



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN**

Reportable

CASE NO: D737/13

In the matter between:

SITHEMBISO REGINALD SIBIYA

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

FIRST NATIONAL BANK (FNB)

Second Respondent

JABULANI NGWANE (COMMISSIONER)

Third Respondent

Heard: 14 October 2014

Delivered: 12 June 2015

Summary: Review application to correct a portion of the arbitration award to substitute the relief of compensation with an order of re-instatement - reinstatement is the default remedy to an unfairly dismissed employee - made subject to conditions such as whether continued employment relationship would be intolerable or it was not reasonably practicable to reinstate or re-employ – reinstatement not reasonable as continued employment not reasonably practicable.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act¹ to review and correct a portion of the arbitration award dated 11 June 2013, issued by the third respondent as a Commissioner of the Bank under case number KNDB11008. The applicant seeks an order substituting the relief of compensation with an order directing the first respondent to re-instate him to his employment on terms and conditions that are not less favorable to him than those which governed his employment before the date of his dismissal. The applicant, in addition seeks an order condoning the late filing of his replying affidavit to the main application and the late filing of the answering affidavit to the “counter review application”. The second respondent, (the Bank) opposed the review application and it also seeks condonation for the late filing of its “counter- review” application.

Factual Background

[2] The applicant was employed by the Bank since 18 July 1994 and based in Umgeni Business Park Regional office of Self Service Channel. The applicant was appointed in October 2006 into the position of Area Manager, also called the Regional Manager for Kwa-Zulu Natal. He was a Senior Manager tasked with looking after the overall performance of ATMs in respect of balancing and reconciliations in KZN. He held the level of senior executives and managerial positions in the Bank, reporting to the Executive Management of the Bank. At the arbitration hearing the applicant chose not to testify, thus leaving the evidence of the Bank unchallenged, to the extent that its version is probable.

¹ Act Number 66 of 1995, henceforth referred to as the Act.

- [3] 30 June of every year marks the end of the financial year of the Bank. A project clean-up for the period February to June 2010 was decided by the Bank for all Regional Managers to disclose all balancing differences in their reconciliations as at 30 June 2010. The exercise was to ensure that losses were identified and placed where they had to be in accordance with proper and acceptable accounting principles so as to start the new financial year 1 July 2010 on a clean slate with no unexplained differences. Reconciliation in the ATM balancing process was regarded by the Bank as extremely important, necessitating its approval to be done by senior management. Such senior management included the following staff at the Bank's National Office in the Cash of Self Service Channel:
1. Mr Luchaan Zeelie, the Head of the Section;
 2. Mr Pieter du Plessis, the National Balancing Manager;
 3. Mr Vikesh Herrie, the Chief Financial Officer;
 4. Ms Suret Greyling, the Head of Finance;
 5. Mr Marque van der Bergh, also the Chief Finance Officer and
 6. Mr Pat Anderson, applicant's line Manager.
- [4] On 16 July 2010 the applicant submitted his reconciliation by an email to the Executive Management of the Bank. He stated that it was the finalized reconciliation for the cost centre 6967. The reconciliation had four versions with unexplained differences. According to the Bank there were significant amounts passed by the applicant into the untraced accounts. On 21-22 July 2010 three staff, Ms Suret Greyling, Mr Pieter du Plessis and Mr van Wyk were sent to Kwa-Zulu Natal, (KZN) by Mr Zeelie to investigate the difficulty experienced by the applicant in its balancing and reconciliation processes. An internal audit report was compiled. It reflected the inspection to have disclosed that:
- There were differences that had been rolling for months with no notes, explanations or breakdown, which was an unacceptable practice. A difference rolled when it was not dealt with in the particular month in

which it should have been dealt with, which was against accounting practice. The financial and accounting entries had to be done to resolve the differences.

- The spreadsheet was of a complicated nature resulting in the clerks having difficulty in understanding it. That created a segregation of duties problematic, resulting in the applicant as the Regional Manager doing all the balancing.
- The journals signed off by the applicant had debits and credits in the wrong way around, demonstrating that there was no attention to detail and accuracy.

