

SOUTH AFRICA / JUDGMENT

Mogapi v Commission for Conciliation, Mediation and Arbitration and Others (JR2014/17) [2020] ZALCJHB 21 (29 January 2020)

[2020] ZALCJHB 21

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR2014/17

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

no JR 2014-17

In

the matter between:

PHINEAS MOGAPI

Applicant

and

COMMISSION

FOR CONCILIATION, MEDIATION AND ARBITRATION

LAWRENCE

NOWOSENETZ N.O

SMALL

ENTERPRISE FINANCE AGENCY

First Respondent

Second

Respondent

Third

Respondent

Application

heard: 5 December 2019

Judgment

delivered: 29 January 2020

JUDGMENT

VAN NIEKERK J

- [1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator) on 29 August 2017. In his award, the arbitrator upheld the fairness of the applicant's dismissal by the third respondent (the employer) on a charge of gross negligence.
- [2] The material facts are apparent from the terms of the arbitrator's award. The third respondent lends money to small businesses. The applicant was employed by the third respondent in December 2014 as an investment officer. His duties included, amongst other things, originating applications for funding and facilitating and signing the relevant documents relating to loan applications. During March 2015, the applicant submitted a proposal made on behalf of GABS Construction and Maintenance CC (the client) for a loan to fund the purchase of specific equipment, being a motor grader and a backhoe loader. On 25 March 2015 the third respondent's management committee approved funding for the transaction. On 31 March 2015, a letter drafted by the applicant was sent to the client by the third respondent's Ms Melane, a post investment officer. The letter

stated that funding had been approved for the purchase of three pieces of equipment, a hydraulic excavator, soil compactor and

backhoe loader. The excavator compactor had not been the subject of approval by the management committee, and certain conditions relating to security for the loan had been omitted from the revised approval letter.

- [3] Three charges of misconduct were brought against the applicant. He was found guilty of two and dismissed. The two charges were both of gross negligence; first, that the applicant failed to bring to the third respondent's attention the deviation from the decision of record which stipulated the machinery that was the subject of the loan, and secondly, that the applicant had facilitated and signed documents relating to the loan application for funding even though he knew it was contrary to the decision record of the management committee approval to indicate any authorisation of the deviation from the original approval by the credit committee. The applicant disputed the fairness of his dismissal and ultimately referred the matter to arbitration.
- [4] The issue before the arbitrator as recorded in paragraph 4 of his award. In that paragraph, he states the following:

The applicant alleges was substantively and procedurally unfairly dismissed by the respondent. He disputed the existence of a rule standard, if it existed he disputed being aware of it and he disputed the reasonableness of it. They allege that discipline was applied inconsistently. The sanction was also in dispute...

[5] The arbitrator heard evidence from witnesses of the third respondent. It is not necessary for present purposes to repeat that evidence, but in essence the third respondent averred that the deviation represented by the second letter of approval had not been approved by the management committee and that the applicant had failed to bring the deviation to the committee's attention. Evidence was led that any deviation from approved terms and conditions had to be approved by the person delegated by the committee approving the transaction. In the present instance, no such person was delegated and the appropriate body to approve the deviation was the management committee itself. The applicant's manager testified that she

had no knowledge of the letter dated 31 March 2015 and that the procedure for the deviation required a memorandum to be drawn up by the investment officer with recommendations for changes to the loan, for submission ultimately to the management committee. The post-investment officer who signed the approval letter prepared by the applicant on 31 March 2017 stated that she had been charged with negligence and disciplined on account of her having signed the letter without preceding due diligence. In response to a question put in cross-examination to the effect that she and the applicant should bear the blame equally, she stated that the applicant had drafted the letter, that she was under pressure at the financial year end, and about to go on maternity leave. The third respondent's chief executive officer testified that any change in the assets of a proposed plan changed the risk profile of the loan and was to be approved by the management committee. While the policy for deviations was not in writing, there was a policy in place known by all investment officers. The applicant's conduct created an unacceptable risk.

[6] The applicant testified that at the relevant time, there was no rule or standard for a memorandum to be submitted about deviations to loans – it was introduced only in July 2015. Accountability lay with the line management and in particular, Ms Moemi and Ms Melane. There is no dispute at that point, the applicant became unruly and engaged in disruptive behaviour, after which he was suspended. The applicant contended that his behaviour was the real reason for his dismissal, rather than the apparent reason that formed the subject of the charges of misconduct brought against him. The

applicant denied that he could no longer be trusted – he insisted that the third respondent's management still trusted

him and testified that the sanction of dismissal was too harsh. The applicant's immediate supervisor testified that he had no knowledge of any disruptive behaviour by the applicant, and that in his view, the relationship of trust had not been broken between him and the applicant.

