

SOUTH AFRICA / JUDGMENT

Mbuyane v Dekker NO and Others (JR1173/2020) [2025] ZALCJHB 224 (18 June 2025)

[2025] ZALCJHB 224

COURT

Labour Court Johannesburg

BEFORE

R Lagrange

CASE / FILE NUMBER

JR1173/2020

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THE

LABOUR COURT OF SOUTH AFRICA

AT JOHANNESBURG

Not Reportable

Case

no: JR 1173/2020

In

the matter between:

BANELE

INNOCENT MBUYANE

Applicant

and

COMMISSIONER

LEN DEKKER N.O.

First

Respondent

COMMISSION

FOR CONCILIATION, MEDIATION AND ARBITRATION

Second

Respondent

STANDARD

BANK OF SOUTH AFRICA LIMITED

Third

Respondent

Heard:

22 October 2024

Delivered:

18 June 2025

Summary: (Review – Dishonest
misrepresentation of cash received by bank – employee believing
practice acceptable on basis of
what he was told by supervisor –
arbitrator’s findings of guilt and upholding dismissal not ones
no reasonable arbitrator
could have arrived at, even if another
arbitrator could reasonably have found dismissal was too harsh a
sanction – review
dismissed)

JUDGMENT

LAGRANGE, J

Nature of the application

- [1] This is an opposed review application. The applicant, Mr B Mbuyane (‘Mbuyane’) was dismissed for dishonesty relating to the submission of a false balance position for the period 21 to 22 October, which was discovered upon a surprise inspection on 23 October 2019. He and his supervisor, Ms N Nkosi (‘Nkosi’) were both dismissed arising from the incident. The first respondent, the arbitrator, found Mbuyane’s dismissal was substantively and procedurally fair. Mbuyane seeks to set this award aside.
- [2] Mbuyane brought the review application himself and personally represented himself at the court hearing.

Background

- [3] At the time of the incident, Mbuyane was performing the function of a treasury custodian together with Nkosi, who was performing in the same capacity. They were responsible for receiving cash for tellers from a security company (‘SBV’). If the amount received was incorrect, the cash had to be returned to the security company. A balance sheet had to be completed which corresponded correctly with the amounts received from the security firm.
- [4] Coinage was received on 18 October 2019, but when Mbuyane weighed it the following Monday a shortage was discovered in one of the bags containing 20 and 10 cent coins. The arbitrator found that Mbuyane correctly notified Nkosi of the shortfall who agreed on the shortfall and that the bag should be returned to SBV when it made the next cash delivery. However, she advised him that the amount that would be captured on the system would be recorded as the full amount that was originally ordered, which meant that the balance sheet would misrepresent the true position.
- [5] The charge against Mbuyane was framed in the following way:

“Alleged dishonesty in that you knowingly submitted a false balance position from the end of 21st October 2019 to the 22nd October 2019 as discovered upon surprise check on the 23rd October 2019.”

(sic)

- [6] The parties concluded a comprehensive pre-arbitration minute.
- [7] Mbuyane’s defence, as reflected in paragraph 5 of the minute, is that he feared he would be acting insubordinately if he disobeyed Nkosi, that he had no formal training as a treasury custodian, and that he had discharged his obligations by reporting the shortfall to her.

The award

- [8] The arbitrator found that they had jointly created the document which misrepresented the correct cash status. He noted that it was common cause that to capture the misrepresentation on the system the supervisor had to provide the Mbuyane’s user details, who had confirmed the information recorded. The arbitrator noted it was common cause that, even though he knew it was a misrepresentation, he said he was acting under the instruction of his supervisor and had no training on what to do in such a situation. However, it was also common cause that he did not report the misrepresentation to anyone else.
- [9] The shortfall was discovered during a surprise cash inspection by the risk mitigation team of the bank. The team found that there were two additional bags which were short, making it three in all.
- [10] The arbitrator noted the applicant’s defence that he obeyed his supervisor’s instruction because to do otherwise would have amount to insubordination. The branch manager had testified that this did not mean he should have even obeyed an unlawful instruction, which was contrary to the values and principles of the bank, set out in his letter of appointment other bank policy

documents. The arbitrator agreed and noted that it would have been clear to Mbuyane that he was being asked to unlawfully misrepresent

the true cash balance. The fact that his supervisor had the final word on the matter did not excuse his conduct in agreeing to

misrepresent the true balance.

- [11] The misrepresentation by the applicant and his supervisor was dishonest and was serious misconduct. He had actively participated in making the misrepresentation. The same principles which applied to him in his capacity as a treasury custodian applied when he was performing the role of cash consultant: documents created should correctly reflect the factual situation, not misrepresent it. He could not rely on an unlawful instruction from his supervisor, who was also dismissed for the same misconduct. The arbitrator emphasised that, on the contrary, Mbuyane had a positive duty not to follow the unlawful instruction.

