REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2121/10

In the matter between:

MTN SERVICE PROVIDER (PTY) LTD	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER THOMAS NTIMBANA N.O	**Second Respondent**
GILBERT MASILO MAMABOLO	**Third Respondent**

Heard: **1 June 2012**

Delivered: **27June 2012**

Summary: Review – arbitrator held employee's dismissal for non-disclosure to labour broker who contracted him to employer held to be substantively unfair – decision not unreasonable given that there was disclosure to employer – application dismissed

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JUDGMENT

BHOOLA J

Introduction

1] This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act") for review of the award of the second respondent ("the commissioner").

Background facts

2] The third respondent ("the employee") was employed by the applicant from August 2004 and dismissed on 27 November 2009. From about 1999 he had worked at the applicant as an employee contracted through a labour broker (Team Dynamics), but he was dismissed by Team Dynamics in 2001 following charges relating to unauthorised disclosure of a customer's cell phone number and personal details. In 2002 another labour broker, (Tlhalefang Placements), again placed him with the applicant at one of its call centres. This second placement was made without Tlhalefang being informed of the dismissal from Team Dynamics ("the previous dismissal").

3] In 2004 the employee applied for a permanent position with the applicant, was interviewed and appointed as Customer Service Representative. In November 2009 he was dismissed by the applicant following charges of misconduct, which were as follows :

1. *Failure to disclose material facts of dismissal when he applied for placement with Tlhalefang Placements Agency;*

2. *Gross misrepresentation by the falsification of his curriculum vitae when he applied for placement with the employer through Tlhalefang Placements Agency in that he stated Leko Thage was the staff member of Team Dynamics Agency whilst he was not;*

3. *Gross misrepresentation in that the employee omitted material information of having been employed by Team Dynamics Agency and thereby making it impossible for Tlhalefang Placements Agency to*

conduct character check with them;

4. *Abuse of employer benefits in that the employee undertook a cancelled trip from Nelspruit to Johannesburg whilst he was informed not to undertake the journey.*

The arbitration award

4] The evidence of the applicant's witnesses, Chris Baloyi, a forensic investigator, was that he had interviewed the employee on two occasions as part of his investigation. In the second interview he admitted that he had not disclosed his previous dismissal on the application form (which specifically asked whether he had ever been dismissed) as it would have jeopardised his employment prospects. He also failed to disclose his dismissal when he joined the applicant in 2004. Baloyi said he held a position of trust as chairperson of the employment equity forum; that misrepresentation was a dismissible offence in terms of the applicant's disciplinary code and that he had secured employment through fraudulent means. Sakie Mashego, the employee relations senior manager, confirmed that the employee had said at the disciplinary enquiry that he had disclosed the previous dismissal to his superiors (including Nkululeko Ntage) when he was interviewed for employment with the applicant in 2004. Evidence for the employee was given by Ntage and Pat Nkosi. Ntage (employed by the applicant as area sales manager since 2000 and who was a member of the interview panel), testified that he knew of the employee's previous dismissal and that he had also informed the interview panel of this during his interview, in the context of a discussion about whether he had any regrets. All three members of the panel were aware of his previous dismissal but nevertheless recommended him for permanent employment with the applicant. Nkosi testified that the applicant was engaged in a "witch-hunt" against the employee because of his role in the employment equity forum. He confirmed that the applicant knew of his previous dismissal and had condoned his failure to disclose this for five years.

5] The employee's evidence was that he made the disclosure to Ntage and the rest of the interview panel but that they were in any event aware of the issue. He was not given an MTN security check form to complete when he was appointed and he believed the dismissal to be a plot against him for his role in the employment equity forum.

6] The commissioner, in his analysis, records the common cause fact that the previous dismissal was not disclosed to Tlhalefang, and states that the critical question to be decided is whether the applicant had *locus standi* to dismiss, and secondly whether a disclosure was made to the interview panel. In regard to the first question he found there was no legal basis for the applicant to institute charges against the employee for the following reasons:

a) The misconduct or omission was never committed against the applicant but to the Tlhalefang employment agency.

b) The completed application form did not even come from the third respondent.

c) The third respondent was not even aware that he was going to be placed at the applicant.

d) The question to be asked is what would have happened if this non-disclosure was picked up by the applicant prior to August 2004. The applicant would not have instituted disciplinary proceedings since it was not the employer at the time, but alerted Tlhalefang who had an obligation to discipline its employees. This would have been consistent with the applicant's decision to remove the third respondent from their premises after he disclosed confidential numbers to a client to allow Team Dynamic to take the necessary disciplinary action.

7] The rest of the award deals with the second issue and on this aspect the commissioner notes that the applicant's argument was based on the application form completed by the applicant (which specifically requires any dismissals from previous employment to be disclosed), but that this was remedied by Ntage's confirmation of his disclosure at the interview.

This was moreover supported by the disciplinary enquiry record. In addition to his disclosure all three panellists were also aware of his previous dismissal because they worked with him. He therefore finds that the "decision to recommend the applicant was made openly, consciously and informed by this fundamental disclosure". The commissioner concludes that the employee therefore did not commit a misrepresentation, verbally or in writing, when he was considered for a permanent position with the applicant in 2004. Even though he had conceded during the investigation by Baloyi that he failed to disclose to Tlhalefang, he had disclosed to the applicant when interviewed for a permanent position. On the procedural aspect he finds that the employee conceded that he was satisfied with the manner in which the disciplinary hearing was conducted and the fact that he did not agree with its outcome did not *per se* constitute a procedural defect.

