private work from householders

Conclusion

[37] In *Head of Department of Education v Mofokeng & Others*³, the LAC held:

"[32]...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the

³ (2015) 36 ILJ 2802 (LAC)

arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.”

[38] Even though there are some flaws in the arbitrator's reasoning, I am not persuaded that the applicant has demonstrated that, if corrected, no reasonable arbitrator could have found that the dismissal was substantively unfair and that a final written warning was a more appropriate sanction on the facts before the arbitrator. Accordingly, the award should be allowed to stand.

Order

1. The review application is dismissed.
2. No order is made as to costs.

R Lagrange
Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: C Bowler from Snyman Attorneys

For the Respondent: No Appearance