[5] In July 2010 all untraced accounts from the reconciliation submitted by the applicant were cleared. Yet it was soon discovered that significant amounts were again passed into the untraced account, being R2 506 790.00 and R1 866 330.00 in the general ledger account number 1418307. Because of the clean-up cost centre 6967 had been standing at zero some three weeks before the amounts were passed into the untraced account. Ms Suret Greyling queried this with the applicant and the applicant emailed a schedule to her on 6 August 2010 to explain the incident. Mr Zeelie was given the schedule and he found that there were differences of amounts in respect of March, April and May 2010. That discovery was of serious concern to him as he believed that it had been agreed that the balancing of accounts for those months had been finalized.

[6] According to Mr Zeelie the detailed analysis of the applicant's schedule showed that the differences listed were alarming. To him, the content of the document indicated gross mismanagement relating to months prior to the end of June 2010, a clean-up period. Mr Zeelie concluded that documentation and reconciliations that had been received from the applicant were inaccurate, false, and a

misrepresentation. The problem was also that G4S, the Banks contracted agent company servicing the automated teller machines, the ATMS, might not accept liability for claims that went so far back in time. According to the Bank there was no other region that would have hidden these numbers and these differences should have been disclosed in the June period as part of the clean- up exercise. Mr Zeelie referred to the difference in numbers as “hidden” because the figures were not disclosed in reconciliations. He said that he had lost trust in applicant’s KZN clean-up exercise because it was incomplete.

[7] Eight days after the report concerning 21-22 July 2010 KZN inspection, Mr Zeelie received an e-mail from Ms Greyling dated 18 August 2010, referring to the fact that the untraced ATM differences account was not a dumping ground to clean up the balancing. Ms Greyling was also of concern that the older the claim got, the least likely the Bank would be able to recover the lost incurred. The e-mail mentions that the Chief Financial Officer, Mr Marque van der Bergh, had requested that the Chief Operating Officer be informed of the problem, meaning that the Financial Manager was requesting that the matter be escalated further. Mr Pat Anderson sent an email to the applicant seeking action and timeframes for resolving what had become an untraced debit balance of R4, 7 million. Further correspondence was addressed to the applicant on the discovered discrepancy.

[8] Mr Zeelie considered the differences in the account as a risk to branch banking and as a potential risk to the business unit itself, resulting in the breakdown of the trust relationship with the applicant. The applicant’s gross mismanagement was considered to be a very serious operational risk to the Bank’s business.

[9] On 9 September 2010, the applicant was suspended by the Bank, pending the outcome of an investigation into ATM balancing anomalies and ATM differences. The applicant challenged the fairness of the suspension. The first respondent found that the Bank had acted fairly in suspending the applicant pending the

conclusion of the investigation. The applicant was subsequently served with a copy of the charge sheet. It had three charges of misconduct. The second charge was broken down into six charges but the applicant was found guilty and dismissed by the Bank on the basis of counts 1, 2 and 2.1 which were described in the terms:

Count 1:

“Fraud, dishonesty in terms of paragraph 4.2.1 of the Banks Disciplinary Code and Procedure in that it is alleged that the balanced position of cost centre 6967 was misrepresented by you when submitting your “ATM balancing to GL reconciliation spreadsheet” dated 30 June 2010 as per your email dated 15 July 2010 to Mr. V Harrie. The reconciliation reflected a “Total Balancing Log” figure of R 22, 602, 230 whereas the actual balancing log for this cost centre reflected a figure of R 22, 019, 880 thus resulting in a variance amounting to R582, 350 spread across various ATM’s.

CHARGE 2

Gross mismanagement in terms of paragraph 4.3.8 of the Banks Disciplinary Code and Procedure in that it is alleged that as Area Manager, FNB Self Service Channel – KZN:

Charge 2.1

You did not ensure that there were adequate controls in place and this caused ATM cash difference losses to the Bank amounting to R11, 082, 281 during the financial year ended June 2010.”

