

SOUTH AFRICA / JUDGMENT

King Price Insurance Company Ltd v Vather and Others (JR 2055/2020) [2023] ZALCJHB 101 (17 April 2023) [2023] ZALCJHB 101

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2055/2020

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IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: JR 2055/2020

In

the matter between:

KING
PRICE INSURANCE COMPANY LTD
Applicant
and
THIRESHEN
VATHER
First
Respondent
THANDILE
KONA N.O.
Second
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION
Third
Respondent

Heard:

12 April 2023

Delivered: 17 April 2023
(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 17 April 2023.)

JUDGMENT

VAN NIEKERK, J

- [1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator). In the award, the arbitrator found that the dismissal of the first respondent (the employee) was procedurally fair, but substantively unfair, primarily for the reason that while the employee had committed an act of misconduct, it was not sufficiently serious to sustain the penalty of dismissal. The arbitrator reinstated the employee subject to a final written warning valid for 12 months.
- [2] The material facts are not in dispute. The applicant provides insurance services, and is subject to the Financial Advisory and Intermediary Services Act, 37 of 2002. To incentivise sales consultants, the applicant has a commission structure. During January 2020, the applicant uncovered a scheme operated by the employee's manager, Daniel Dan, which entailed a fraudulent inflation of referral commissions paid to sales consultants even when targets were not met, on the basis that a portion of the inflated commission would be paid to him. The employee received referral commission to which he was not entitled by way of payments into his personal account, and proceeded to distribute money that he had received in accordance with instructions issued by Dan. These payments extended to the costs of Dan's wedding, and a holiday for Dan and his fiancée.
- [3] The applicant considered that by failing to report the irregular deposits into his personal account, the employee had violated his obligation under the FAIS Act and that he had failed in his duty to act with the utmost good faith towards his employer. The employee was charged with misconduct and ultimately dismissed for accepting cash from other employees resulting from his association with his employer. The employee was dismissed on 10 June 2020. On 20 August 2020, the employee was debarred by the Financial Services Conduct Authority (FSCA).
- [4] The employee contested the fairness of his dismissal, and ultimately referred the matter to an arbitration hearing. The arbitrator's award was issued on 2 November 2020.

[5] Despite a degree of confusion between them discernible from the papers filed by both parties, the grounds for review raise two discrete conceptual issues. The first is the fairness of dismissal as a sanction for the misconduct the arbitrator found to exist; the second is the remedy of reinstatement awarded by the arbitrator given the fact that at the time the award was issued, the employee was debarred from practising in the financial services industry. In regard to the first, the applicant contends that dismissal was an appropriate sanction in that the employee failed in his duty to act in the best interests of his employer. In regard to the second issue, the applicant contends that it was not open to the arbitrator to reinstate the employee in circumstances where he had been debarred by the FSCA. It was not in dispute that the employee was a 'representative' for the purposes of the FAIS Act, nor was it in dispute that the employee could not act as a representative of the applicant if he was debarred in terms of section 14 of the Act. It was also not in dispute that the applicant, as an authorised financial services provider, was

obliged to be satisfied that all of its representatives were competent to act in that capacity. In these circumstances, the applicant submits that the arbitrator failed to have regard to the fact that the employee's debarment had the consequence that he was precluded from working in the finance industry.

[6] The arbitrator's reasoning can be discerned from his analysis of the evidence. First, he records that the charge brought against the employee was that, without the consent of the applicant, he accepted a benefit in compensation in cash resulting from his association, engagement duties with the applicant. The arbitrator then records that the charges related to two incidents where the employee, on Dan's instructions, received money from two of the applicant's employees, in order to pay for the services related to Dan's wedding. The arbitrator then records that the applicant's case was that the employee, as a manager, should have known that the three-way transaction constituted misconduct, and that he should therefore not have partaken in it, or, at the very least, he should have reported it. The arbitrator then finds that there is no plausible explanation as to why the other participants in the transactions were not charged by the applicant. He dismisses the applicant's version that they are still to be charged as insufficient to explain the reason not to charge them together with the first respondent. Further, the arbitrator finds that the practice of exchanging money between employees was common. Finally, the arbitrator found that there was no evidence to prove that the employee personally benefited or was compensated in any way from the monies transferred to him. This, the arbitrator, rebuts any inference that the employee accepted any benefit in compensation for the purposes of the charge against him. Despite these findings, the arbitrator goes on to find that the employee 'can be faulted for failing to report Daniel at Dan's unethical behaviour to the respondent'. In regard to sanction specifically, the arbitrator found that the employee had a clean disciplinary record, but that his failure to report Dan's unethical conduct 'cannot go unsanctioned.' In these circumstances, the arbitrator found that dismissal was an inappropriate sanction and that it should be substituted with the sanction of the final written warning, valid for 12 months.

