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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 353/16

In the matter between:

THE CITY OF CAPE TOWN **Applicant**

and

SALGBC **First Respondent**

URSULA BULBRING N.O. **Second Respondent**

IMATU OBO FRANK HERWELS **Third Respondent**

Heard: 21 June 2017

Delivered: 2 August 2017

Summary: Review – dismissal – gross dishonesty – conflict of interest – dismissal fair – arbitration award reviewed and set aside.

JUDGMENT

STEENKAMP J

Introduction

[1] The third respondent, Mr Frank Herwels[1], worked as a technician for the applicant, the City of Cape Town. The City dismissed him for gross dishonesty, in that he failed to declare a personal interest in the businesses belonging to his wife and his brother, both vendors to the City. He referred an unfair dismissal dispute to the first respondent, the South African Local Government Bargaining Council. The arbitrator, Ms Ursula Bulbring (the second respondent), found that the dismissal was unfair. The City seeks to have that award reviewed and set aside in terms of s 145 of the Labour Relations Act.[2]

Background facts

[2] The employee, Herwels, worked as a technician in the City's Housing Maintenance Unit in Elsiesrivier. The City alleged that he had failed to declare his personal interest or a conflict of interest in three entities that provided services to the City, namely RFH Interior & Exterior Works cc (RFH); RH Interior & Exterior Decorators (RH); and Jay Dee Construction (Jay Dee). Jay Dee belongs to the employee's wife, to whom he is married in community of property. It is a registered vendor to the City. RFH was registered in the name of the employee and his brother, Robert Herwels [thus RFH: Robert and Frank Herwels]. He testified that he had resigned his membership. RH is owned by his brother, Robert. It is a registered vendor to the City and had traded with the City to the value of more than R285 000 over a period of more than two years.

[3] Following a complaint on its hotline, the City conducted a forensic investigation and called the employee to a disciplinary hearing to face six allegations of gross dishonesty. They all related to his failure to declare his personal interest or a potential conflict of interest in the three entities discussed above. He was dismissed.

[1] Represented by his trade union, IMATU.

[2] Act 66 of 1995 (the LRA).

The award

[4] At the arbitration, the City led the evidence of its senior forensic officer, Joseph Louis. The employee testified and called his brother, Robert; and a colleague, Kerneels Kouter.

[5] Louis testified that the City had a policy that, if an employee is involved in a business or if a family member is doing business with the City, that employee must declare such interest. There was no declaration in the employee's staff file. His wife, Desiree, completed a vendor application document on behalf of Jay Dee. Frank Herwels signed as a witness. The clause headed "declaration of interest" was left blank. It reads:

> "If there is any known potential conflict of interests or if any owner, partner or member of the tenderer is an official, an employee or a counsellor of the City of Cape Town, or is related to an official, an employee or a councillor of the City of Cape Town, that relationship must be placed on record here."

[6] Despite that, and despite the fact that they are married in community of property, neither the employee nor his wife declared the potential conflict of interest. Both of them signed the document. And Louis referred to the City's "Private Work and Declaration of Interests" policy that states:

> "5.7.1 Employees shall be responsible for declaring any possible conflict of interest which may arise in the course of fulfilling their responsibilities, in the course of conducting approved private work or in relation to the activities of family, friends or business associates.
>
> 5.7.2 Such conflict shall be declared at the point at which it may occur and the individual becomes aware of such possible conflict.
>
> 5.7.3 For clarity, a conflict shall arise whether an employee stands to benefit directly or indirectly and shall include any benefit to the employee, the employee's spouse, immediate family and extended family and to close friends and business associates.
>
> 5.7.4 Failure to declare such conflict of interests shall lead to disciplinary action against the employee."

[7] With regard to RFH, Louis testified that the employee was listed as a member of the CC, although he had resigned as a member subsequently. He could not ascertain that the employee had an interest in RH, owned by

his brother, Robert. RH and RFH had the same address. RH did work to the value of more than R285 000 for the City. The employee, Frank Herwels, was the requisitioner on five occasions and the contact person on five occasions where purchase orders were done for RH to do work for the City.

[8] The employee testified that he was 55 years old and had worked for the City for more than 29 years. He agreed that he was a member of RFH, but that he had resigned. It never traded and was not a vendor to the City. His brother, Robert, was the sole proprietor of RH. With regard to Jay Dee, he acknowledged that it was his wife's business. In 2008 his supervisor, Arthur Julie, reminded him to declare the potential conflict of interest; but there was no workshop or explanation of the policy or process. He completed two forms. A courier was meant to take the forms to the personnel section at the Civic Centre. A month after he had sent the forms, they had still not received it. He understood that the declaration of interest policy only "came alive" in 2010/2011.

[9] Robert Herwels testified that RH and RFH were two different companies. He had set up RH Decorators for the purposes of doing work with the City. RFH – of which the employee was a member – was set up to do work outside the city. RFH was deregistered in 2011.

