



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C515/2020

In the matter between:

SASBO OBO SEBELO VINGER

and

NEDBANK LTD

COMMISSIONER DANIEL DU PLESSIS N.O.

CCMA

Third Respondent

Second Respondent

First Respondent

Applicant

Date heard: 24 August 2022

Date delivered: 14 December 2022

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to review an arbitration award under case

number WECT2204-20. In terms of the Award, the applicant's dismissal was

found to have been substantively fair.

[2] There were certain common cause facts before the second respondent (the

Commissioner) which he recorded in his Award as follows:

“THE ISSUE TO BE DECIDED

2. I must decide whether the applicant's dismissal was for a fair reason. If not, whether to order his retrospective reinstatement.

BACKGROUND AND AGREED COMMON CAUSES FACTS

3. On 3 January 2020, the applicant referred an unfair dismissal dispute to the CCMA, alleging that his dismissal on 17 December 2019 was not for a fair reason. He requested retrospective reinstatement. The CCMA set the matter for a conciliation meeting on 21 February 2020. The matter remained unresolved. On 7 April 2020, the applicant requested arbitration.

4. The applicant started to work for the respondent on 15 August 2008 as a trainee branch manager. Since February 2009, he has been employed as a branch manager. Since November 2018, he has been the branch manager at the Grand Central branch in Cape Town.

5. The dismissal relates to an incident on 8 January 2019, when an individual withdrew R100 000,00 cash, using a debit card, against an electronic funds transfer of R110 500,00 from a business account in Johannesburg. It transpired that this was a fraudulent transfer after the account holder's cell phone went missing and the banking application on the phone was used to make the transfer. The business account holder was refunded. The bank would not cover the cash amount drawn. This resulted in a loss for the Grand Central branch.

6. It was common cause that on 8 January 2019 the applicant was on duty. The teller, who attended to the cash withdrawal client, Ms Nomathembo Rani, asked the applicant to authorise the withdrawal as the withdrawal amount exceeded her mandate. The applicant then approved the withdrawal.

7. It was also common cause that at the time, the respondent's system indicated that the electronic funds transfer was flagged as “code 9033 – movement due”. What this means and whether this is a red flag to pick up anything untoward, is in dispute.

8. The applicable workplace rules and procedures.”

[3] The charges levelled against the applicant for which he was dismissed were the following:

“* You authorized a withdrawal against movements due without following the correct process.

- You failed to confirm source of funds before you authorized the withdrawal against movements due.
- You failed to notice that the signature on the force slip does not match the signature as per SigVer
- You failed to exercise duty of care when you authenticated that account holder in terms of the conduct of the account versus the explanations provided by the account holder.”

[4] It was undisputed at arbitration that the funds were sent from another Nedbank account. It was also not in dispute that a Nedbank business client in Johannesburg was defrauded on the day of the withdrawal and that client informed his business banker on that day that his account had been defrauded, but the Nedbank fraud division did not block the account until the following day. The applicant's line manager (Fourie), testified that business account managers are not always in office to report such a matter immediately to the Nedbank Fraud Division. The upshot of this was that there was no alert on the system regarding the transfer of the funds to the Cape Town account holder's account.

[5] The grounds of review of this Award set out in the founding papers are various and include that the Commissioner committed gross irregularities and reached a decision that that reasonable decision-maker could not reach including:

- 3.1 In finding that the trust relationship had broken down without any evidence to this effect having been given;
- 3.2 In misconstruing the charge against the applicant, which it is submitted was not that the applicant did not perform the authentication of the transaction at all;
- 3.3 In excluding relevant evidence by Rani in that she testified that applicant had indeed verified the transaction himself;

3.4 In ignoring and/or failing to take into account the evidence placed before

him that the applicant had indeed followed all the Bank's procedures to
 authenticate the transaction.

