IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

CASE NO: D2258/2018

In the matter between:

RAJANTHREE KANNIAH **APPLICANT**

And

FIRST NATIONAL BANK **FIRST RESPONDENT**

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION **SECOND RESPONDENT**

COMMISSIONER R SHANKER N.O. **THIRD RESPONDENT**

Heard: **6 October 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand-down is deemed to be 10h00 on 3 March 2022.**

JUDGMENT

Hiralall AJ

Introduction

[1] This is an application in which the applicant seeks an order reviewing and setting aside the arbitration award dated 12 November 2018 under case number KNDB 4736-18 issued by the third respondent under the auspices of the second respondent. The application is opposed by the first respondent.

Background

[2] The applicant was at the time of her dismissal for alleged misconduct employed as a Business Manager at the first respondent's Hayfields branch (the bank) and had been in its employ for approximately 20 years. The charge which led to her dismissal was stated as follows:

'Contravention of paragraph 4.2.9 of the Bank's Disciplinary Code and Procedure in that you accessed the account of ZA Amandaba Fikekhaya JV (Pty) Ltd, furthermore, you divulged confidential client information of ZA Amandaba Fikekhaya JV (Pty) Ltd to Mr Peter Dick.'

[3] It was common cause that the directors of ZA Amandaba Fikekhaya JV (Pty) Ltd (the client), Messrs Dwenga and Goba, had been to the bank on 16 October 2017. They sought the assistance of the bank for purposes of transferring a sum of money to another account holder at the bank and to this end the applicant assisted them by opening an online banking facility. However, they were not successful in transferring any monies to the intended recipient on the day as the relevant online banking

facility would take up to two weeks to be set up. They were referred to another employee of the bank for the purpose of obtaining a bank cheque to meet their needs. Before they left the applicant, they telephoned the intended recipient of the bank cheque, referred to as Peter, and got the applicant to explain to him the reason that the funds could not be transferred to him at the time in question. She explained to the said Peter that the best option would be to accept a bank cheque. With that, Dwenga and Goba were referred to another employee who was to assist them with the issue of a bank cheque as this function was part of that employee's portfolio. The applicant did not see them again in the disputed period.

[4] It is common cause that the first respondent later received a complaint from Messrs Dwenga and Goba, on 1 November 2017. The complaint read as follows:

'We would like to lay a formal complaint on FNB and one of your employees at Hayfield branch.

We had an issue with our bank account for …

We were assisted by Rajenthree your Relationship manager, and our matter was escalated to you, that you resolved and we thank you for that.

I have attached an affidavit sworn by Peter Dick the applicant from the PMB High Court dated 20-10-2017, that clearly indicates that Rajenthree spoke to Mr Peter Dick, a third party to our account and disclosed information and activities that both myself and Mr Goba undertook in our account. This incident happened between 16th and 19th of October 2017.

It is point 50 on the affidavit.

Her actions have caused a lot of stress in our lives and threats and litigation against our company and personal lives, …

I trust that FNB is an institution that protects their client's privacy and you will get back to us …'

[5] It is common cause that they were referring to a statement appearing at paragraph 50 of the affidavit of Peter Dick, also a client of the bank, in support of his application to the Pietermaritzburg High Court for an order interdicting and restraining them from making any payments from any accounts held by them at the bank except to himself. The statement at paragraph 50 read as follows:

'An employee of Sixth Respondent has advised me this morning, after my conversation with Fifth Respondent that what Fifth Respondent had conveyed to me regarding the amount of the payments received into the account, was incorrect. Two payments of R498 000.00 each were made into the account on 16 and 18 October 2017. I was also advised that Fourth and Fifth Respondents withdrew an amount of R100 000.00 (as opposed to R60 000.00) from the account.'

The arbitration hearing

[6] At the arbitration hearing, the first respondent presented the evidence of Shaun Bishop, a fraud investigator employed by the bank. He testified *inter alia* that during his investigation of the case, he obtained a Hogan computer footprint to establish whether any of the first respondent's staff might have accessed the client's transaction history.

[7] The Hogan footprint showed that on 19 October 2017:

7.1 the applicant, whose employee number was [F…….], accessed the transaction history of the client's account ending with number 488 at 9.30.22;

7.2 she accessed the client's account ending with number 476 twice, at 9.31.23 and 9.31.38, with the code ACPL which was the code for access to the account profile;

7.3 she accessed the client's account twice, at 9.32.31 and 9.32.51, with the code THDI which was the code for access to the account transaction history; and

[8] He stated that the signatories to the client's accounts were not present in the bank when the applicant accessed their accounts as above. The only person who accessed the transaction history of the above accounts on 19 October 2017 was the applicant. As such the applicant would have been aware of the two deposits in the account that were made on 16 and 18 October 2017.