- [10] The charges were formulated in terms of the Bank’s disciplinary code. Section 4.2.1 of the code describes the offence as theft, fraud, dishonesty or the unauthorised removal of any material from the Bank or from any person or premises where such material is kept. The disciplinary sanction for a first offence of this nature is summary dismissal. Charge 1 of the notice simply utilised the very wording of the section of the code and alleged “fraud, dishonesty...” Charge 2 was stated to be in terms of section 4.3.8 of the Code. Section 4.3 is however

a list of the types of disciplinary action. The nature of the offence alleged and the factual allegations are stipulated in this charge and the charge fully advises the employee of the allegations against him. The particulars of the alleged gross mismanagement were stipulated in 2.1 of the charge. The applicant filed an internal appeal with no success as his dismissal was confirmed.

- [11] Aggrieved by his dismissal the applicant referred an unfair dismissal dispute for conciliation and later for arbitration. At the commencement of the arbitration hearing the Bank indicated that it did not intend to proceed with the fraud allegation in Charge 1. It was submitted that the wording “fraud, dishonesty ...” in the context of section 4.2.1 must be understood to mean fraud or dishonesty. The Bank did, however, persist in its contention that there had been dishonesty in that the balanced position of Cost Centre 6967 had been misrepresented. It then called four witnesses to prove that the dismissal of the applicant was substantively fair. The witnesses were all working in the Cash of Self Service Channel and were:
7. Mr Luchaan Zeelie;
 8. Mr Pieter du Plessis;
 9. Mr Vikesh Herrie and
 10. Ms Suret Greyling.
- [12] The applicant elected not to testify but called Mr David Jesse, his neighbour and a friend. He assisted the applicant in drafting the papers for the internal appeal. Although he drafted the appeal documents, the applicant perused and considered the appeal prior to submitting it. The appeal documents made wild allegations which included accusing senior management, including Mr Zeelie, of serious criminal offences and it alleged that the Bank produced a “doctored” and “false” document. The Bank was accused of producing such a document for the purposes of the disciplinary hearing. Mr Jesse communicated those appeal documents to the Reserve Bank and he said that he did it on his own volition, seeking to exonerate the applicant of any blame in respect thereof. In his

evidence he sought to negate any suggestion that the employment relationship of the applicant and the Bank had irretrievably broken down.

[13] The third respondent issued an award with the finding that the Bank failed to prove the link between the mismanagement of the applicant by using the automated balancing system and any single activity as the contributing factor to the loss of R8, 9 m. Further, he found that the evidence led on the mismanagement of the G4S account amounted to gross mismanagement. He consequently found that the dismissal of the applicant was substantively unfair. He found though that the applicant was not entitled to reinstatement and he ordered the Bank to compensate the applicant in an amount of money equivalent to his nine months' salary.

[14] The review application of the applicant is premised on the failure of the third respondent to order the Bank to re-instate him. The Bank subsequently filed a "counter-review" application to challenge the findings on substantive fairness of the dismissal. An *ex tempore* judgment was delivered soon after the hearing of this matter. The Bank has since filed an application for leave to appeal.

Chief findings by the third respondent on re-instatement

- [15] The third respondent found in his award that:
- the applicant was an Area Manager of the region that had been shown to have produced a significant loss of R8,9 million;
 - he was at the helm of that region when the unexplained loss was incurred;
 - he still wanted to be reinstated to that position;
 - he did not assist in sharing light on how that loss occurred;
 - re-instatement defied any logic by any known standard;
 - Re-instatement would not be a good order in the circumstances.

- The need to analyze the evidence tendered by Mr Jesse on behalf of the applicant was irrelevant and insignificant as it was to show that the relationship between the parties had not irretrievably broken down.
- The old standard of the trust between the parties was not to be used; instead a consideration was to be made whether it would be fair to the Bank to order it to re-instate the applicant.

Grounds for review: re-instatement

[16] The applicant contended that the failure of the third respondent to order reinstatement was unjust when seen against the reasons given for it.² He said that the award suffered from a logical fallacy and that the third respondent exceeded his powers in the sense contemplated in section 145 (2) (iii) of the Act. He said that the third respondent had two contradictory opinions in his award. On one hand it was wrong to dismiss the applicant for the misconduct, but on the other it was inappropriate to re-instate him because of the same misconduct. He contended that when the allegation of fraud was removed at the commencement of the arbitration hearing, the reason for dismissal remained unclear. He stated that there were no circumstances to justify a failure to re-instate him. He averred that it was illogical to expect him to testify to explain how the loss of R8.9 million might have been occasioned whereas the Bank had already written off the amount totaling R33 million which included R8.9 million as part of the clean.