[7] The arbitrator found the applicant guilty on the second charge brought against him. At paragraph 26 of the award, he states:

The Applicant's conduct regarding charge 2.2 flies in the face of the Credit Policy in that he prepared the letter of approval for the loan dated 31 March 2015 despite it being a material deviation from the decision record of MANCOM, and without its approval. The Applicant argued

that the deviation was not material as the value of the loan was the same and only the assets were different. The Respondent's witnesses including the CEO explained that the assets are evaluated as to sustainability of the loan and the risk profile. The CEO emphasised that it is not inconsequential to change the assets under lying alone but requires analysis. Factually not only the assets changed. The security and the initiation fee was removed. The Applicant has wrongly attempted to minimise the deviation and his contention must fail. The Respondent has proven that the applicant violated a workplace standard and is guilty of misconduct.

[8] The arbitrator went on to find that no explanation had been proffered for the deviation and the unauthorised letter drafted by the applicant, who had acted outside his authority. In doing so he had undermined the third respondent's management committee and corporate governance. In the arbitrator's view this was wilful and reckless conduct and amounted to gross negligence. On the issue of consistency and the appropriateness of the sanction of dismissal, the arbitrator noted that the applicant behaving in an unruly manner was a factor to be taken into account in determining an appropriate sanction – it was not in itself the reason for dismissal. The arbitrator said the following:

There is nothing sinister about the respondent seeking a harsher sanction at the hearing (the fairness of which was not in dispute). The inference ought to be drawn that trust was not broken because he was not suspended immediately after the incident and (on his version) only after he asked to be put on special leave is not warranted. Suspension is applicable in limited circumstances which operates as a precautionary measure and is not per se indicative of the existence or lack of trust at all... To put it plainly

- he was not charged dismissed for unruliness but it was a relevant and fair aggravating circumstance. Even if he had not been unready the sanction of dismissal was fair and reasonable in my view.

[9] In relation to the applicant's averment is regarding the inconsistency of the penalty of dismissal, the arbitrator said the following:

Regarding the question of inconsistency there is a clear difference in moral blameworthiness between the conduct of the applicant and the other officials. He initiated and drafted a letter of approval dated 31 March 2015 which she knew was an unapproved deviation. The others did not create or initiate the deviation. They simply failed to check documents and failed to discover the deviation.

[10] In summary, the arbitrator rejected each of the defences put up by the applicant – that he had been dismissed for a reason unrelated to the reason recorded, that there was an absence of any applicable rule or standard, that the charges had not been proved, that discipline had been inconsistently applied, that dismissal was not an appropriate sanction and that the relationship of trust and confidence had not been irreparably harmed.

- [11] The applicant has raised grounds of review that correspond to each of the findings made by the arbitrator. First, he contends that the arbitrator ignored evidence to the effect that the reason for his dismissal was apparent rather than real; secondly, that the third respondent failed to discharge the onus of proof; thirdly, that discipline against him was the subject of inconsistent application; fourthly, that the arbitrator incorrectly found that the trust relationship between him and the third respondent had broken down, that the arbitrator ignored or incorrectly applied evidence that the applicant had prepared a letter of arrival for a loan without approval, and finally, that the arbitrator committed an irregularity by allowing another witness to testify while the applicant was still on the stand giving his evidence. These grounds were supplemented by way of an affidavit filed in terms of Rule 7A (8).
- [12] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court must be particularly cautious not to blur the line, especially where the grounds for review smack off no more than a disagreement with the arbitrator's findings. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In *Head of Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), the LAC said the following:
- [30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome...
- [32] ...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.
- [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome

would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant

factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable

equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the

arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to the

determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

[13] In other words, arbitrators are allowed to be incorrect, and this court is not entitled to intervene only because it would have come to a different conclusion on the same evidence. What matters is whether the conclusion the arbitrator reached on the evidence is so unreasonable that no reasonable decision-maker could come to the decision he did.

