

SOUTH AFRICA / JUDGMENT

Nedbank Limited v Mvelase and Others (D.299/2014) [2015] ZALCD 18 (13 January 2015)

[2015] ZALCD 18

COURT

Labour Court Durban

BEFORE

Crampton

CASE / FILE NUMBER

D.299/2014

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Case no. D.299/2014

DATE: 13 JANUARY 2015

Not Reportable

In the matter between:

NEDBANK LIMITED.....Applicant

And

NKOSINGIPHILE CEDRIC MVELASE.....First Respondent

COMMISSIONER B PILLEMER N.O.....Second Respondent

COMMISSION FOR CONCILIATION,

MEDIATION & ARBITRATION.....Third Respondent

Heard: 13 January 2015.

Delivered: 13 January 2015

Summary: Conflict of interest. No breach of any obvious fiduciary duty. Dismissal unfair.

CRAMPTON AJ

- [1] This is a review application in terms of Section 145 of the Labour Relations Act No. 66 of 1995.

First Respondent was dismissed on 15 November 2013. His letter of dismissal reads as follows:

‘At a disciplinary enquiry which took place on 15 November 2013 you were found guilty of the serious misconduct of conflict of interest in that:

- (a) During 2013 you facilitated the sale of your brother’s KIA truck, with an unknown registration, to Nedbank’s existing client;
- (b) You engaged your brother, Mr Bonga Mvelase, thereby facilitating the registration of Mbalisto Food Services on behalf of Nedbank’s existing client;
- (c) On 3 September 2013, you attended a meeting where the existing Nedbank client, Concorescore Motor Works Auto Body Repairs, was signing a memorandum of agreement with the client;
- (d) During 2013, you entered into a personal vehicle-swop deal involving your private vehicles with a Nedbank client without authority of your management.’

These charges all related to a relationship that had developed between First Respondent, who was employed by Applicant as a financial advisor, and one Mr Nxele, who was one of applicant’s clients to whom First Respondent was required to render financial advice. Mr Nxele was a lottery winner and, therefore, a relatively uneducated client who had “come into money”. As the charges reveal, a close relationship had developed between First Respondent and a Mr Nxele (who is referred to in the charge sheet as “Nedbank’s existing client”). First Respondent became involved in Nxele’s business and personal affairs outside the ambit of the professional relationship of adviser and client. It is apparent that Applicant became uncomfortable with the closeness of this relationship. Hence the charge that First Respondent has acted in conflict of interest.

- [2] Second Respondent (“the Commissioner”) found that the dismissals were unfair, and consequently she awarded certain relief. Applicant now applies for a review of her Award.

- [3] The grounds of review include:

3.1 a general attack, which is related to a statement in the Award, from which it appears that the Commissioner may have excluded certain evidence on the ground that such evidence was inadmissible;

3.2 four grounds of review corresponding to each of the commissioner’s four findings in relation to the four counts of alleged misconduct. In each case it is contended that her findings are not findings that could have been made by a reasonable decision maker.

- [4] I deal firstly with the attack relating to the inadmissibility of evidence. In the course of her Award, the Commissioner made the following statement:

‘The only admissible evidence, at the arbitration, in relation to the events that gave rise to the charges, was that of the Applicant himself.’

[5] In fact, there were three witnesses who gave evidence at the arbitration:

5.1 First Respondent, the employee, who gave direct evidence relating to all the events in respect of which he was charged.

5.2 Mr Ernest Phewa, an internal forensic investigator, who gave evidence on behalf of the Employer. His evidence was mostly hearsay, but, in any event, did not conflict with that of the First Respondent.

5.3 Mr Ravin Maharaj, Applicant’s area manager who, as Applicant’s second witness, gave his views on the alleged misconduct and how, in his opinion, this affected the trust relationship between employer and employee.

[6] In these circumstances, the Commissioner was, in my view, quite correct to state that:

‘The only admissible evidence as to the events (my emphasis) was that of the employee.’

[7] In any event, Applicant has not pointed to any specific evidence as to the events that the Commissioner did not consider and which might have impacted materially upon the conclusions in her award. Indeed, the argument before me proceeded on the basis that the parties were *ad idem* as regards the facts which constituted the misconduct for which the employee was charged.