Ground opposing the review: re-instatement

[17] It was submitted that the applicant's failure to give evidence in respect of the alleged misrepresentation and the charge of gross mismanagement established that there was a serious operational risk to the second respondent's business. While the third respondent's decision on reinstatement relied on this failure on the part of the applicant, the Bank submitted that there was also ample evidence

² See paragraph 15 above.

it led in respect of the breakdown of trust and also evidence of post dismissal misconduct which made a continued employment relationship intolerable within the meaning of section 193(2)(b) of the LRA. The submission was that although this evidence led by the Bank was erroneously not considered by the third respondent, it was not rejected.

[18] The applicant occupied a key position in relation to ATM banking and financial reporting in respect of ATMs. He was appointed Regional Manager at FNB ATM, KZN on 16 October, 2006. He was a Senior Manager and was responsible for the overall performance of ATMs in the KZN province. He had been in various managerial roles for about 10 years prior to his appointment as Regional Manager. It was submitted that the operational requirements of the Bank in respect of the applicant's position as Regional Manager required the applicant to explain the losses and address the question of adequate controls. His failure to do so as Regional Manager, it was contended, had destroyed the confidence and trust which the employer required of a Regional Manager.

[19] The further submission was that the post dismissal misconduct of the applicant was characterised by ill-conceived and strident attacks on the integrity and honesty of senior managers and by serious allegations against the bank. This conduct thus confirmed the irretrievable breakdown of the relationship between employer and employee.

Evaluation

[20] The applicant seeks to review the award only on the basis of the third respondent having failed to re-instate him. Nowhere in his submissions did the applicant refer to the exceptions to the general rule in section 193 (2). The applicable provisions of the section read:

(2) The Labour Court or the arbitrator must require the employer to reinstate or

re-employ the employee unless:

- (a) ...
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable,
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee.

[21] Therefore while reinstatement is the default remedy to an unfairly dismissed employee, it is made subject to whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or it is not reasonably practicable for the employer to reinstate or re-employ the employee. Reinstatement is therefore a discretionary remedy. In *Dunwell Property Services CC v Sibande and Others*³ the Labour Appeal Court held that:

“[31] ... In order to determine whether or not an unfairly dismissed employee should be reinstated, as contemplated in s 193(2) of the LRA, the overriding consideration in the enquiry should be the underlying notion of fairness between the parties, rather than the legal onus, and that “fairness ought to be assessed objectively on the facts of each case bearing in mind that the core value of the LRA is security of employment”⁴

[22] The Court found that the employment relationship would be intolerable particularly because the employee had levelled very serious and scandalous allegations against certain people in the top and lower management level of the

³ (2011) 32 ILJ 2652 (LAC); See also *First National Bank, a Division of First Rand Bank Ltd v Language*, (2013) 34 ILJ 3103, paragraphs [28] to [30] ; *Zilwa Cleaning and Gardening services CC v CCMA and Others* (2010) 31 ILJ 780 (LC).

⁴Equity Aviation Services v CCMA (2009) (1) BCLR 111 (CC) paragraph 39

employer. In *Mediterranean Textile Mills v SACTWU*⁵ the Court referred to a need to provide evidence in respect of the alleged intolerable relationship but indicated that the finding should be based on fairness to the parties. The overriding consideration is fairness rather than an emphasis on legal onus. The behaviour of the dismissed employee after such dismissal is one of the factors to be considered in determining the fairness of dismissal.

[23] If the applicant had been reinstated, the probabilities are that he would continue running the office as he did before his dismissal. How he ran the office as a Regional Manager was found by his employer not to conform to the standards set by Bank. He excluded his two staff members in the reconciliation of the accounts. If they did not measure up to the set standards, he had to arrange for their intensive training. If they still proved incapable, he had to consider counselling them with the possibility of incapacity hearing. He held a very high and a responsible position and the Bank was entitled to rely on him in the running of its business. The applicant was aware of the stipulated balancing procedure which the Bank prescribed. Control measures provided for in the process guide were not followed. The guide requires ATM logs to be “screen dumped” and signed daily by the team member who was the supervisor.