[9] The applicant also accessed Peter Dick's Customer profile on 19 October 2017 at 9.44.43

[10] According to Shaun Bishop, the applicant furnished the first respondent with the following response to the client's complaint, which response she confirmed at the disciplinary enquiry:

' My account as I recall:

I first met with Mr Dwenga and Mr Goba around 16/10/2017.

They had come into the Hayfields Branch to request a transfer to another FNB account. They were advised at the branch that it was not possible to do the transfer and were referred to me to set up online banking.

…

A few days later, one of my clients had come into the branch and requested to meet with me. It was only then that I realized that this was the same Peter that I had spoken to as per Mr Dwenga's request. Peter made mention that there was a joint venture between his company and Fikekhaya Za Amandaba JV (Pty) Ltd. This connection was privy to me during my first meeting with Mr Goba and Mr Dwenga.

Peter appeared to be distraught as he believed that they were being evasive and would not follow through in payment leading to him occurring (sic) serious financial losses. I reminded him of the points that I had previously addressed with him over the phone and advised him that accepting the bank cheque would be an appropriate option as funds would be debited from the client's account on the day the bank cheque request was made.

Due to Peter's doubts, he asked me to confirm this information on the bank system. I accessed the system with the intention to confirm whether or not online banking had been set up and if a request for a bank cheque had been made. As I did not have the account details at hand, Peter gave me the account number which was given to him by Mr Goba and Mr Dwenga. When I accessed the account, I saw that there were no funds available and noticed that this was not the account that I had requested online banking for, however the account name was the same. So I did a search on the business name and found that Mr Goba and Mr Dwenga had opened a separate account so that funds could bypass the account which Peter had knowledge of.

I thought that there may have been grounds for Peter's allegations. Even though I believed that there was an injustice being done to Peter, I was unable to disclose any information as he was not a representative. At this stage I suggested that Peter returned with the representatives in order to view the transaction history. He seemed to think that Mr Goba and Mr Dwenga were avoiding him and would not co-operate.

I emphasize the point that I could not share any information with him and that his option would be to seek a subpoena against Fikekhaya Za Amandaba JV so that all accounts under that name could be investigated.

It was clearly visible that the funds were still in the bank account thus it was of my recommendation that he should accept the bank cheque as a means of payment. He then inquired if an additional cheque could be issued on the following day. I was unsure and sought clarity from Thandeka and told Peter that we could not knowingly exceed the cheque payments limit.

I had not disclosed any information as referenced on point 50 and can only assume that if Peter had discovered any information in my office on that day, it was by viewing the screen as he was pacing my office and hovering around the desk. Peter has called me on my cell phone on a few occasions pleading for information but I have always maintained my stance that he should obtain a subpoena and was under the impression that he had obtained information via the subpoena.'

[11] Mr Bishop stated that according to the version in the applicant's written statement, she had obviously conducted a 'small investigation' and was siding with one customer over the other. By her accessing the two accounts, she was able to say that Peter Dick was not a representative on the accounts, and she was also able to say that there were funds in one of the bank accounts.

[12] After an inspection in loco at the bank, the applicant's attorney agreed that the bank records were not in dispute.

[13] The applicant testified that no evidence was presented at the hearing to show that she had accessed the transaction history or statement screen of the client. As a result, she had written out her appeal as follows:

‘I have been charged for accessing the account of ZA Amandaba Fikekhaya JV (Pty) Ltd, and divulging confidential client information of ZA Amandaba Fikekhaya JV (Pty) Ltd to Mr Peter Dick.

I had presented evidence at the hearing to outline my reasons for accessing the account and believe it to be for a valid business reason.

Regarding divulging client confidential information to Mr Peter Dick, I would like to make reference to paragraph 50 of filing notice which was presented as evidence of the confidential information that had been divulged. The confidential client information mentioned in this paragraph was of a transactional nature. In order for me to have divulged this information I would have had to access the transaction history of ZA Amandaba Fikekhaya JV (Pty) Ltd in the presence of Mr Peter Dick. No evidence was presented at the hearing to show that I had accessed the transaction history or statement screen. Actually, a footprint of employees and screens accessed was presented and showed that I had not accessed the transaction history or statement screen.

Secondly one of the transactions mentioned, a withdrawal of R100 000 happened after my meeting with Mr Peter Dick. This was established by the evidence presented at the hearing that shows I had accessed the account between 9.00 and 10.00 and the withdrawal took place after 14.00.