[8] The Commissioner’s said statement cannot, therefore, in my view, provide grounds for any review.

[9] I turn to consider the Commissioner’s findings in relation to the four charges.

The attendance at the meeting (charge 3)

[10] As regards this charge, the Commissioner’s factual findings, which are not challenged on review, are set out at paragraph 5.3 of her award, from which I quote:

‘Nxele had asked Applicant to accompany him to a meeting where he was to sign an agreement in a business venture relating to certain motor vehicles. Applicant knew nothing about the business, which was in the domain of Nxele’s experience, but he had been asked by Nxele to accompany him to make sure that he understood the content of the agreement, as his [Nxele’s] English was poor. Applicant was an observer at the meeting and signed the agreement as a witness. He had not benefitted from the transaction and had not perceived any actual or potential conflict of interest, so had not disclosed the transaction to Respondent.’

[11] On the facts so stated the Commissioner made the following finding:

‘The complaint that is now made is subtle. Having attended a meeting only to assist in understanding in English, but nonetheless being a financial adviser employed by the bank and the person who dealt with Nxele, there was notionally potential, if the deal had gone sour, for

Nxele to complain that Applicant ought not to have sat by without advising him against the pitfalls and to sue the Bank. There is something to be said for the complaint that Applicant should not have agreed to attend the meeting, as it conflicted with his duty to the bank, not to put it at risk. On the other hand, should that have been his position, it would potentially have harmed the relationship between the client and the bank and, refusing to attend, could also be seen as acting against the interests of the bank. On Applicant's explanation for his role, there could be no legitimate claim against the bank. Applicant did not, himself, see the possible conflict of interest and one can understand that because it is subtle, and based upon the proposition

that the client could, if the deal went sour, potentially claim, dishonestly, that the reason why Applicant had attended was to give advice as a representative of the bank. In the circumstances, it seems to me that Applicant was not guilty of misconduct in attending the meeting or in signing the agreement as a witness.'

With respect to the learned Commissioner, I have, in this and other instances, made some adjustments, and I think improvements to her grammar, without changing her intended meaning.]

[12] In its founding affidavit, Applicant alleges that, since the Commissioner found that there was a conflict of interests, albeit subtle, she ought to have found that First Respondent was guilty of misconduct. Accordingly, so it is argued, the Commissioner ought then to then have gone on to consider the appropriateness of the sanction. This is advanced as a ground for review.

[13] In my view, that allegation is based on a misunderstanding of the Commissioner's role.

[14] A Commissioner is not required to determine what sanction ought to have been imposed by the employer, only whether the sanction of dismissal is fair in the light of the material presented before her.

[15] A dismissal can be unfair either:

- (a) because there was no misconduct; or
- (b) because such misconduct as was committed was not sufficiently serious to attract the ultimate sanction of dismissal.

[16] It, therefore, matters little whether the Commissioner determined:

- (a) that the conflict of interest was so subtle that it did not constitute misconduct; or
- (b) that, although there was a conflict of interest, it was too subtle, and, therefore, did not constitute misconduct that was sufficiently serious to warrant dismissal.

[17] Suffice to say, in my view, both these conclusions fall within the band of reasonable conclusions that could have been adopted by a reasonable decision-maker.

The sale of the Kia

[18] Again, the relevant facts are not disputed on review. These are summarised, as follows, at paragraph 5.1 of the award:

‘In respect of the first allegation, Applicant denied that he had facilitated the sale of the truck between his brother and Nxele. He explained that Nxele had wanted to buy the truck and, as it was his brother’s truck, he referred Nxele to his brother. Nxele and his brother negotiated a deal. Applicant did not know the financial details of the deal. Applicant explained that Nxele was “at home” with trucks, as a truck driver, was happy with the deal. Applicant had not benefitted from the transaction. He did not disclose the transaction to Respondent because, in his view, there had not been a conflict of interests and he had not seen the need to make disclosure.’

