IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR221/22

In the matter between:

MONAPOLE DANIEL KAWENG	**Applicant**
And	
SOUTH AFRICAN NATIONAL BIODIVERSITY INSTITUTE	**First Respondent**
MINETTE VAN DER MERWE N.O.	**Second Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Third Respondent**

Heard: 4 September 2024

Delivered: 18 October 2024

(This judgment was handed down electronically by circulation to the parties' representatives by email. The date of hand-down is deemed to be on 18 October 2024.)

JUDGMENT

MYBURGH, AJ

Introduction

[1] The applicant was employed by the first respondent (the employer) at the Free State National Botanical Gardens ("the Botanical Gardens") as a specialist machine operator, and was also a shop steward. He was dismissed after having been found guilty of engaging in an unlawful money-lending scheme at work.

[2] In her award, the commissioner found the applicant's dismissal substantively and procedurally fair. The applicant now seeks to review that decision.

[3] The review application was launched seven days late, with the delay being bound up with the applicant having legal insurance. I am of the view that a proper case for the grant of condonation has been made out, and thus intend to grant condonation. I turn now to the review application.

Outline of the matter

[4] On 11 June 2019, the employer received a whistleblower report indicating that a "loan shark" was operating at the Botanical Gardens. The report did not implicate the applicant in person.

[5] The matter was investigated by Mazars,[1] who produced its forensic report on 17 September 2019. It found that, *inter alia*, Mr Zola (a senior artisan) was involved in loaning money to employees, at interest rates of 50%. The applicant was not implicated in the forensic report.

[6] Arising from the forensic report, the employer brought disciplinary charges against Mr Zola, who was ultimately dismissed. During the course of his disciplinary inquiry, Mr Zola indicated that the applicant was part of the scheme.

[1] Mazars Forensic Services (Pty) Ltd.

[7] This led to the applicant being charged and ultimately dismissed on 17 August 2021. The charge that he was found guilty of read:

> "It is alleged that on or about the year 2017 you participated in the unlawful money-lending scheme within the SANBI's premises for own benefit during official working hours.
>
> Your conduct is in violation of clause 5.1 of SANBI's disciplinary policy and procedure which says that an employee shall not commit any deed to the detriment of the SANBI or the discipline or efficiency of the SANBI, or allow such deed to be committed.
>
> Your conduct is in violation of clause 5.18 of the SANBI's disciplinary policy and procedure which says that an employee shall refrain from participating either individually or with other employees in any form of action or omission, which will have the effect of disrupting the operations of the SANBI."

[8] At the arbitration, the employer called a single witness, Mr Mutshinyalo (the director). His evidence traversed, *inter alia*, the whistleblower report, the Mazars' forensic report, Mr Zola's revelation, and the events of the applicant's disciplinary inquiry, at which he made certain admissions. Mr Mutshinyalo did not have personal knowledge of the applicant's misconduct.

[9] The applicant was the next to testify. The thrust of his defence was that he had been involved in a stokvel, and not an unlawful money-lending scheme.

<u>The commissioner's award and grounds of review</u>

[10] The applicant's case on review as advanced in his heads of argument, and in oral argument before me, is limited to the issue of guilt on two narrow grounds. Firstly, it is contended that the commissioner acted irregularly in relying on hearsay evidence in finding him guilty ("the hearsay ground of review"). Secondly, it is contended that the commissioner acted unreasonably in finding that he had engaged in an unlawful money-lending scheme, when he had (allegedly) simply engaged in a stokvel ("the stokvel ground of review").

[11] The relevant passages in the award dealing with guilt are these:

"30. The Applicant submitted that he did not break the rule. The Applicant initially maintained that he was involved in a stokvel, but under cross-examination he conceded that some people had borrowed money from the scheme he was involved in. He further conceded that interest was charged during 2017 on the borrowed money, but averred that he did not agree with the decision and as such terminated his membership. He conceded that money was borrowed from the scheme.

31. The Applicant's version that he was a member of a stokvel is wholly rejected. The definition of a stokvel in the South African context is '*a savings or investment society to which members regularly contribute an agreed amount and from which they receive lump sum payment. The definition of a stokvel does not include the borrowing of money to others*'. In instances where a stokvel is used as a money lending scheme, interest is charged on the loan. It is therefore clear that the Applicant's version that it was a stokvel and not a money lending scheme, is highly improbable and not plausible. The evidence supports the Respondent's version on a balance of probabilities, and it follows that the Applicant did break the rule, and that his conduct was intentional.

32. The Applicant disputed the Respondent's version that his conduct, which led to the disciplinary charges levelled against him, was detrimental to the Respondent. On this aspect, the legal implications of the Applicant's involvement in the money lending scheme has to be analyzed. The Department of Trade and Industry, on 11 May 2016, published a notice determining that the threshold for registering as a credit provider with the National Credit Regulator (NCR) is now R0, for all the applicable credit providers involved in lending money. Only a loan which does not include interest or a fee for late or deferred payment will be exempt as it would not fall under the definition of a 'credit agreement' in the NCA[2] and registration as a credit provider will not be required. It is therefore clear that, by its very definition, the Applicant was involved in an illegal money lending scheme.

33. The Respondent was unable to prove how the Applicant's conduct had been detrimental to its reputation, but as it is a public entity, it can be

[2] National Credit Act 34 of 2005.