- [12] The arbitrator rejected the argument that there was a practice of not recording shortfalls provided SBV replaced the bags which were short with bags containing the correct amounts. He reasoned that a practice could not be conducted if it was at odds with the bank's policies and principles.
- [13] The arbitrator considered the fact that Mbuyane was subordinate in rank to Nkosi but found that they both had a responsibility as treasury custodians. Mbuyane should have the matter to management. His conduct amounted to a breach of the trust relationship.
- [14] The arbitrator found that integrity and ethical conduct were core values of the bank and to create a document misrepresenting the facts, as they did, was contrary its policies and values. However, the arbitrator did acknowledge that the applicant had initially acted correctly in reporting the cash shortfall to his supervisor but then committed serious conduct when he cooperated in misrepresenting the facts on the balance sheet.
- [15] The arbitrator also found, as a matter of principle, that the case law stated a commissioner ought not without good reason interfere where an employer, applying norms, standards and values acceptable within the industry, who decides to dismiss an employee who contravenes the core requirements of the employer.

Grounds of review

- [16] The applicant drafted his review application himself. Like many laypersons, he reiterated the merits of his case rather than focusing on the alleged fatal flaws in the arbitrator's reasoning. Making allowance for this, his grounds of review will be viewed on the basis that he is arguing that the arbitrator's findings are ones no reasonable arbitrator could have arrived at on the evidence before him.
- [17] As his grounds of review aim to demonstrate that the arbitrator's factual findings are flawed, it is important to emphasise that a review application is not an appeal. Accordingly, even if the court would have come to a different conclusion on its own evaluation of the evidence, what matters in a review is whether the arbitrator made findings that no reasonable arbitrator could have made[1]. In the most recent LAC judgment reaffirming the test for a review challenging the arbitrator's factual findings on the evidence,

the court stated:

"[24] The limitations inherent in a right of review were recently affirmed by this Court in Makuleni v Standard Bank of South Africa Ltd and Others , where Sutherland JA said the following:

'... The court asked to review a decision of commissioner must not yield to the seductive power of a lucid argument that the result could be different. The luxury of indulging in that temptation is reserved for the court of appeal. At the heart of the exercise is a fair reading of the award, in the context of the body of evidence adduced and an even-handed assessment of whether such conclusions are untenable. Only if the conclusion is untenable is a review and setting aside warranted.'

And further:

‘To meet the review test, the result of the award has to be so egregious that, as the test requires, no reasonable person could reach such a result.’ [2]

(emphasis added)

[18] This means that in order to set an award aside on the basis that the factual findings and award are unreasonable, the conclusions reached on the evidence are ones that are incapable of being defended on any rational basis. If the findings and outcomes are ones that a reasonable arbitrator might reach, then they must stand, even if it is also possible another reasonable arbitrator could have reached a different outcome.

[19] Another requirement of the review test in such cases, even if the some of the arbitrator’s findings cannot stand, is that the review court must still decide if the outcome is nevertheless one that a reasonable arbitrator could have reached by different reasoning on the same evidence, viz;

“The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence.”[3]

[20] Essentially, Mbuyane argues that the arbitrator failed to appreciate that his primary role was that of a cash custodian and, in that capacity, he had not been trained in how to deal with cash shortages in the treasury custodian position. Further, he claims the arbitrator ignored that there was no fraudulent intent involved, that he was acting under instruction of the supervisor and that it was plausible for him to accept that the discrepancy would be rectified when the security company replaced the short bags with the correct ones. The arbitrator ignored that this was a practice, even if it was not strictly compliant. The arbitrator also failed to consider that the correct procedure for dealing with shortages had not been conveyed to him, and that it was not sufficient that he could access it the procedure on the bank’s intranet.

Evaluation

Lack of training as a treasury custodian.

[21] Mbuyane’s branch manager, Mr E Engelbrecht (‘E1’) testified that there was no specific training of a treasury custodian and that the principles governing the work of a cash consultant and a treasury custodian are exactly the same. When he was cross-examined by Mbuyane, he gave the example of how a cash consultant would refuse to accept a deposit from a customer that was short and that this was analogous to the situation when SBV made a short delivery, except that in SBV’s case the shortage would be recorded on a form and conveyed to SBV. He claimed to have been unaware of the practise which was followed of simply retaining the bags which were short until SBV could replace them, without recording the shortfall. No evidence was led to show that he ought to have been aware of it. Engelbrecht was not challenged on his evidence that there was no specific training for

treasury custodians.