Therefore this factual information proves that Mr Peter Dick had not obtained any of the information mentioned from myself neither could he have obtained this by viewing my screen whilst in my office.’

[14] She stated that her recollection of 19 October 2017 was that she received an email which informed her that Peter Dick had called for her. She accessed his account with a CUP1 code for his details and returned his call out of courtesy. She was unable to get hold of him so she left a voicemail message.

[15] A short while later, Thembi the admin assistant called her to inform her that the cash for the clients Messrs Dwenga and Goba was ready but she did not disclose the amount. Although this was not part of her portfolio, the applicant accessed the client's business profile with a CUP1 and an ACPL code in order to obtain their contact details. She called the first director but was unable to reach him, so she went into the second director's profile with an ACPL code. She got hold of the second director and informed him that their cash was ready. He responded that they would go into the bank after lunch. That was the sum of the events of the 19th, that is that she had accessed the account in order to phone the relevant parties.

[16] She stated that it was after the 19th that she met with Peter Dick, probably the 26th. Peter Dicks went to her office and it was only at that time that she made the connection between Mr Dwenga and Peter Dicks, and that he had been the intended recipient of the funds. He was quite agitated and jumpy, and made statements to the effect that he was not going to receive payment and that 'these guys had run off with his money'. She recalled the conversation with him on the 16th and the option offered to him that he could have taken a bank cheque. He said that he had told them to go ahead with the cheque and asked her to check if it had been done. She believed it was possible that the clients could have gone into the bank and requested the bank cheque and were still holding it in their hands so she made the decision to access the account and she believed it was for a valid business reason. Had the events of the 16th not taken place she would not have accessed the account or even listened to Peter Dicks. She asked him for the bank account details which he provided. When she accessed the account, she found that there were no funds in it. When she went into the transaction history, she saw that the deposit which she had seen previously did not reflect in the account, and this was also not the account for which she had set up the online banking. She then did a search with the company name and found a second account which was the one for which she had set up the online banking and in which the funds reflected. At that stage she felt that he needed to know this but she did not give him the information. She told Peter Dick that he

should bring in the clients but he said that communications had broken down between them. She told him that the only other option was for him to subpoena the information.

[17] The arbitrator found that the dismissal of the applicant was substantively and procedurally fair.

The grounds of review

[18] The applicant's main grounds of review are *inter alia* as follows:

17.1 The third respondent failed to consider the vagueness of the charges brought against the applicant by the first respondent.

17.2 The third respondent failed to apply his mind properly to the evidence presented in the matter leading to an irregularity in his duties as an arbitrator when he misconceived and misapplied the legal principles applicable to circumstantial evidence and came to a decision that was not the most plausible inference and was not consistent with the proven facts.

17.3 The third respondent's findings regarding the reliability and credibility of the applicant and the first respondent's witness were unreasonable.

17.4 The third respondent's decision that the applicant's dismissal was the appropriate sanction was irregular due to his failure to consider and properly apply his mind to the appropriateness of the sanction as one of the material issues in the arbitration.

17.5 The third respondents award was one that no reasonable decision maker could have reached on the evidence that was before him."

Legal principles

Review

[19] It is trite that the requirements for the review of an award under the Act are stringent and that the applicable test in reviews is that of reasonableness: an award of a commissioner of the CCMA or a Bargaining Council is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not reach.[1]

[20] In *Herholdt v Nedbank Limited*[2] *,* the Supreme Court of Appeal stated as follows:

> '[25] … For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[21] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[3], it was stated that 'in short, a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.' The Labour Appeal Court went on to state per Waglay JP as follows:

---

[1] *Sidumo & Another v Rustenburg Platinum Mines Ltd & others*, (2007) 28 ILJ 2405 (CC)

[2] (2013) 34 *ILJ* 2795 (SCA)

[3] (2014) 35 *ILJ* 943 (LAC)

'[20] The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

[22] The applicant in this case is required to establish that the award was one that could not have been made by a reasonable decision-maker on the evidence presented.