[19] In relation to this transaction, the Commissioner found that First Respondent did not, by merely putting Nxele in contact with his brother, act in conflict with Applicant’s interests. Indeed, Mr Pillay, who appeared before me on behalf of First Respondent, argued that First Respondent’s intervention could be equated to a situation where a financial adviser, such as First Respondent, refers a client, such as Nxele, to a restaurant that is operated by a family member of the financial adviser. He argues that that would not constitute misconduct worthy of the ultimate sanction of dismissal.

[20] Applicant, on the other hand, describes the situation as one where “First Respondent utilised his relationship with Nxele to facilitate a business transaction with his brother”.

[21] Applicant is, however, not in the business of selling motor vehicles. Nor was First Respondent employed by Applicant to advise Nxele on what vehicle to buy. In my view, Applicant had no legal interest that would be affected by Nxele’s decision to purchase the vehicle from First Respondent’s brother and not some other vendor. At worst, any such conflict of interest that there might be, would be subtle in the manner described above.

The registration of the company

[22] Again, the facts, which are not in dispute, are summarised as follows in the arbitration award:-

‘Nxele had approached the Applicant for assistance when he needed to register a company. Applicant told Nxele that his brother registered companies and they telephoned him to see if he could assist. He could and he registered the company for Nxele at the cost of R800-00, which was much less than the going price. [The employee] explained that he had not benefitted from the transaction. He did not declare his interest to Respondent as, in his view, there was no conflict of interests. He merely assisted Nxele to resolve a problem, as the bank expected him to do, when looking after an important client.’

[23] The Commissioner’s findings on these facts were stated as follows:

‘The complaint against Applicant is very subtle. Nxele needed a company formed. Applicant’s brother provided this service and did it relatively cheaply. The bank did not provide the service and so referring the work to his brother did not present any conflict. The price for the service was

extremely reasonable. It is acknowledged that a case such as this, where a client is referred to family members for professional service, needs careful scrutiny. There is a potential for the service provider to be chosen, not on merit, but because of the family connection. That might not serve the client's best interests. However, on the present facts, there does not appear to me to be anything untoward in using the relatively inexpensive services of Applicant's brother to secure the registration of a company that Nxele wanted formed. In this instance too, I see no conflict of interests and no misconduct established.'

[24] In the founding affidavit, the Commissioner's said reasoning is subjected to the following attack:

'The Commissioner has thus confused the issue of whether First Respondent was guilty of the misconduct and the appropriate sanction that should be meted out.'

[25] As I state above, such an allegation is based on a misunderstanding of the Commissioner's role. More particularly, it was not the Commissioner's function to determine what sanction ought to be meted out. Her function was to determine the fairness, or otherwise, of the dismissal.

[26] In my view, the Commissioner's finding is, if not correct, then certainly a reasonable one. Again, the misconduct was subtle. It was, therefore, reasonable to conclude either that it did not constitute misconduct or, even if it did "cross the line" and did, therefore, constitute misconduct, it did not merit the ultimate sanction of dismissal.

The vehicle exchange

[27] The facts, which, again, were common cause, are stated as follows in the Commissioner's award

'Nxele arrived to see Applicant as he was leaving to buy a motor vehicle for his wife. Nxele insisted on accompanying him, and when he heard Applicant was to exchange his Hummer and Polo for a new Jeep, he insisted that he wanted the two motor vehicles and that he would pay for the Jeep. Without thought, the Applicant accepted the offer. Applicant said the value of his two vehicles was R450,000-00 which was much more than the price of the Jeep (R395,000-00) and that Nxele gained in the deal. Applicant had seen this as a personal transaction, where Nxele had benefitted at his expense and where he, Applicant, had taken a loss. He did not

perceive there to be any conflict of interests. Nxele had to go to the bank to do the transfer. At the bank the supervisor and branch manager asked him to confirm that he was happy to make the payment, which he was. Applicant, therefore, did not see the need to disclose the transaction to Respondent as this was a personal matter.'