- [7] It is not certain from the terms of the award whether the arbitrator made any specific finding of inconsistency, or to what extent any such finding specifically formed the basis of a finding of a substantively unfair dismissal. The arbitrator appears to have been concerned only with the inadequacy of the explanation that the two employees who had debated in similar misconduct had not yet been charged. The inconsistent application of a disciplinary sanction is ordinarily a matter that goes to the determination of the fairness of sanction against the employee concerned. In the present matter, it is not clear from the record whether the employee's case was that he was similarly circumstanced to those persons he regarded as comparators, nor is there any evidence that the cases referred to were properly comparable, or that the employee's dismissal was tainted by any inconsistency. On the contrary, the undisputed evidence adduced by the applicant was that disciplinary action was pending against those employees chosen as comparators. Given that what might be construed as a finding of inconsistency is not specifically a basis on which the arbitrator considered that the employee's dismissal was unfair (the award turns largely on the arbitrator's finding that the employee was guilty of some lesser form of misconduct than that with which he was charged), it is not necessary for me to make any findings in this regard.
- [8] As I have indicated, what is specifically challenged by way of review is the arbitrator's finding on the nature of the employee's misconduct and in particular, the reasonableness of the finding that the charge brought against the employee could not be sustained on account of the fact that the employee derived no personal benefit from his conduct, and that the employee was guilty of no more than a failure to report Dan's unethical conduct, an omission which in the view of the arbitrator, was not sufficiently serious to warrant dismissal and the appropriateness of reinstatement in circumstances where at the relevant time, the employee had been debarred by the FASC.
- [9] The test to be applied on review is well-established. At its most fundamental, it seeks to preserve the line between a review and an appeal. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2007 28 ILJ 2405 (CC) at para 110, the Constitutional Court held that the outcome of the proceedings under review, in the form of the arbitrator's conclusion, must fall within a range of decisions that a reasonable decision-maker could make. The Constitutional Court reaffirmed this test in *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2018) 39 ILJ 2633, where at paragraph 43 of the judgment, it said the following:
- The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by the rational reasons.
- [10] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 ILJ 943 (LAC), the court held that the review court must ascertain whether the arbitrator considered the principal issue in dispute, evaluated the facts presented at the hearing and came to a conclusion that is reasonable. In essence, the test is a two-stage test. To succeed, an applicant must establish some reviewable irregularity on the part of the arbitrator and given

the existence of any such an irregularity, establish that the outcome of the proceedings in the form of the arbitrator's ruling or award, falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence.

- [11] More recently, in *Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* [2021] 5 BLLR 475 (LAC), the Labour Appeal Court restated the review test in the following terms:

The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" To maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator's award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator's reasoning is found to be unreasonable, the result is, nevertheless, capable of justifications for reasons other than those given by the arbitrator. The result will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.

- [12] This court has eschewed a piecemeal approach to a review application. The proper approach is for the court to consider the totality of the evidence in deciding "whether the decision made by the arbitrator is one that a reasonable decision maker could make." In regard to what have been referred to as 'penalty reviews', Myburgh and Bosch in their seminal work 'Reviews in the Labour Courts' cite two important passages from the judgment of the Constitutional Court in *Sidumo & another v Rustenburg platinum mines Ltd & others* [2007] 12 BLLR 1097 (CC). The first is from the majority judgment, per Navsa AJ:

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 in 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.

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...

And further, in the judgment by Ngcobo J:

What this means is that the commissioner... does not start with a blank page and determine afresh what the appropriate sanction is. The commissioner's starting point is the employer's decision to dismiss. The commissioner's task is not to ask what the appropriate sanction is but whether the employer's decision to dismiss is fair.

In answering this question, which will not always be easy, the commissioner must pass a value judgment. However, objective the determination of the fairness of a dismissal might be, it is a determination based upon the value judgment. Indeed, the exercise of a value judgment is something about which reasonable people may readily differ.

But it could not have been the intention of the lawmaker to leave the determination of fairness to the unconstrained value judgment of the commissioner. Were that to have been the case, the outcome of the dispute could be determined by the background and perspective of the commissioner... yet fairness requires that regard must be had to the interest both of the workers and those of the employer, and this is crucial in achieving a balanced and equitable assessment of the fairness of the sanction.

These considerations imply certain constraints on commissioners. However, what must be stressed is that having regard to these considerations does not amount to a difference to the employer's decision in imposing a particular sanction ...[W]hat is required of a commissioner is to take seriously the reasons of the employer establishing the rule and prescribing the penalty of dismissal for breach of it... The commissioner should respect the fact that the employer is likely to have greater knowledge of the demands of the business than the commissioner.

However, such respect for the employer's knowledge is not a reason for the commissioner to defer to the employer. The commissioner must seek to understand the reasons for particular rule being adopted and its importance in the running of the employer's business and then weigh these factors in the overall determination of fairness.