[6] An important finding by the Commissioner is contained in paragraph 31 of his
 Award:

"31. The applicant's version amount to an outright denial of having done
 anything wrong. Ms Rani¹ was a very reluctant witness. Her version contributed
 not much. Noteworthy is that the applicant did not put it to her to confirm that
 he had redone the verification exercise in her presence. She testified that she
 called him and he verified. This is repeated in the applicant's written statement.
 It was also not put to Mr Fourie that the applicant had redone the verification
 exercise. Mr Fourie gave a factual recount of the incident, used the relevant
 policies and drew inferences from the facts in hand and knowledge of the
 business. I hold that the more probable version is that the applicant did not do
 his job on 8 January 2019. He simply asked Ms Rani whether she had done the
 necessary checks and then authorized the withdrawal upon her confirming that
 she had done so." (emphasis mine)

[7] It is important to note that although the Commissioner mentions that Fourie
 gave a 'factual recount' of the incident, Fourie was not present at the time of
 the incident. Secondly, as referred to below, Fourie was cross examined about
 the verification exercise. The written statement by the applicant dated 23
 January 2019 referred to by the Commissioner was contained in the bundle of
 documents before him and reads as follows:

"On the said date (8/01/2019) I was called to the Teller to authorize a large cash
 withdrawal of R100 000. I checked with the teller and the client why such a big
 withdrawal and if we can assist the client to facilitate the payment electronically
 rather. Client mentioned that it's for salaries and they pay their staff on hand. I
 double checked the authentication modes with the teller and all was in order.
 Since the amount was within my mandate, I then authorized the transaction."

[8] At the arbitration, the transcript reveals that the applicant gave a full and
 detailed explanation as to how he verified the process and double checked it:

¹ The teller in question

“with the Teller in terms of the processes. So double checking the Teller means we check the verification.” The checking he describes in his evidence at arbitration includes that of the verification of the ID or in this case the passport of the client (i.e. the account holder) by means of comparing it with the passport in the Nedbank system; the authentication mode which consisted of (i.e. the card and pin which the client had in his possession) and then the signature. All of these were contained in the system.

- [9] Under cross-examination, Fourie was referred to the applicant’s statement and asked as follows:

APPLICANT REPRESENTATIVE:Do you agree that as per this statement, the Applicant confirmed that he did authenticate this client, and he double checked with the client and also with the teller?

MR ANDRE JOHANNES FOURIE: So can I just read the sentence for my own sake? Uhm

“I double checked the authentication modes with the Teller and all was in order.”

He doesn’t say that I double the authentication modes and all was in order. So I double checked with the Teller. This is what that sentence says to me.

APPLICANT REPRESENTATIVE: Uh, am I correct that double means more than one? He did one thing more than once, double.

MR ANDRE JOHANNES FOURIE: Ja so the Teller checked it. Uhm, and I checked the Teller. That’s my interpretation.

APPLICANT REPRESENTATIVE: No : It says, this sentence reads as follows:

“I double checked the authentication modes with the Teller and all was in order.

MR ANDRE JOHANNES FOURIE: You could read it like that as well.”

- [10] Included in the bundle of documents before the Commissioner, and referred to during the arbitration, was the transcript of the disciplinary hearing. The transcript reflects that the applicant clearly set out what steps he personally took to check the transaction cash as follows:

“ MR VINGER: Okay, Ja, it was on Tuesday I remember. I was only authorising personally the branch that day. So I was called by Mrs Connie or Ms Connie for a large deposit withdrawal. So which is normally the case when it's over and above the mandate they will call me to come through. So I went through and the first thing they normally check which are basic teller practises when it comes to anything before they get to the screen where it asks for authorisation is to verify if all the checks are in place and check everything is on place which they do. And because we work in the CBD and I always say the security is twofold. We always say to the clients, every client that come in the branch, the first thing I always ask is, you know, carrying someone's money in the CBD is not safe so is there any way we can do this electronically, you know. And the other thing as well is always important to say if you're paying people in cash it's important to open accounts for them as well. So unfortunately, he did mention that it was foreigners and he is a foreigner as well so not all of them qualify for accounts and that types of thing. And then after verifying all of that I checked- when I checked on the account – because normally when a account is not active because I checked the force slip when it says inactive when the case of dormancy because that request authorisation which is different case on its own. So I checked the activity which was active account normally says within plus minus one year so I checked the previous transactions so when I checked the previous transaction I saw deposit withdrawals and this was done over the counter as well with a slip, the R100 000.00. If I go the way its printed on annexure 4B. So I checked the amount on the 22nd of October. So this amounts when I checked them as well because the other thing I needed to establish because it's salaries and, you know, with salaries normally you get to pay people- you either pay them month end or fortnightly and this was happening to on a Tuesday as well. So you need to check as to why and then the explanation on that document- because at that stage I was trying to start a conversation so that I can get the opportunity as well to actually try to move everything to electronic. So I checked- then I saw those deposits and they were done over the counter and with every transaction that's done over the counter the two things that are most important is the card and the PIN, you know, because as per account rules only the account holder has a pin to the card. So I was comfortable with the fact that I was with the correct account holder on the account and the ID as well.