- [22] The emphasis of the bank's case was about the dishonest representation which Mbuyane made in confirming that there was no shortfall, which was made on two consecutive days, despite him knowing that it was a misrepresentation. Whatever the correct process for dealing with SBV was, that did not alter the fact that the misrepresentation was made.
- [23] In the circumstances, even if the arbitrator did not deal with Mbuyane's lack of training as a treasury custodian, the evidence showed there was no such training available, and that the key principle underlying the charge was no different for a cash consultant. Accordingly, it is not apparent why the arbitrator would have reached a different conclusion, if he had dealt with Mbuyane not receiving specific training.

Absence of fraudulent intent

- [24] It was never part of the bank's case that Mbuyane had acted with fraudulent intent when he made the false representation about the balance. It was simply the fact that it was not an honest representation, which it believed undermined the ability to trust him. In so far as Mbuyane is claiming that the arbitrator failed to treat this as a mitigating factor, the question that has to be asked is whether this would necessarily have swayed him to impose a lesser sanction. It is possible another arbitrator might have placed emphasis on this factor and taken a more lenient approach, but it does not follow that no reasonable arbitrator could find that the absence of fraud meant that dismissal was not an appropriate sanction.

Acting under instruction

- [25] The arbitrator did consider this defence but rejected it on the basis that it must have been clear to Mbuyane that he was being instructed to make a false representation which he must have known was unlawful. If he felt he was being put in an impossible situation by Nkosi, he failed to report it to anyone else in the bank. It cannot be said that no reasonable arbitrator could have reached the same conclusion. It was a plausible conclusion to have drawn, even if another arbitrator could have taken the view it was a factor that warranted a more lenient sanction.

Existence of a practice

- [26] Undoubtedly, there was evidence that a practice was taking place which was not compliant with the procedure that should have been followed when there was a shortfall in money received from SBV. If the arbitrator's finding meant that no such practice existed at all, his finding is not supported by the evidence. However, there was no evidence this practice took place with management's knowledge. If the arbitrator meant that there was no authorised practice of that kind, his finding would be perfectly justified.
- [27] Assuming the arbitrator simply meant that no such unofficial practice existed, could the award still stand if he ought to have found it did? The fact remains that the unauthorised practice involved falsifying the recorded balance of what had been received from SBV. The

difficulty any arbitrator would have with accepting that Mbuyane believed it was legitimate practice is that it necessarily required collusion between two staff members to falsify bank records. As the essence of the charge concerned the making of a false representation and not that an incorrect procedure was followed, the existence of the illegitimate practice would not mean Mbuyane was not guilty of the charge, so the existence of the practice would not have had any impact on the finding of guilt.

- [28] To the extent that Mbuyane believes the existence of the practice and his ignorance of anything to the contrary ought to have been a mitigating factor, the arbitrator ought to have given this consideration. However, when doing so the arbitrator would also have needed to consider whether it was plausible of Mbuyane to believe the practice was legitimate, given that he realised it required him to act dishonestly. Accordingly, it cannot be said with confidence that the existence of the unauthorised practice and Ntuli's instruction to follow it, would necessarily have led any reasonable arbitrator to conclude that dismissal was too harsh a sanction.
- [29] I note, in passing, that the arbitrator might appear to have believed he had to adopt a deferent approach to the employer's dismissal decision. The correct approach to be followed was laid down in Sidumo, namely that the arbitrator must decide if the employer's decision to dismiss an employee was a fair one without deferring to the employer's decision on what the appropriate sanction should be, but also not by deciding what the arbitrator would have done in the employer's shoes.[4]
- [30] However, whether the arbitrator actually applied a deferential approach in reaching his decision is not obvious. I must emphasise that these comments are strictly obiter because Mbuyane did not raise any allegation that the arbitrator misdirected himself in this regard. Accordingly, it is not a ground of review that needs to be considered. Nevertheless, because it was potentially an important omission by Mbuyane, I feel it is necessary to mention that even if it had been raised as a ground of review I would still have been satisfied that a reasonable arbitrator applying Sidumo test could have arrived at the same outcome as the arbitrator.

Conclusions

- [31] In the light of the discussion above, I am not persuaded that the arbitrator's findings that Mbuyane was guilty of the misconduct and that his dismissal was fair are ones that no reasonable arbitrator could have arrived at on the evidence presented in the arbitration. That said, it does not mean that another reasonable arbitrator could not have concluded, on the same evidence, that the sanction of dismissal was too harsh.

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:

In person

For the Third Respondent: D Cithi from Mervyn Taback Inc. t/a Andersen

[1] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC) at paragraph 110, where the Constitutional Court expressed the test in review cases such as this one as: “Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?”

[2] Glencore Operations South Africa (Pty) Ltd v Taala and Others (JA 52/24) [2025] ZALAC 23; [2025] 6 BLLR 559 (LAC) (27 March 2025)

[3] Head of Department of Education v Mofokeng & Others

(2015) 36 ILJ 2802 (LAC) at paragraph 31.

[4] At paragraph 178 and 182.

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