[10] The arbitrator correctly noted that all six of the misconduct allegations were directed at gross dishonesty. The first three charges related to the employee's alleged failure to declare his personal interest in his wife's and brother's companies. Having considered the evidence, the arbitrator concluded:

> "The duty was on Herwels to make a valid disclosure. He did not do so and I find that he is guilty of the first three charges."

[11] Charges 4 to 6 related to the employee allegedly using his position as staff member for private gain by sourcing work projects and securing payments from the City for RFH; using his position as a staff member to improperly benefit Jay Dee; and for allegedly failing to withdraw from the SCM process where RFH was a successful bidder for City work while the employee was the appointed project manager. The arbitrator found that

RFH and RH were two separate legal entities. There was no evidence that RFH did any work for the City. She was also persuaded that the employee did not secure work for RH. And with regard to Jay Dee, she could not find that the employee secured work for that entity or improperly benefited it. She found that the employee did not commit the misconduct complained of in charges 4 to 6, or, as she put it, that the employee "is not guilty of those charges".

[12] Having found that the employee did commit the misconduct outlined in charges 1 to 3, she had to consider the appropriate sanction. She found that "dishonesty implies deception which entails wilful misrepresentation of the truth, with the intention to cheat and induce a belief that the misrepresented fact is indeed the truth". She continued:

> "I find that whilst there was a rule (Herwels knew about the disclosure requirement), he did not knowingly or with intention break the rule. He made a half-hearted attempt to comply with the rule and then he left it having been told that it would take time. There was no gross dishonesty. There was no material evidence of what the effect of the non-compliance with the rule was. Dismissal was not the appropriate sanction."

[13] The arbitrator ordered the City to reinstate the employee and to pay him one year's back pay.

Review grounds

[14] The City argues that the arbitrator committed an error of law as well as other reviewable irregularities that made his conclusion – i.e. that the dismissal was unfair and that the employee had to be reinstated – so unreasonable that no reasonable arbitrator could have come to the same conclusion. In short, the City argues that, once the arbitrator had endorsed the chairperson's finding on three charges of gross dishonesty, she could not have found that his dismissal was unfair.

Evaluation / Analysis

[15] The starting point is the arbitrator's finding that the employee "is guilty of the first three charges". Those three charges relate to his failure to declare his personal interest in his wife's and brother's companies. And, as the

arbitrator pointed out, all of those charges alleged gross dishonesty. Ergo, the arbitrator accepted the finding of the disciplinary hearing chairperson that the employee was guilty of gross dishonesty.

[16] Despite that unequivocal finding, the arbitrator then does a volte-face and finds that there was no "gross dishonesty" because, although there was a rule and the employee knew about the disclosure requirement, "he did not knowingly or with intention break the rule" and there was no material evidence of what the effect of the non-compliance with the rule was.

[17] As Mr *Ackermann* argued, that finding is a reviewable error of law, in that it conflates the subjective test for *dolus* relating to dishonesty (knowledge of wrongdoing) with the objective test for negligence ("should have known better", as he put it). And *Goldfields Investment Ltd v City Council of Johannesburg*[3] is authority that an error of law is reviewable if it prevented a fair trial of the issues. It amounts to a gross irregularity when the arbitrator does not direct her mind to the issue before her and so prevents the aggrieved party from having its case fully and fairly determined. In this case, the arbitrator embarked on the wrong enquiry. She did not direct her mind to the correct legal definition and elements of dishonesty. What she had to do, was to answer three questions:

17.1 Was there a rule?

17.2 If so, did the employee knowingly breach it? and

17.3 if he breached it, was this breach serious enough to warrant dismissal?

Was there a rule and did the employee knowingly breach it?

[18] The arbitrator found that there was a rule and that the duty was on the employee to make a valid disclosure. His failure to do so led to her finding that "he is guilty of the first three charges", all of which relate to gross dishonesty.

[19] Having found that, it must be accepted that *dolus* had been proven; intention of wrongdoing is an essential element of gross dishonesty.

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[3] 1938 TPD 551.

[20] The arbitrator's contrary finding that "there was no gross dishonesty" and that, although the employee knew about the rule, he did not knowingly or with intention break the rule, is irrational and constitutes a reviewable defect.

[21] In *Stoop v Rand Water*[4] Basson J summarised the issue of *dolus* relating to dishonesty:

> "*Dolus directus, dolus indirectus* or *dolus eventualis* is sufficient to constitute the intent required for fraudulent misrepresentation. Where the representor knows or foresees and reconciles him to the possibility that the representation is false and intends the representee to act upon it, the second requirement will have been satisfied. In determining whether Stoop and Buckle had the intention to defraud, it is necessary to investigate their state of mind at the time. In this regard Greenberg, JA held as follows *in R v Myers*:
>
> 'In English Law the house of lords decision in *Derry v Peek* (14 ac 337) is the *locus classicus* on the question of the state of mind of a person who makes a false representation which justifies a finding that he has been fraudulent in making such representation.
>
> I think it can be summed up, for the purposes of the present case, by saying that if the maker of the representation which is false has no honest belief in the truth of his statement when he makes it, then he is fraudulent. (There may be other factors, such as materiality or inducement, but they are not relevant to the point I am discussing.)"
>
> …
>
> "Fraud is proved when it is shown that a false representation has been made (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in its truth."'

