



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Not of interest to other judges

Case no: D860/2017

In the matter between

CAPITEC BANK LIMITED

Applicant

AND

CCMA

First Respondent

C OAKS N.O.

Second Respondent

NHLAPO D

Third Respondent

Heard: 28 November 2018

Delivered: 28 November 2018

Edited: 20 December 2018

Summary: Review application – award one that a reasonable commissioner could have made – application dismissed

EX TEMPORE JUDGMENT

COETZEE AJ

- [1] This is the ex-tempore judgment with reasons in case number D860/2017 between Capitec Bank Ltd, applicant, the CCMA, first respondent, C Oaks NO, second respondent and D Nhlapo, the third respondent.
- [2] The applicant seeks to review and set aside an arbitration award dated 4 June 2017 under case number KNDB10460/2016. The award reinstated the third respondent after having been dismissed.
- [3] The proceedings have been somewhat protracted. The matter can, however, be resolved on a fairly restricted basis.
- [4] The applicant had in place a rule that provides as follows:
- “Where an employee issues or approves a loan to a client who has submitted fraudulent documentation, appropriate action to be taken warrants dismissal when:
- fraud check not properly done and as a result errors / fraud indicators were not detected.”
- [5] It is important that, this rule applies to an employee who issues a loan or approves a loan to a client.
- [6] The applicant charged the third respondent with the following:
- “Transgression: approval of a fraudulent loan: on 1 April 2016 at Durban West Street 331 branch, you approved a fraudulent loan issued by S C Palisa Makotodia to a client named ...
- “You failed to notice that the payslip and the bank statement used was (sic) fraudulent. Capitec suffered a loss of R79 485.99.”
- [7] The charge clearly related to the rule quoted above. The third respondent did not look at the paperwork. The employer found

the employee guilty as pleaded and dismissed her. She did not expect to be dismissed after pleading guilty.

- [8] The third respondent ("the employee") had previous warnings: one on 6 February 2014 for misconduct relating to breach of policy and procedures; a written warning on 9 December 2014 for misconduct relating to passwords and the final written warning on 30 July 2016 for dereliction of duties.
- [9] The employee contends that the applicant acted inconsistently in that one Greer who was a branch manager at the Smith Street branch issued a fraudulent loan of R1 500 and was not dismissed.
- [10] This case, according to the applicant, was distinguishable as Greer only had to carry out a final check as the loan was issued solely by the service consultant who was dismissed.
- [11] The employee also raised an inconsistent application of discipline with reference to L Khan.
- [12] According to the applicant, in the case of L Khan, the errors that she disregarded were previously referred to the fraud department as suspicious but who said they were legitimate documents and she therefore approved the loan when she later found the same errors. That was not a dismissible case.
- [13] The employee stated that if she was given the option to resign she would have taken it.
- [14] She conceded that she was busy at the time.
- [15] In the award the Commissioner correctly interpreted the rule correctly but then made a finding that the witness had testified that the employee was guilty of gross negligence and that the

applicant dismissed her for gross negligence instead of for the breach of a rule.

- [16] It cannot be that, the applicant dismissed the employee for gross negligence. This was the interpretation of the witnesses as to the seriousness of the contravention of the rule. She was not dismissed for gross negligence but for breaching a rule which would constitute gross negligence. The applicant dismissed her for a breach of the rule.
- [17] This approach of the Commissioner does not have a material effect on the outcome of the proceedings, as I will demonstrate below.
- [18] The Commissioner considered whether the rule was fair and did not make a finding that the rule was unfair. The Commissioner held that during cross-examination the employee conceded that she had failed to review the documents and that would mean checking for fraud indicators. In so many words, the Commissioner found her guilty of being in breach of the rule.
- [19] The Commissioner regarded as mitigating factor the fact that three other persons had scrutinised the documents before her. The provision in the disciplinary code in fact refers to any employee who breaches that rule either by issuing or approving the loan. Four persons were involved in the issuing and approving of the loan.
- [20] The commissioner paid much attention to the consistent application of the rule. As to consistency, he limited himself to the two cases of Greer and Palisa Khan.
- [21] He found that one of the distinguishing factors was that Khan had a clean disciplinary record and for that reason she was not disciplined but given the option to enter into either a separation

agreement or to resign, whatever the factual position was. But she was not disciplined or dismissed.

[22] The Commissioner found that the employee had two warnings that both had expired. Both warnings did not directly relate to the issue at hand, and that is approving a fraudulent loan.

[23] In any event, they were not valid for purposes of further disciplinary action as they had already expired. For other purposes, the employer might have had regard thereto. The applicant's submission that the applicant could for purposes of progressive discipline rely upon the two expired warnings is ill founded.