> inferred that the conduct of the Applicant had to have some degree of reputational harm to the Respondent. The Respondent was able to show the detrimental effect the illegal money lending scheme had on the operations of the Respondent. It was the undisputed evidence of the Respondent that some of the members who did not honour their repayments were threatened by some of the members of the scheme. Although no evidence was led to prove that the Applicant himself had threatened the borrowers personally, it is accepted that the members of the illegal money lending scheme had, either collectively or individually, intimidated the borrowers who did not honour their repayments, and that the Applicant was one of the founding members of the scheme."

[12] Having found the applicant guilty, the commissioner went on to find that the sanction of dismissal was appropriate. In the process, she found, *inter alia*, these aggravating factors:

> "35. … It is accepted that he had left the scheme during December 2017, but he has failed to inform the Respondent that such activity was happening and that it had escalated to a full money lending scheme even after the 2018 memo was issued. … By the Applicant's own admission, he knew that a money lending scheme had to be registered with the [NCR], and that non-registration meant that the scheme was illegal."

Analysis of the applicant's grounds of review

[13] To begin with the hearsay ground of review, Mr Roux (who appeared for the applicant) advanced this argument: the employer did not offer any direct evidence of the applicant's participation in an illegal money-lending scheme, with both the whistleblowing report and the Mazars' forensic report not having implicated him; the "only evidence" that served to convict the applicant was the evidence that Mr Zola had implicated the applicant at his disciplinary inquiry; but this was inadmissible hearsay, and ought to have been disallowed by the commissioner.

[14] There is no merit in this. Although the commissioner makes reference to Mr Zola's revelation in her summary of Mr Mutshinyalo's evidence, she took no

account of it in finding that the applicant was guilty. And, as appears from the quotation of the award above, the applicant's culpability was, in effect, decided on his own version by the commissioner. That version included an admission by the applicant that he was a member of a stokvel together with Mr Zola.

[15] Turning to the stokvel ground of review, Mr Roux submitted that: in terms of section 8(2)(c) of the NCA, "a transaction between a stokvel and a member of the stokvel in accordance with the rules of that stokvel", does not constitute a credit agreement with the result that the NCA does not apply thereto; because of this exception, the stokvel was not operating illegally; once he became aware that money was being lent out and interest charged, the applicant resigned from the scheme; and the commissioner failed to consider the aforesaid statutory exception in finding the applicant guilty, resulting in an unreasonable outcome.

[16] In assessing this ground of review, it is necessary to reflect on the applicant's evidence. He testified that: he had formed a stokvel together with Mr Zola and another member – "we just put money together so that at the end of the year we can share [it] amongst us … there was no … lending of money … it was only for us"; in 2017, they were joined by a women who "changed the laws of this stokvel" – things became "very formal" and they started loaning money to, *inter alia*, employees and charging interest; he knew that a money-lending scheme had to be registered with the NCR and that it was not; "we were not registered … that is a reason that made me quit the stokvel, because [of] that money lending"; and when he tried to quit, "they said no, you are already [in] so you will only quit in December when we share the money".

[17] As appears from the applicant's evidence, at best for him, the financial scheme changed from a stokvel into a formal money-lending scheme in terms of which employees (and others) were granted loans and charged interest, with it being the applicant's own case that the change required registration which was not undertaken.[3] Despite this, the applicant continued to participate during 2017 and

[3] The Mazars' forensic report makes reference to these sections of the NCA: section 89(2)(d) ("a credit agreement is unlawful if … at the time the agreement was made, the credit provider was unregistered and this Act requires that credit provider to be registered"); and section 100(1)(c) ("a

(presumably) shared in the profits in December. Seen thus, section 8(2)(c) of the NCA, which formed the basis of the stokvel ground of review, finds no application. During 2017, the stokvel changed into a money-lending scheme with the financial transactions not being between "a stokvel and a member of the stokvel" (the language of the section), but rather with third party borrowers, i.e. employees, etc.

[18] In the circumstances, I am not persuaded that section 8(2)(c) advances the applicant's case or has any bearing on the commissioner's finding that the money-lending scheme was unlawful (as per the charge brought against the applicant), let alone serves to render it unreasonable. This disposes of the stokvel ground of review – it being the second and last ground of review advanced by Mr Roux.

[19] This notwithstanding, I should mention that even if the money-lending scheme was somehow not in breach of the NCA, the commissioner's decision to uphold the applicant's dismissal would, nevertheless, have been reasonable. For the duration of 2017, the applicant participated in the money-lending scheme at work – with fellow employees apparently having been charged exorbitant interest rates – and there was evidence of it having caused disruptions to the workplace (even if this was caused by the applicant's partner, Mr Zola). Although it might be considered harsh, a decision to the effect that this constituted serious misconduct warranting dismissal, nevertheless, falls within a range of reasonableness,[4] and is thus not reviewable.

Order

[20] Accordingly, I make the following order:

1. The applicant is granted condonation for the late launching of the review application;
2. The review application is dismissed;
3. There is no order as to costs.

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credit provider must not charge … an interest charge under a credit agreement exceeding the amount that may be charged consistent with this Act").

[4] See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) at para 110.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv L Roux instructed by Symington & De Kok Attorneys / Adriaan Janse van Rensburg Inc

For the first respondent: Mr S Khanya of Ismail & Dahya Attorneys