[22] In this case, the employee acted dishonestly by not disclosing his conflict of interest, well knowing that he had to do so.

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[4] [2013] ZALCJHB 258 (13 September 2013) par 89.

[23] Despite the employee's protestations that the rule had not been "fully workshopped" with him, he knew very well what was required of him: as far back as 2007 he told his brother, Robert, that he was not "… able to link my name with a company working with the City and that is it." In fact, that is why he resigned from RFH and why did not want any part of RH. He explained in cross-examination:

> "I do not want to link my name with his [Robert's] company and I do not want to be involved in a company that is trading with the City either."

[24] The existence of the rule and the employee's knowledge of the rule had been established. The arbitrator accepts as much. Her endorsement of that chairperson's finding of gross dishonesty *ipso facto* establishes wrongdoing. To then find that dismissal was not a fair sanction, especially where public funds are involved, is not a decision that a reasonable arbitrator could have reached.

[25] The employee also knew what the consequences would be if he broke the rule. When questioned about his alleged involvement in obtaining work for his wife's company, Jay Dee, he said:

> "No. I did not assign her to that job. I tried to recuse myself from this job. The reason being I know what the consequences would be."

[26] That evidence is incompatible with the arbitrator's finding that *dolus* was not present. She thus failed to have regard to material evidence. Had she had proper regard to the law and the facts, she would have come to a different conclusion.

[27] The employee knew that he could not give jobs to friends and family. He conceded as much. And he gave direct evidence that his supervisor, Julies, told him in terms as far back as 2008 that he had to declare the conflict.

[28] The Commissioner embarked on the wrong enquiry when she focused on whether the employee did or did not influence the award of work to his wife's company. The question was whether or not he had to make a disclosure; and whether he had in fact done so. He was aware of the rule and he breached it. Whether or not he influenced the City assigning work to his wife's company is irrelevant. Neither he nor his wife disclosed the

conflict of interest; she did benefit from the company receiving work from the City; and the employee, who signed as a witness, was party to the non-disclosure. They were married in community of property. He benefited directly from his own non-disclosure. That was the effect of the non-compliance with the rule. For the arbitrator to find that dismissal was not an appropriate sanction because "there was no material evidence of what the effect of the non-compliance with the rule was" cannot be sustained on the evidence before her.

[29] Mr *Ackermann* referred to *Gaga v Anglo Platinum Ltd*[5] where the Labour Appeal Court found that the Commissioner had committed a reviewable irregularity when he failed to grasp the definitional requirements of an act of sexual harassment and consequently failed to undertake a proper enquiry into guilt. Similarly, in this matter, the arbitrator failed to appreciate the "definitional requirements" of an act of gross dishonesty. Once she had found that the employee did commit gross dishonesty, his knowing and intentional misrepresentation was established. To find otherwise, is a reviewable irregularity that led to an unreasonable outcome.

The decision on sanction

[30] Given the employee's gross dishonesty, I agree that the arbitrator's finding that dismissal was nevertheless not an appropriate sanction is one that fell outside of a range of reasonable outcomes. As Zondo AJP [as he then was] held in *Toyota South Africa Motors (Pty) Ltd v Radebe*:[6]

> "After carefully considering the commissioner's reasoning and reading his award over and over again, I still have no idea what the commissioner meant by saying dismissal was not the only sanction available to the appellant. The closest I can think of is that he meant that the misconduct committed by the first respondent was not sufficiently serious to justify his dismissal. If that is what he meant, then, in my view, it would contradict his earlier finding that this was a case of gross dishonesty. As the commissioner had described the first respondent's dishonesty as gross, he must have found the misconduct extremely serious."

[5] [2012] 3 BLLR 285 (LAC).

[6] [2000] 3 BLLR 243 (LAC) par 14.

Conclusion

[31] The arbitrator committed an error of law. She misconceived the enquiry before her and she failed to take material evidence into account. All of these factors led to an unreasonable decision on the fairness of the employee's dismissal. The award must be reviewed and set aside.

[32] There is no reason to remit the matter for a fresh hearing. All of the evidence was before the Court. The employee committed serious misconduct amounting to gross dishonesty. His long service does not diminish the gravity of the misconduct. The sanction of dismissal was fair in those circumstances. This Court is in a position to substitute the finding of the arbitrator.

Costs

[33] There is an ongoing relationship between the City and IMATU, acting on behalf of its member. And he had an award in his favour. In law and fairness, a costs award is not appropriate.

Order

[34] I therefore make the following order:

34.1 The arbitration award of the second respondent, Ursula Bulbring, under SALGBC case number WCM 021303 is reviewed and set aside.

34.2 It is replaced with an award that the dismissal of Mr Frank Herwels was fair.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Lourens Ackermann Instructed by Bradley Conradie Halton Cheadle.
THIRD RESPONDENT:	Nelia Geldenhuys (trade union official) of IMATU.