[24] The third warning of 30 July 2016, according to the Commissioner, issued two days prior to the disciplinary hearing in which she was dismissed, was also to be considered. He found that she did not have the opportunity to challenge the veracity of that final written warning.

[25] Having found that the employee had no valid prior warnings, as they had expired, he found that there was no difference between the employee and Khan as both had clean disciplinary records.

[26] The Commissioner also held that Khan was a comparator as to consistency. She was the first main person to work on the loan application. She shared equal responsibility with the employee. She was given the option to resign while the employee was not given such option. That, according to him, was inconsistent application of discipline. He relied upon the case of *Member of the Executive Council, Department of Health Eastern Cape Public Health and Social Development Sectoral Bargaining Council and Others*.¹ In this case the Court held that one of the three perpetrators involved in the same transaction were given

¹ 2016 37 ILJ (LC)

the opportunity to resign but the third one in a similar position was not given the opportunity to resign. For that reason the dismissal was substantively unfair.

- [27] The grounds of review relate *inter alia* to an alleged misconception of what “gross negligence” is, that the previous warnings were still relevant, a misunderstanding of the rule about inconsistency by the Commissioner and the like.

Analysis

- [28] There was a rule that specified the consequences in the event of a breach. The employee may be dismissed.
- [29] The applicant submits that the two previous warnings were still relevant and therefore that the employee had a disciplinary record. It is correct that fairness must dictate whether expired warnings may be taken into account. The 2014 warnings have expired. They dealt with policies but not specifically with what she was alleged to be misconducting herself in during April (for which she was called before a disciplinary inquiry in August). They had already expired and therefore it is unfair to have regard to them on the facts of this matter.
- [30] In July 2016 a warning was issued after the fraudulent loan was approved in April. It therefore in the normal course of proceedings will not serve as part of the disciplinary record that could influence the sanction imposed upon her during the August proceedings. There was no opportunity to correct her behaviour after the final written warning in July because the event occurred probably after the 1 April event. The horse had already bolted as far as alleged misconduct that had already occurred on 1 April 2016.

- [31] The Commissioner's finding that she did not have an opportunity to challenge the final written warning and that it must be disregarded and that her position equated to that of Palisa, is not one that a reasonable Commissioner could not have made. In fairness, they both therefore had no valid disciplinary record.
- [32] All the other issues aside, the Commissioner eventually held that there was inconsistency in the treatment of the perpetrators. The employee was not given the opportunity to resign either in terms of a mutual separation agreement or simply to resign. The applicant submitted that resignation was always open to her, but she elected not to do so.
- [33] Of the four who issued, checked and verified the documentation, only one was dismissed. Palisa was given the opportunity to enter into a mutual separation agreement or to resign, whatever the position was. The employee was not given that opportunity. Applicant submits it was a simple resignation. She could merely resign if she wanted to. The evidence is not clear on what the option to resign means. The evidence of the third respondent referred to in the transcript records that she referred to a resignation.
- [34] In cross-examination reference was made to a mutual separation agreement but that was not pursued any further. That would seem to be more than a resignation, and it probably was, but it is not necessary for me to make a finding on that. It is sufficient that the other employee was given the option to resign and then did so. Then why not grant the opportunity to the third respondent? The evidence strongly suggest that it is an offer that must come from the applicant.
- [35] The *Executive Council*-case refers to only the option to resign as opposed to a disciplinary inquiry. On the evidence it appears that the circumstances must have been such that she had to be

offered the opportunity to resign so that her record remains clean.

[36] Much was made in evidence about the opportunity to be given to resign. The circumstances as to why that was necessary has not been elaborated on in the evidence as far as I could ascertain. The employer did not clarify the position regarding an option to resign versus a disciplinary inquiry.

[37] The evidence shows that such an option existed, and that the employer had to offer it. This must mean something. The only qualifier was the clean record of the applicant or the person involved in such a case.

[38] I find the *Executive Council*-case applicable. The ultimate conclusion of the Commissioner that the applicant dismissed the third respondent substantively unfairly is an award that a reasonable Commissioner could have made. One may differ from the award, but it still falls within the band of reasonableness.

[39] As far as costs are concerned, I have considered the factors that determine a cost order. The parties are still in an employment relationship and it is inappropriate to make a costs order,

[40] I make the following order:

[40.1] The application is dismissed.

[40.2] There is no order as to costs.

A handwritten signature in brown ink, appearing to be 'F. Coetzee', written in a cursive style. The signature is positioned above a horizontal line.

F Coetzee

Acting Judge of the Labour Court

Appearances:

For the applicant[s]: Mr W Jacobs from Willem Jacobs & Associates

For the Respondent[s]: Ms N Hiralall from Hiralall Attorneys