[28] The Commissioner's findings on these facts were stated as follows:

'This is the most difficult of the four charges to assess. Prima facie, it is wrong for a financial adviser of a relatively unsophisticated client to allow the client to pay for a new vehicle and to swap that vehicle for the adviser's used vehicles. This is so even if the financial effect of the

transaction is fair. However, the circumstances under which the transaction materialised were unique. The [employee] was willing to do the swop with the motor dealer and it was the client, Nxele, who was not there as a client but as a friend, who then insisted that he wanted the Hummer vehicle and that he wanted to do the swop rather than have his adviser and friend do the deal with the third party. One can understand how, in those circumstances, such a strange transaction took place. It is not a transaction that should have had any effect on the bank, which was not involved. Nor did the transaction undermine the relationship with the client. If anything, it would have strengthened it. The swop was not a gift. There was no conflict of interests with the bank, since it was the client that insisted on the deal. It was not instigated by [the Employee]. In this instance too, therefore, having regard to the unusual circumstances that gave rise to the swop, I do not see that it has been proved that [the Employee] did anything wrong. I accordingly find that the swop agreement, although borderline, did not constitute misconduct.

‘But even if I am wrong, and the swop agreement can be said to be so inappropriate that [the employee] should have explained it to Nxele that he could not enter into such a transaction with him, because of their relationship of adviser and client, it is not the kind of conduct that should have resulted in [the employee’s] dismissal. There was no dishonesty. The transaction was instigated by the client and the client benefitted from the deal.’

[29] I agree with the Commissioner’s reasoning so stated and can, therefore, find no ground upon which it should be set aside on review.

[30] Ms Caddie, who appeared before me on behalf of the Applicant, argued that the Commissioner should have viewed the four events cumulatively and that she ought, accordingly, to have found that the combined effect of the separate instances of misconduct was sufficient to warrant dismissal.

[31] Although there may be some merit in such an argument, the difficulty for the employer, in my view, is that, as was common cause, it has no specific policy to govern relations between financial planners and clients, particularly lottery winner clients such as Mr Nxele. Nor is there, apart from “Nedbank’s Level 3 Code of Conduct”, any policy that might demarcate the borderline between relations that the employer considers to be appropriate and those that it does not.

[32] A reasonable Commissioner, in the position of Second Respondent, would be guided by section 7 of the Code of Good Practice (schedule 8 to the LRA). In my view, it can be implied from this provision that an employer is, in appropriate circumstances, required to prove the misconduct in question contravened a rule or a standard of which the employee was aware, or ought reasonably to have been aware and, furthermore, the employee was similarly aware, or ought reasonably to have been so aware, that a contravention would or could attract the sanction of dismissal.

[33] In the present case all the instances of misconduct inhabit a grey area:

- (a) On the one hand, it cannot be doubted that First Respondent was serving the Applicant's interests by establishing a sound personal relationship with the client. It appears that he took a genuine interest in Mr Nxele's affairs and this would no doubt have benefitted Applicant since Nxele would be less likely to take his business elsewhere.
- (b) On the other hand, Applicant became uncomfortable with the closeness of relationship that developed between First Respondent and Mr Nxele. As Ms Caddie argued: such a relationship could provide fertile ground for abuse since a lottery winner such as Nxele, might be uneducated and malleable and, therefore, an easy victim for an scrupulous adviser – not that there is any evidence of any such unscrupulousness in the conduct of First Respondent.
- [34] In my view, this is a case where it was incumbent on Applicant to have demarcated the borderline between what it considered to be appropriate relations between an adviser and client, and what was not. In the absence of any clear demarcation, a reasonable decision-maker might well have concluded, like the Commissioner, that it was unfair for First Respondent express its discomfort with the ultimate sanction of dismissal.
- [35] This is particularly so in the case of First Respondent who, it is not disputed, was an exemplary employee with a clean disciplinary record.
- [36] In my view, therefore, the review application must fail.
- [37] As regards costs, there was some debate before me as to whether I should award costs, since the Labour Court is a court of equity. In the end, however, I am persuaded by Mr Pillay's submission that it is eminently fair that the costs should follow the result.
- [39] I therefore order that the review application should be dismissed with costs.

Crampton AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: Ms Caddie of Cliffe Dekker Hofmeyr Inc

For the Respondent: Adv I Pillay instructed by Mhlanga Inc.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCD/2015/18.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/nedbank-limited-v-mvelase-and-others-unknown-topic-alcd-2015>

Prepared on 12 October 2026 · Esheria