



IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case no: D 1271-13

Not Reportable

In the matter between:

SANDHYA ANNITOODH KASSIE

Applicant

and

FIRST NATIONAL BANK

First Respondent

COMMISSIONER L SULLIVAN

Second Respondent

CCMA

Third Respondent

Heard: 1 July 2020

Judgment delivered: 14 August 2020

JUDGMENT

WHITCHER J

[1] On 27 October 2013, that is more than 6 years ago, the commissioner issued an award in terms of which he found that the dismissal of the applicant by the first respondent (“FNB”) was substantively fair.

[2] The applicant was dismissed for falsifying bank records. The commissioner recorded that while he appreciated that the misconduct did not involve fraud or

theft and that the applicant had pleaded guilty and showed remorse and had served the respondent for 32 years with a clean disciplinary record prior to this matter, in his view the sanction of dismissal was fair for the following reasons:

The respondent's code of conduct indicated that falsifying any documents, even for a first offence would result in summary dismissal.

The Unions had agreed to that Code of Conduct.

Falsifying the documents was not done on a sudden isolated impulse by the applicant. She had done this on at least three occasions and her testimony was that changing the date on the documents was a long procedure which took about two weeks for her to do.

The applicant's motive in changing the document was not to assist the bank. It related directly to her performance appraisal as she conceded that she believed her performance appraisal would be tarnished if the documents were not submitted.¹

There was no inconsistency in respect of the respondent's treatment of the applicant and her manager. The manager's ("Naidoo") testimony was that she could not check every figure and entry and her signature was merely confirmation that the documents had been lodged. Muller supported this view. Naidoo never submitted figures she knew to be wrong and had immediately queried those figures she suspected of being wrong.

- [3] The applicant seeks three orders. These include condonation for the late filing of an amended supplementary affidavit, an order seeking correction of a supplementary affidavit and an order reviewing and setting aside the above award.
- [4] This is again one of those review applications plagued by long delays and irregular steps.
- [5] The applicant, who has always been represented by attorneys, filed the review application on 12 December 2013.

¹ As part of her grounds of review, the applicant complains that she did not say this. She in fact said: "I needed to put forward my work". There is no material difference in my view. Certainly not sufficient to warrant a review against this finding.

- [6] The application was filed under section 158 of the LRA. I will condone this improper step because it is clear from the contents of the Notice of Motion and accompanying affidavit that the intention was to pursue a section 145 review. It was merely a matter of citing the wrong section.
- [7] The applicant, however, has more pressing problems. The supplementary affidavit on which she seeks to rely was only filed on 26 November 2016. That is almost three years after the original review application was launched and then her replying affidavit was filed four months late.
- [8] The question is whether the applicant has a reasonable explanation for this egregious delay. It has been held that the longer the delay, the more compelling the explanation should be.
- [9] For the reasons set out by the first respondent, I do not accept that the applicant has provided a reasonable explanation for the delay. The applicant essentially places the blame on her erstwhile attorneys. However, it appears that she left the matter to languish for two years before she took steps to deal with her delinquent attorneys and further the prosecution of her review. If she did not contact her attorneys for a period of two years, then she cannot properly allege that she was a serious litigant. She is *dominis litis* and was required to check on the progress of her matter and ensure it is prosecuted within a reasonable time.
- [10] What is of further concern is that even after the applicant changed her attorneys the review was unnecessarily prolonged by the filing a succession of supplementary and amended supplementary affidavit in which the applicant constantly sought to change her case and introduce new material which was never before the commissioner and not process related, and to which the respondent was forced to respond at great expense.
- [11] In these circumstances, the first respondent's claim that it has been prejudiced by the applicant's dilatory, piecemeal and misguided manner of prosecuting this review is not unreasonable. There is no requirement that actual pecuniary loss must be suffered for the balance of convenience to favour the first respondent. The first respondent had a proper interest in this matter being finalised within a

reasonable time. As indicated above, it is now more than 6 years since the award was issued to the applicant.

[12] In any event, I am not convinced that the applicant has good prospects of success in the review application.

[13] The applicant in this case is really asking the court to retry the issue of sanction. The question really posed in the review is whether the sanction imposed by the employer was fair taking into account not only the evidentiary material that was before the commissioner but also evidentiary material and submissions not placed before the commissioner.

[14] An arbitrator is afforded the power to exercise discretion and make a value judgment as to the severity of misconduct. The test to be applied is not whether a reasonable decision maker could have imposed a lesser sanction but rather whether no reasonable decision maker could have found dismissal appropriate. It is, therefore, a higher threshold.

[15] To my mind, the commissioner's award is actually fortified by the following pieces of evidence on record, some rather startling, which he did not include:

15.1 The applicant occupied a special position of trust in that she was a team leader (part of management) to whom other employees reported.

15.2 On her own version, she knew her actions would have repercussions "if caught".

15.3 Still on her own version, she slipped the altered documents in with other untainted documents and *hoped that Naidoo would not notice*, which is actually deceitful.

15.4 Considering the amount of paper work Naidoo had to go through, the applicant would have appreciated that Naidoo operated to a large extent on trust in the person whose work she has to spot check.

15.5 The applicant disclosed that the altered documents Naidoo discovered were not the only documents she had altered. She had similarly altered others in the past.

[16] Further to the above, as submitted by the first respondent, it cannot honestly be submitted by the applicant that the falsification of bank documents could ever

be countenanced, no matter the nature of the alteration, service and disciplinary record of the employee in involved.

[17] Regarding the applicant's claim of inconsistency in the application of discipline, the only claim on record relates to that of Naidoo, her manager.² In this respect the commissioner correctly pointed out that Naidoo was not a comparator. It was not her job to meticulously check every document and detail in the documents submitted to her by the applicant. The performance of her task depended to a large extent on trust in the applicant. And, as the evidence demonstrated, when she noticed discrepancies (which the applicant on her own version deliberately did not disclose and actually took steps to hide) she immediately took action.

[18] Even if it could be argued that Naidoo was remiss in not noticing in time that the applicant had altered documents (as indicated the applicant disclosed at the arbitration that prior to Naidoo's discovery she had passed similarly doctored documents to Naidoo), this aspect of inconsistency would not have carried weight simply because the applicant's conduct was more serious than Naidoo's alleged negligence. The applicant admittedly falsified banking documents and the disciplinary code, which had been approved by the trade unions operating within the first respondent clearly specified the sanction of dismissal for a first offence of falsification.

[19] Considering the applicant's financial position, I make no order as to costs.

[20] In the premises, I make the following order:

1. The late filing of the supplementary affidavit is not condoned.
2. The review application is dismissed.

Benita Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

² The rest of the claims in this review were not raised at the arbitration.

APPLICANT: Adv T J Moodley, instructed by Derek Jafta Attorneys

FIRST RESPONDENT: V Oosthuizen, from Shepstone and Wylie

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Labour Court