

SOUTH AFRICA / JUDGMENT

Absa Bank Limited v Rogers and Others (C31/2014) [2015] ZALCCT 26 (20 March 2015)

[2015] ZALCCT 26

COURT

Labour Court Cape Town

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

C31/2014

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REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

C31/2014

DATE: 20 MARCH 2015

Not Reportable

In the matter between:

ABSA BANK LIMITED.....Applicant

And

PETER ROGERS.....First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION.....Second Respondent

STEPHEN BHANA N.O.....Third Respondent

Date heard: 25 November 2014

Delivered: 20 March 2015

RABKIN-NAICKER J

- [1] This is an opposed application to review, set aside and substitute an arbitration award under case number WECT9594-13. The third respondent (the Commissioner) made the following award:

“70. The applicant’s dismissal was substantively unfair.

71. The respondent, ABSA Bank Limited, is hereby ordered to reinstate the applicant into his previous position and under the same terms and conditions that prevailed at the time of his dismissal. This reinstatement is effective from 25 May 2013 and is without

retrospective back pay. The respondent must further issue the applicant with a final written warning effective for 12 months from

25 May 2013. Respondent is further ordered to reverse the applicant’s debarment and remove his name from the REDDS listing.

72. The applicant must report for duty by no later than 2 January 2014.”

- [2] The first respondent (Rogers) was employed by Absa as a private banker. In that capacity, and in terms of the Financial Advisory and Intermediary Services Act, 37 of 2002 (FAIS), he was a FAIS representative. In terms of that legislation a FAIS representative, appointed by an employer such as Absa, has to have personal qualities of honesty and integrity and it is the bank’s duty to ensure that their representatives are fit and proper[1]. Section 13(1)(b)(ii) of the FAIS provide that :”A person may not act as a representative of an authorized financial services

provider, unless such person if debarred as contemplated in section 14, complies with the requirements determined by the Registrar, after consultation with the Advisory Committee, by notice in the Gazette, for the reappointment of a debarred person as a representative.”

- [3] The specific grounds of misconduct for which Rogers was charged and dismissed were as follows:

“You acted dishonestly by misrepresenting the signature of a client and/or information regarding physical site visits and/or the verification of FICA documents.

The above mentioned allegations are made with reference to the following incidents(s)/ example(s):

1. It has come to management’s attention that on 28 March 2013 you misrepresented the signature of a client Dr MD Broodryk on a CIF verification document.
2. It has come to management’s attention that on 3/4/2013 you sent an e-mail to your colleague, Brian Jacobs, stating the following regarding Dr MD Broodryk: “I ascertained that his secretary signed the original CIF...” On 19/4/2013 you sent an email to your manager, Mathew Knowtsec, stating the following: “He was not available to sign the CIF and I signed the document alongside the authorized by section.”

3. It has come to management's attention that you misrepresented the information on the following physical site visit conducted for verification purposes document with regards to Dr MD Broodryk:

3.1 You completed the following on a physical site visit document for the business address of Dr MD Broodryk: "I hereby confirm that I conducted a physical site visit on 27/4/2013" and "I have consulted with Dr Michael Dudley Broodryk at the above address and verified the aforementioned address and/or trade name" which is not true.

4. It has come to management's attention that you misrepresented the information on the following physical site visit conducted for verification purposes documents with regard to Dr JT Butler:

4.1 You completed the following on a physical site visit document for the residential address of Dr Butler: "I hereby confirm that I conducted a physical site visit on 27/3/2013" and "I have consulted with James Thomas Butler at the above address and verified the aforementioned address" which is not true.

4.2 You completed the following on a physical site visit document for the business address of Dr Butler: "I hereby confirm that I conducted a physical site visit on 27/4/2013" and "I consulted with Dr James Thomas Butler at the above address and verified the aforementioned address" which is not true.