[14] I am unable to find that the arbitrator's decision falls outside of the bounds of reasonableness having regard to the evidence before him. In relation to the reason for dismissal, it not unreasonable for the arbitrator to find, as he did, that the applicant's dismissal was fair on the basis of the misconduct that he had been found to have committed. As the arbitrator observed, even if the applicant's unruly behaviour was to be discounted, his misconduct was sufficiently serious to warrant dismissal in its own right. There is nothing unreasonable about this conclusion, and contrary to what the applicant submits, the inference that he was dismissed for an ulterior reason is not the only inference to be drawn from the evidence. The primary factual dispute between the parties (which the applicant perceives in these proceedings) concerned the internal controls and procedures that applied at the relevant time. The conclusions drawn by the arbitrator from the evidence were that none of the witnesses but for the applicant had denied that there was a deviation procedure in place during March

2015. This procedure provided that any material change in the terms of the loan had to be submitted by the investment officer by means of a memorandum to the management committee. The arbitrator recorded the existence of two policies regulating deviations, the credit and lending policy issued in 2013 with which the applicant said he had complied. Further, the internal controls and procedures provided that

where there are material changes, the investment officer's compiler memorandum outlining the changes and forwarded to the

regional manager for signoff, the latter then required to present the changes to the relevant authority. The arbitrator found that it was common cause that this policy came into effect after the fact. However, the third respondent's witnesses, including its chief executive officer, had stated unequivocally that prior to the formal adoption of the policy it was practice for an investment officer to prepare a memorandum for approval by the management committee. He found that the 'overwhelming and credible evidence' was that the policy did not exist in writing at the time it was known and applied. The arbitrator rejected the applicant's version, as well as his evidence that he was not aware of such a practice. The arbitrator's reasoning is reflected in paragraph 23 of the award where he finds that the rationale for the deviation rule is intrinsic to good corporate governance and risk management and that it was 'not only improbable but inconceivable' the applicant should be unaware of this. Further, the arbitrator reasoned that there was evidence that the applicant had previously submitted a memorandum to the management committee regarding the changing conditions on which the loan was approved. That's the arbitrator finding on the probabilities that the rule on which the third respondent relied indeed existed, and that the applicant was aware should have been aware of it. However, as reflected in paragraph 24 the award, the finding that the rule is formulated did not place a duty on the investing officer to submit the memorandum to the sanctioning authority (in this case, the management committee) and this is the basis on which the found the applicant not guilty of the first charge brought against him. In other words, neither the policies referred to required the applicant to submit the memorandum to the management committee. The arbitrator, as indicated above, then found as a fact that the applicant had prepared the letter of approval for the loan dated 31 March 2015 despite there being a material deviation from the decision record of the management committee, and without its approval. On this basis, the arbitrator held that the third respondent had established that the applicant had violated workplace standards and was guilty of misconduct. There is nothing unreasonable about the conclusion to which the arbitrator came, nor is there anything unreasonable about the manner in which the arbitrator came to this conclusion. Insofar as the applicant avers that the third respondent failed to discharge the onus of proof, there is no basis for this contention. The applicant's explanation that he was not required to report the deviation by way of a memorandum because there was no material change in the terms and conditions was considered by the arbitrator and rejected. The basis on which he came to the conclusion he did is not unreasonable and is clearly sustained by the evidence proffered by the third respondent's witnesses. He considered the evidence, he applied the correct test to determine the dispute of fact or that served before him and came to the conclusion that was reasonable in the circumstances. In regard to inconsistency, this was also a matter considered by the arbitrator in the light of the evidence before him. He concluded that while others in the approval chain had been negligent, the applicant as the

originator of the loan application carried a greater degree of moral culpability; the fact that others had received warnings did not detract from the fairness of the penalty of dismissal imposed on the applicant. While the applicant obviously disputes the correctness of that decision, I fail to appreciate how it can be said that it is so unreasonable that no reasonable decision-maker could come to it. In regard to the trust relationship, the arbitrator clearly applied his mind to the evidence of those witnesses who testified about the breakdown of the trust relationship. Moemi's evidence in relation to the breakdown of the trust relationship was unchallenged and Mchunu's evidence that he could no longer trust the applicant to engage with clients with due care and skill was properly considered and decided. One of the issues before the arbitrator were decided, as the applicant's representative put it, at a tangent to the evidence that served before him.

[15] In short, the arbitrator's decision is not unreasonable by reference to the evidence that served before him and the application for review thus stands to fail.

[16] Finally, in relation to costs, the court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. This court conventionally does not make orders for costs against aggrieved individuals who pursue disputes against their employers in good faith. This case falls into that category and there is no reason why the general should not apply.

I make the following order:

1. The application is dismissed.

André van Niekerk

Judge

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