I was happy with that ID, the SIGVER as well, the signature. Yes, the signature from where I was sitting it looked properly okay but because I was comfortable with the fact that it just need the account because they use the card and the PIN of which only the account holder can have. So I was comfortable to authorise the transaction in that case.”

- [11] At the arbitration, the transcript further reflects that under cross-examination the applicant was questioned about his evidence at the disciplinary hearing, and clarified the following regarding the meaning of ‘with the Teller’:

“**RESPONDENT REPRESENTATIVE:** According to your case (inaudible) hearing, you said (inaudible), I only check the Teller, (inaudible).

MR SEBALO VINGER: Which means (inaudible). Any transaction that requires authorisation *becomes a dual controlled transaction*. So, I cannot check on my own. Because remember, the money in the Teller is the responsibility of the Teller. Hence, I have to check with the teller. This is a large withdrawal So, there has to be dual control. Because if I do it on my own, I can pocket R100. At the end of the day, that Teller will be short one hundred.” (my emphasis)

- [12] On the question of the signature of the account holder the Commissioner found that:

“ 29. It is not difficult to spot the glaring differences between the specimen signature and that applied by the person withdrawing the money. The client profile shows that of an employee who is paid a salary. Yet the account history does not show any regular movement; neither does it show regular monthly deposits by way of a salary. The previous deposits and withdrawals were made at the salt River branch. This is the account’s ‘home branch’ so to speak. The applicant did not dispute this; neither did he testify that this could not act as a warning signal. He produced a copy of his bank statement and banking profile, still showing him as a bank employee and submitted that the profiles are unreliable. His account though seems to have regular movement, not seen in the account from which the money was withdrawn.....”

- [13] There was no expert witness called in regard to the signature. The applicant testified as follows regarding his consideration of it:

“MR SEBALO VINGER:

The signature, page 6, I must confess I'm not a signature expert, but if you look at the format of the signature, in terms of the two loops going up, you can see that on the bottom and the top signature as well. You can also see the line running towards the right, as well, indicating it's the same signature as well. So the difference in these signatures, one can argue is the size in terms of the signature. However, what made me comfortable with the signature as well, the passport that we used for the client is the exact passport that we have on the system. We checked that under UV light. Secondly, the card and the pin.”

[14] In as far as the charge of failing in his duty of care was concerned, the Commissioner found that:

[32].....the applicant ignored every single red flag highlighted by Mr Fourie. It is not improbable that bank manager (sic) has the right to tell the client who wants to withdraw cash in such circumstances, to return the following day as “the money had not yet been cleared”. Part of a bank manager’s duties is to safeguard funds and to prevent fraud. The applicant was experienced, yet ignored the red flags, which included common-sense issues such as the client profile not indicating a person who regularly withdrew money to pay wages, an inactive account, all other transactions were concluded at the Salt River branch, the improbability of paying wages on a Tuesday at the beginning of the month and the differences in the signatures. I hold that the respondent proved that the applicant acted grossly negligently on 8 January 2019 as he authorized the withdrawal without having followed the correct procedures. He did not confirm the source of the funds. Both the force slip and 9003-code warned him about a possible issue with the funds. To blame the business banker or the fraud division for not having put some or other formal caution on the deposit is the applicant not taking responsibility for failing to follow the procedures He failed to exercise the duty of care expected of a person in his position.”

[15] Mr Fourie gave the following evidence at arbitration:

MR ANDRE JOHNNES FOURIE: I just want to come to the movements due also on the account uhm so if there is movements due in this instance uhm the argument is that the account is active. So the client could most probably go to

[16] Mr. Fourie testified that it was practice in such situations to ask the account holder to return the next day. This was not a regulation contained in the first respondent's policies. It is obvious that same would have been prudent. However, it is the Court's view that the Commissioner's finding that the applicant did not follow the correct procedures at all on the day in question and was therefore grossly negligent, amounts to a material gross irregularity which distorted his decision that the sanction of dismissal was appropriate in the circumstances of the dispute. The Commissioner ignored the applicant's testimony at the arbitration and in the disciplinary hearing, that he double checked the teller's authentication of the account and carefully looked into the history of the account in question, as referred to above, as well as satisfying himself that the account holder was in front of him. The Commissioner also failed to take into account the concession made by Fourie regarding 'double checking', and treated Fourie's evidence about the checking process as 'factual' when Fourie was not present at the scene, while rejecting that of the Teller who was the bank's witness at the arbitration. This material misdirection by the Commissioner is of the type referred to in *Mofokeng*²:

Evaluation

came from.....".

a teller and withdraw money. The challenge that your Teller limits ag your Teller, sorry your ATM. You can just run to an ATM to withdraw the cash but you've got a small limit on the ATM which is five thousand. So he had to come into the branch to draw a large sum of money. So with movements due you can't with all these red flags. So one of the authentications that didn't meet the requirement was the signature. So if you look at that you say it is a red flag. It's an inactive account March, the last withdrawal was two and a half months ago, the last deposit was four months ago so a quarter of the year. Ag a third of the year, so that's another red flag and then you've got movements due on the account, is also a red flag. So what you do in cases like that is you would inform the client he can come back the following day to withdraw the money because that will allow the system at the backend overnight to indicate where the money

“[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 enquiry. 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 enquiry, 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, 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.”

- [17] The material errors made by the commissioner evident in paragraph 31 of the Award referred to above, *inter alia*, led to an unfair trial of the issues and an unreasonable result. This is evident if one has regard to the way that the Commissioner decided on the fairness of the sanction of dismissal. The relevant portions of the Award read as follows:

“ 33. The Respondent knew in January 2019 through their fraud and internal audit division that the fraud had been committed. I accept, as it was not disputed, that the final report of the incident came out by the end of October 2019. It was not the applicant's case that the delay in taking disciplinary steps amounted to unfairness. I agree that, as no action was taken, the respondent displayed the attitude that they fully trusted the applicant despite what

happened on 8 January 2019. The applicant carried on until the date of his dismissal with all of his managerial authority and functions in place. Mr Fourie did not testify that he ever mistrusted the applicant or lost his trust in the applicant. The applicant had a clean disciplinary record at the time. Mr Fourie's version was that he would stand by the disciplinary hearing outcome. No evidence was presented about the breach in the relationship. It was not even mentioned in the closing submissions.....

36. The applicant clearly took a risk when he authorised the pay-out in circumstances *where he had relied on his teller for having done the necessary validation checks*. He was employed as a bank manager requires to always act with the utmost care. He failed to display the utmost care on 8 January and caused his employer to suffer a loss of just under R100 000,00. This is not an insignificant amount bearing in mind case law where employees, such as still operators in supermarkets, are regularly dismissed due to negligence involving amounts for as little as R500,00. (emphasis mine)

37. Given my finding that the applicant acted grossly negligently, that he puts the blame for what happened on others and clearly does not want to concede to any wrongdoing, I hold that dismissal was a fair sanction, despite the employer not having led the evidence of the breakdown of the trust relationship. This is one of the cases where the breakdown of the employment relationship flows from the type of misconduct. The attitude of the employee is not taking any responsibility for his actions and the consequences of the misconduct for the employer are aggravating factors favouring dismissal. This is despite the employee having been allowed to carry on with his duties for almost a year from the date of commission of the misconduct."

- [18] In circumstances in which the Commissioner prevented a fair trial of the issues in finding that the applicant had shown no duty of care whatsoever in allowing the withdrawal, the Award stands to be reviewed and set aside. His material irregularity took him along a path to the unreasonable decision that despite there being no breach in the trust relationship, the applicant should be dismissed. No purpose would be served in remitting the dispute. In substituting the Award, I take into account that the applicant sought the primary remedy of

reinstatement in the proceedings before me. In addition, I consider it fair in the circumstances, that the substituted award should reflect the failure on the part of the applicant, a senior employee, to have taken the further diligent step of requiring the account holder to return the following morning to collect his cash. A costs order in this matter is not apposite given the ongoing relationship between SASBO and the first respondent.

[19] I therefore make the following order:

Order

1. The Award under case number WECT2204-20 is reviewed and set aside and substituted as follows:

- 1.1 The dismissal of Sebalo Vinger was substantively unfair.
- 1.2 The first respondent is ordered to retrospectively reinstate the applicant on the same terms and conditions as he enjoyed prior to his dismissal.
- 1.3 The retrospectivity of the reinstatement is limited to the period between the date of the Award and the date of this Order, being 1 October 2020 and 14 December 2022 respectively.

H.Rabkin-Naicker

Judge of the Labour Court

LABOUR COURT

Appearances

Applicant: G. Goosen instructed by BJ Erasmus Pieterse Attorneys

Respondent: Cliffe Dekker Hofmeyer Inc