[24] While he deviated from the prescribed procedures of the Bank, it was not proved on a balance of probabilities for count 1 that he knowingly and deceitfully did so. Inferences were drawn with much speculation that he knew that his reconciliation was wrongly done. In the same vein, he could have run out of his depth, as the July 2010 inspection appears to have revealed. Evidence of the subjective knowledge of his wrong doing was lacking, hence the acquittal on this count. In respect of count 2 the gross mismanagement was allegedly constituted by a failure to ensure that adequate controls were put in place **which caused** (my emphasis) ATM cash difference losses.

⁵ (2012) 2 BLLR 142 (LAC) paragraph 28. See also *Billiton Aluminum SA Ltd t/a Hillside Aluminum v Khanyile and others* (2010) 31 ILJ 273 (CC) at paragraph 43

[25] The problem here was that the Bank having proved the mismanagement and having proved the losses incurred, thought it was entitled to a conviction. It was not. It failed dismally to prove the nexus between the two aspects it proved. Put differently, there are other regions where losses were incurred while correct banking practices were followed, hence the observation that KZN had a problem not found in any other regions. Evidence of the Bank did not prove that the applicant caused the Bank to suffer any financial loss. It proved that its financial losses were incurred at its ATMs. That is not where the applicant was working. His duty was *ex post facto* accounts reconciliation, meaning after the losses were incurred. Yet he was charged for causing such losses. He was charged with consequential as opposed to formally defined misconducts. The Bank assumed that by proving some parts of the misconduct, it was entitled to a conviction. It was not. It had to prove the alleged consequence flowing from the allegations made earlier in the charge. Therefore the Bank charged him for the consequential acts he did not commit and it proved the commission of the consequential acts he was not charged for. It does not help the Bank to seek to hide behind the say that it did not have to be meticulous as in the criminal court in framing the charge. The charges were very clear but the evidence failed to support the allegations therein contained.

[26] The remarks on the acquittal of the applicant have been necessitated by his attitude which appears to be that of an entitlement, anything notwithstanding, to reinstatement. As already indicated, his escape was not with clean hands, thus necessitating a probe whether reinstatement would be fair to both parties.

[27] The final probe turns on the participatory role of Mr Jesse. He helped the applicant by drafting papers for the internal appeal. He was therefore acting as an agent, furthering the aims and objectives of his friend. He stood to gain nothing personally in the appeal. The applicant signed the appeal papers, having gone through them. The applicant cannot therefore escape the responsibility flowing from the conduct or misconduct of his agent. The applicant is therefore

accountable for wild allegations made in the appeal, which include accusing senior management, such as Mr Zeelie, of serious criminal offences and allegations that the Bank produced a “doctored” and “false” document.

[28] Similarly, the applicant cannot successfully distance himself from the email of 25 October 2011 containing serious allegations which was sent to the press. A conclusion is inescapable that as the arbitration hearing was due to commence on the following day, the motive for the dispatch of this email was to attempt to publicly embarrass the Bank immediately prior to the arbitration. Again the applicant cannot escape the responsibility of an agent he had briefed on the matter. The serious attacks on the employer and its senior managers by the employee using his agent are circumstances surrounding the dismissal which makes a continued employment relationship intolerable.

[29] In my view, the second respondent succeeded at arbitration in demonstrating that the circumstances surrounding the dismissal were such that a continued employment relationship would be intolerable and it was not reasonably practicable for the employer to reinstate or re-employ the applicant. The third respondent reached a decision that was both fair and reasonable, albeit traversing on a different route.

[30] In the circumstances, and having reflected on the law and fairness in regard to the costs order, the following order shall issue:

1. The applicant’s review application on reinstatement is dismissed.
2. The applicant is to pay the costs thereof.

Cele J

Judge of the Labour Court of South Africa.

APPEARANCES:

1. For the Applicant: In person
2. For the Respondent :Adv.P.Flynn instructed by Cowan-Harper Attorneys

LABOUR COURT