Circumstantial evidence

[23] The approach to be adopted when an inference is sought to be drawn from other facts was stated in *Cooper and Another NNO v Merchant Trade Finance Ltd*[4] to be as follows:

'[7] It is not incumbent upon the party who bears the onus of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the "two cardinal rules of logic" referred to by Watermeyer JA in R v Blom is that the proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences then there must be a doubt whether the inference sought to

[4] Case number 474/97, Judgment 1 December 1999, SCA

be drawn is correct. *This rule is not applicable in a civil case. If the facts permit of more than one inference, the court must select the most "plausible" or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If on the other hand an inference in favour of both parties is equally possible, the litigant will have not discharged the onus of proof*.' (footnotes omitted) (my emphasis)

[24] In *Ngidi v Relyant Trading (Pty) Ltd and others*[5], the court stated as follows with regard to the evaluation of circumstantial evidence:

'[21] The legal principles governing reliance on circumstantial received attention from this Court in the decisions of *National Union of Mine Workers &Others v Commission for Mediation, Conciliation and Arbitration (2007) 28 ILJ 1614 (LC)* and *National Union of Metal Workers & Another v Kia Motors (2007) 28 ILJ 2283 (LC)*. In those decisions the Court in relying on the authority of Hoffman & Zeffert, SA Law of Evidence (5ed) at 93, held that the inference to be drawn from circumstantial evidence must be consistent with all the proven facts because if it is not then the inference cannot be drawn. In the *Kia Motor's case* the Court, held that a distinction should be drawn between a permissible inference, a mere conjuncture and speculation. It was further held in that case that the onus is discharged if the inference advanced is the most readily apparent and acceptable from a number of other possible inferences. See also *AA Onderlinge Assuransie- Assosiasie BPK v De Beer 1982 (2) SA 603 (A)*.'

Evaluation

[25] In the present case, the evidence before the commissioner was as follows:

25.1 Peter Dick received accurate information, which was not in dispute, that two payments of R498 000.00 each were made into the client's account on

[5] LC D140/07

16 and 18 October 2017, and that the client withdrew an amount of R100 000.00 from the account on 19 October 2017.

25.2 His affidavit was deposed to on 19 October 2017.

25.3 In his affidavit, he stated that he received the information that morning, that is on 19 October 2017.

25.4 The Hogan footprint showed that the applicant, whose employee number was F2670089, accessed the transaction history of the client's account ending with number 488 at 9.30.22 when the signatories were not present in the branch.

25.5 It also showed that the applicant accessed the client's account ending with number 476 twice, at 9.32.31 and 9.32.51, with the code THDI which was the code for access to the account transaction history.

25.6 The Hogan footprint showed that the applicant was the only person who accessed the transaction history of this account on 19 October 2017.

[26] Although the later affidavit of Peter Dick (which formed part of the applicant's bundle of documents and relied upon by the applicant without challenge from the first respondent) sought to clear the applicant of guilt, it is a fact that the withdrawal of R100 000.00 from the client's account was only made on 19 October 2017. Peter Dick could not have learnt of this fact any earlier, nor could he have learnt of it after 19 October 2017. He must have learnt of the withdrawal on 19 October 2017 prior to deposing to his affidavit.

[27] Although the applicant denied that Peter Dick had visited the bank on 19 October 2017, the Hogan footprint shows that she accessed his customer profile on 19

October 2017 at 9.44.43. The applicant testified that she had accessed Peter Dick's profile early on the morning of 19 October 2017 in order to return his telephone call which she did as a courtesy. Nothing more was said about the reason for the call and what transpired thereafter. The probabilities are that he was in the bank when this was done.

[28] The bank records which include the Hogan footprint constitute *prima facie* evidence of the applicant's interaction with the account. After an inspection in loco was conducted at the bank, the applicant's attorney agreed that the bank records which were presented were not in dispute. The applicant was required to provide a reasonable explanation for her conduct. However, despite her attorney's concession, the applicant was adamant that Peter Dick did not visit the bank on 19 October 2017.

[29] Her version that she accessed Peter Dicks' account only to obtain his contact details to return his call out of courtesy stands alone with no mention of a follow up or the reason that he had called. She says that her next interaction with him was around 26 October 2017.

[30] Her version that she accessed the client's profile twice in order to obtain their contact details so that she could inform them that the cash was ready attempts to explain only some of the entries on the Hogan footprint, but this is in any event a late propounding of a version which the applicant initially steered clear of. Her version was that she only learnt of the client's withdrawal of cash on 19 October 2017 much later and therefor could not have given Peter Dick this information. Her version also does not explain why, if it were to be accepted as the truth, she also accessed the transaction records of both of the client's accounts on that date.

[31] The Hogan footprint viewed together with the applicant's written statement which she really only recanted in respect of the date when she saw Peter Dick, the only plausible inference from the proven facts is that she met him in the bank on 19

October 2017 and that was when she accessed the client's accounts. It should be noted that the applicant said in her written statement that she did not disclose any information to Peter Dick and could only assume that if he had discovered any information in her office on that day, it was by viewing the screen as he was pacing her office and hovering around the desk.