[13] Section 193 of the LRA regulates remedies for unfair dismissal and unfair labour practices. Section 193(2) provides that an employee found to be unfairly dismissed must be reinstated or reemployed unless the employee does not wish to be reinstated or employed, the circumstances surrounding the dismissal of such that a continued employment relationship would be intolerable, it is not reasonably practicable for the employer to reinstate or employ the employee, or because the dismissal is unfair only because the employer did not follow a fair procedure. The courts have held that the words 'not reasonably practicable' extend beyond mere inconvenience and that it is the feasibility of reinstatement that is at issue (see *Xstrata SA (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha*

[2017] 4 BLLR 384 (LAC)). In *DHL Supply Chain (Pty) Ltd v De Beer NO & others* [2008] 12 BLLR 1129 (LAC), Sutherland JA referred to 'non-re-instatable conditions' and the high threshold set to establish their existence.

[14] In the present instance, the arbitrator made no reference in the award to the provisions of 193(2), nor did he engage properly in any attempt to consider all of the relevant factors, or to balance the interests of the employee and the applicant having regard to those factors. He made no reference to the intolerability of continued employment and no reference to the employee's debarment and the consequences of debarment as a 'compelling operational burden' (see *SA Commercial Catering & Allied Workers Union & others v Woolworths (Pty) Ltd* (2019) 40 ILJ 87 (CC).

[15] I deal first with the applicant's submission that the arbitrator erred in his finding that dismissal was not an appropriate sanction for the misconduct of failing to report Dan's unethical behaviour to the applicant. The arbitrator clearly took it upon himself to decide an appropriate sanction for the misconduct that he had found the employee to have committed. He then decided, to use the language of Navsa AJ in *Sidumo*, 'to consider afresh what he... would do...'. The evidence before the arbitrator was that the employee's misconduct amounted to a failure to disclose to his

employer the receipt of payments made into his personal account and the subsequent payments made by him in respect of Dan's wedding expenses. Regardless of the existence of any personal benefit to the employee, this is by definition serious misconduct in a business that is regulated by the FAIS Act, and in which a premium is placed on the honesty and integrity of employees. The employee was engaged as a team leader, in a responsible position. The employee failed, on his own version, to question the source of the payments meant for Dan into his personal account. At the very least, he turned a blind eye to gain Dan's favour, in circumstances where it should have been obvious to him that the elaborate construction of the transactions was an effort by Dan to launder money by giving cash to his team managers, for them to present that cash to him as wedding gifts. This is patently misconduct that is sufficiently serious to warrant the penalty of dismissal. This court has long held that in the employment relationship, a premium is placed on honesty and that conduct involving moral turpitude compromises the trust relationship between employer and employee. This obviously extends to omissions. Even by maintaining his silence, the employee was a participant in a dishonest and fraudulent scheme to the prejudice of his employer.

[16] The arbitrator's finding that the sanction of dismissal was inappropriate for the misconduct that he found to have been established, is a decision that falls outside of the band of decisions to which a reasonable decision-maker could come on the available evidence. The award thus stands to be reviewed and set aside. Given this finding, it is not necessary for me to consider whether the remedy granted by the arbitrator (i.e. reinstatement with retrospective effect) warrants interference with the award. I would note however that the arbitrator's failure to consider the provisions of section 193(2) of the LRA and to consider the fact of the employee's debarment at the time the award was issued are themselves sufficient grounds for review. It is not open to the employee to contend, as he does, that the issue of debarment is a separate one and that it ought not to have been the subject of any deliberation in the arbitration proceedings. The fact remains that at the time the arbitrator made his decision, the FSCA had issued a notice of debarment which precluded the applicant from acting as a representative in the financial services industry, and from employment in the position from which the applicant was dismissed.

[17] In relation to remedy, the court has a discretion either to substitute the arbitrator's finding, or to remit the matter for rehearing. There is little point in remitting the matter for rehearing. All of the relevant evidence is before the court and in the circumstances, an order of substitution is appropriate.

[18] Finally, in so far as costs are concerned, the court has a discretion to make orders for costs according to the requirements of the law and fairness. The court ordinarily does not make orders for costs against individual employees in dispute with their employers and who act in good faith to defend their interests. The present case falls into that category and in my view, the requirements of the law and fairness are best served by each party bearing its own costs,

I make the following order:

1. The arbitration award issued by the second respondent under case number GATW8100-20 on 2 November 2020 is reviewed and set aside.
2. The award is substituted by the following:

‘The dismissal of the applicant was substantive and procedurally fair’.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv PH Kirstein Instructed by: Weavind & Weavind Inc. For the respondent Adv C Barreiro Instructed by: R S Ramsamy Naidoo & Associated Inc

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Prepared on 12 October 2026 · Esheria