5. It has come to management's attention that on 2/4/2013 you sent an e-mail to the Regional Manager: Sales Support, Albertus Brand, stating that Dr Butler had in fact signed a CIF form dated 28/3/2013. On 17/4/2013 you stated in your email to your manager, Mathew Knoetsec, that you wrote the name of Dr Butler on the CIF form rather than obtaining the client's signature.
6. It has come to management's attention that on 28 March 2013 you requested your colleague, Faheema Arnold, to verify the identity documents and utility bill of client, Dr MD Broodryk, as a true copy of the original without her having sight of the original documents.
7. It has come to management's attention that on 28 March 2013 you requested your colleague, Faheema Arnold, to verify the identity document of client, Dr Carol Ann Thomas, as a true copy of the original without her having sight of the original document."

- [4] The Commissioner recorded the following in paragraph 62 of his award:

"The existence, validity of the rules, policies, procedures and legislation are common cause. It is further not disputed that the

applicant had misrepresented signatures of two clients in initial documentation, had lied about it in two instances, had not completed

the site visit forms properly and had asked a colleague to certify without having the originals present. It is common cause that his actions had breached the rules and policies and legislation. The applicant admitted and acknowledged that he was aware of all these.”

[5] In his award, the Commissioner refers to the Sidumo[2]

judgment

which he states: “requires that Commissioners must decide whether dismissal was an appropriate sanction on an objective assessment of all relevant facts and circumstances presented at arbitration.” This summary which is often used in awards is somewhat cryptic. The full quotation from the judgment is as follows:

“[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal.

There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.

[79] To sum up. In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.”

[6] Essentially the Commissioner decided that the dismissal was substantively unfair based on the following:

6.1 That on the basis of the evidence of one expert witness, (which was strongly contradicted by another), Rogers was severely stressed at the time he committed the offences and acted completely out of character;

6.2 That Rogers was a first offender and had a long unblemished record;

6.3 That Rogers was remorseful and contrite and was not intentionally dishonest when he misrepresented his clients' signatures as he wanted to ensure their accounts were not frozen;

6.4 That his subsequent dishonest conduct (i.e. when he sought to cover up his wrongdoing) was in a “phase of self –preservation”;

6.5 That, although inconsistency in the application of discipline was not established, the company should have re-visited their decision to dismiss him when they had done so in respect of Faheema Arnold who was put on a final written warning.

- [7] It is evident from the above issues on the basis of which the Commissioner made a finding on substantive fairness and which are elaborated on in paragraphs 64-68 of the Award, that he simply did not apply his mind to the importance of the rules breached, the position of Rogers as a senior private banker, the industry in which he worked and the reasons the sanction of dismissal was imposed. In short he does not consider all relevant circumstances as required.
- [8] I must agree with the submissions of Mr. Leslie on behalf of Absa who argued that the Commissioner completely failed to have regard to or comprehend the nature of its business i.e. as a bank dealing with the funds of members of the public and operating in a highly regulated statutory environment. Furthermore that the Commissioner exceeded his powers in purporting to reverse the debarment of Rogers (by ordering his name be removed from the REDDS list), which debarment was effected in terms of the FAIS. The latter issue was properly conceded by Mr Rautenbach on behalf of Rogers.
- [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.
- [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. In my judgment when these issues are properly weighed in casu, there can be no doubt that the sanction of dismissal was fair.
- [10] Given the full record before me, there is no reason to remit this matter for hearing. I do not consider it apposite to order costs against Rogers. In view of all the above circumstances, I make the following order:

Order:

1. The award under case number WECT9594 is hereby set aside and substituted as follows:
 - 1.1 "The dismissal of Peter Rogers was substantively fair".

H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicants: Adv. G. Leslie instructed by Cliffe Dekker Hofmeyr

First Respondent: Adv. F. Rautenbach instructed by C & A Freidlander

[1] Sections 8,13 and 14 of the FISA

[2] Sidumo & another v Rustenburg Platinum Mines Ltd & others 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC)

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