[32] The applicant's version on appeal in respect of the R100 000 is the proverbial final nail in the applicant's case. She says there that the withdrawal of R100 000 took place *after* her meeting with Peter Dick but that clearly cannot be true based on her own version in the arbitration hearing.

[33] Despite the applicant's contention to the contrary, her version as to the content of her discussion with Peter Dick shows that she had more than just a superficial conversation with him. She saw fit after finding that there were no funds in the account ending with 488, a transaction she was not entitled to perform in any event in the absence of the clients, to persist with the search for the account with funds. She drew conclusions that Peter Dick was the investor, that the clients had opened a separate account so that funds could bypass the account which he had knowledge of, that he was being treated unfairly and that this was an injustice.

[34] The only inference to be drawn from the proven facts is that the applicant accessed the client's accounts in their absence without a valid business reason, and that it was the applicant who divulged the client's confidential information to Peter Dick on 19 October 2017.

[35] I did not find that the charge against the applicant was vague in any way as contended by the applicant. She contended that she had a valid business reason to access the accounts when she met with Peter Dick on account of the conversations which took place on 16 October 2017. However, the facts evidence that she was not merely advancing a common intention of the clients and Peter Dick. Having accessed the account which Peter Dick had referred her to and found that there

were no funds in it, which access in my view was an offence on its own, she had no valid business reason to continue her search into the client's other account.

[36] I need say no more about the credibility of the applicant as a witness. The respondent submitted correctly that the applicant's contentions in this regard are unsubstantiated and without merit. The record of the arbitration proceedings made for arduous reading in order to obtain a clear version of the applicant due to her evasiveness and the contradictions in her testimony. Shaun Bishop, on the other hand, gave a clear account of the evidence at his disposal. I find no reason to fault the commissioner's findings on the credibility and reliability of the witnesses. He stated of the applicant as follows:

'49. The applicant changed her version from the investigation to the disciplinary enquiry to the appeal hearing, at this arbitration hearing and after the inspection in loco. This combined with inconsistencies and contradictions in her version as well as her failure to put her version to Bishop led me to arrive at a finding that the applicant was not a credible witness.'

[37] It was submitted by the applicant that the third respondent, in holding that the sanction of dismissal was substantively fair, made a decision that no reasonable arbitrator would have made upon a proper consideration of the evidence. He failed to address the applicant's personal circumstances, her years of service, previous clean disciplinary record and the circumstances of the infringement. It was correctly submitted by the first respondent that a failure to list every factor in an arbitration award is not in and of itself a reviewable irregularity.

[38] The third respondent stated as follows in relation to whether dismissal was an appropriate sanction,

'61. In conclusion, I find that the applicant met with Peter on 19 October 2017, access (sic) the client's account without a valid business reason and disclosed

confidential account information to Peter Dick. It is trite and, in any event, common cause in this matter that misconduct of this nature in the banking sector is a very serious offence for which dismissal is an appropriate sanction.'

[39] He went on to state further as follows when dealing with the chairperson's handling of the mitigating factors:

'65. … I'm not convinced that there could have been any lighter sanction in the circumstances of this case in which the applicant agreed that dismissal was an appropriate sanction and the applicant breached a rule regulating conduct in the workplace that went to the heart of the trust relationship and rendered the continued employment relationship intolerable.'

[40] I am satisfied, having regard to the evidence that was placed before the commissioner, and the submissions and arguments made on behalf of the parties, that the commissioner dealt with the substantial merits of the dispute, that the finding of guilt on the charge against the applicant is unassailable and that there is no basis for a conclusion that the sanction of dismissal was inappropriate. The decision arrived at was one that another decision-maker could reasonably have arrived at based on the evidence before him.

Conclusion

[41] Accordingly, the applicant's review application must fail, and the arbitration award of the third respondent must be upheld. The applicant's review application is therefore dismissed.

Costs

[42] I see no reason to burden the applicant with a costs order since costs do not necessarily follow the result in labour matters.

Order

[1] In the result the following order is made:

1. The application for review of the third respondent's award is dismissed.
2. There is no order as to costs.

_____

Narini Hiralall

Acting Judge of the Labour Court of South Africa

APPEARANCES

For the Applicant: ADV W.B. MATHEWS
Instructed by: BHAMJEE ATTORNEYS; PIETERMARITZBURG

For the Respondent: LUWAY MONGIE
Instructed by: BOWMAN GILFILLAN