8] The commissioner concluded as follows: *"[o]n this basis, the respondent failed to discharge the onus as required by section 192(2) of the LRA 66 of 1995. I therefore find the dismissal of the applicant by the respondent to be procedurally fair but substantively unfair. Reference can be made in the case of Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578, where it was held that the court should interfere with the sanction imposed by the employer if the decision to dismiss appears to have been made in bad faith or for ulterior reasons or not directly related to the misconduct in question"*. On this basis the applicant was ordered to reinstate the third respondent with immediate effect and to pay him five months "arrear wages".

Grounds of review

9] The applicant relies both on the outcome and the process of decision-making. Mr Maunatlala, for the applicant, made the following submissions in this regard :

9.1 The findings of the commissioner are not reasonable in light of the evidence presented to him;

9.2 The commissioner took account of irrelevant evidence and ignored relevant evidence, and in so doing misunderstood the case before him;

9.3 The commissioner ruled that the applicant had no legal basis to institute charges against the employee, and in making this ruling misdirected himself and committed a gross irregularity.

10] In amplification of these grounds Mr Maunatlala submitted that a commissioner's duty is to determine whether a dismissal is fair or not, and he is not given powers to determine afresh what he or she would do. Mr Maunatlala submitted that the employee had conceded that he intentionally withheld information about his previous dismissal because it would have affected his employment prospects. This amounts to a concession that he was dishonest and this was essentially the charge for which he was dismissed. His defence that he was not dishonest in relation to the applicant but to the placement agency is not sustainable. Accordingly the commissioner's finding that the non-disclosure did not affect the applicant is not a decision that could have been made by a reasonable arbitrator. In making this ruling the commissioner failed to apply his mind to evidence led by the applicant to the effect that although the employee was technically employed by Tlhalefang, when he was placed at the applicant he became a part of its workforce and therefore was subjected to less stringent scrutiny when he applied for a permanent appointment. This was the clear import of Baloyi's evidence. He testified that when people who are already on the system are appointed, the assumption is that the checks and balances have been done by the agency and the applicant is influenced by documents submitted to the agency. The interview is simply a mere formality. This evidence, Mr Maunatlala submitted, was not challenged and the commissioner failed to appreciate that by making a misrepresentation to the agency, the third respondent had effectively misrepresented himself to the applicant, as a result of which he was shortlisted and even considered for employment. Mr Maunatlala submitted therefore that given the employee's concession that he was dishonest it is unreasonable for the applicant to be compelled

to continue working with him. A reasonable commissioner would not have ignored the fact that before the third respondent was interviewed by the applicant, he would have been recommended by the agency and the recommendation of the agency was critical to his employment : see *Hoch v Mustek Electronics (Pty) Ltd*[1] where an employee's dismissal based on misrepresentation of her qualifications was upheld.

11] The commissioner further committed a gross irregularity by suggesting that the dismissal was motivated by bad faith and that there was an ulterior motive for the dismissal not related to the misconduct in question.

12] The commissioner failed to have regard to the fact that the trust relationship between the parties had broken down, and that is unreasonable to expect the applicant to continue working with someone who on his own version admits that he is not trustworthy. In *Miyambo v CCMA & others* [2] the court held that business risk is predominantly based on trustworthiness of company employees and that the accumulation of individual breaches of trust has economic repercussions.

Analysis

13] Mr Boshoff submitted on behalf of the employee that it is common cause that he did not make the disclosure to the placement agency, but this was remedied by his disclosure to the interview panel. Ntage's evidence moreover was that the panel was happy to recommend him for appointment despite this disclosure, and he then continued to work for the applicant for five years without problems. It is common cause that the employee conceded from the point of the investigation to date that he failed to disclose to Tlhalefang but at no stage did he misrepresent or fail to disclose this to the applicant. Therefore, the commissioner did not commit misconduct in that he properly understood the case before him and applied his mind to all relevant evidence. There is no nexus between the evidence that third respondent made a misrepresentation verbally or in writing to Tlhalefang, and his subsequent employment by the applicant.

1 (2002) 21 *ILJ* 365.

2 [2010] 10 BLLR 1017 (LAC.

The applicant's continued reliance on misrepresentation to a former employer is therefore irrelevant and gives the applicant no right to dismiss in the circumstances it cannot be said that the commissioner committed a material error in finding that the failure to disclose to Tlhalefang did not constitute misconduct.

14] Mr Boshoff further submitted that the applicant's reliance on numerous authorities was misplaced, more particularly *Hoch (supra) s*upports employee's submission that there was no misconduct committed in relation to the applicant. *Hoch (supra)* is also distinguishable in that there was direct evidence that the relationship of trust had broken down by the employee's false claim in an interview that she had formal qualifications, and her persistence with such a claim thereafter. The applicant's persistent reliance therefore on misrepresentation to the applicant has no legal basis. There was no evidence that the permanent appointment to the applicant was based on a recommendation from Tlhalefang, or that such recommendation was based on material non-disclosure by the third respondent. The commissioner was moreover justified in the assumption that there must have been an ulterior motive for his dismissal five years after he had worked for the applicant, as the evidence was that it was linked to his role in employment equity issues at the applicant. In this regard the third respondent's case is supported by the authority relied upon by the applicant, *Miyambo (supra)*, in that it cannot be said that the employee is no longer trustworthy as this was not proven. The commissioner therefore applied his mind correctly to the facts and the legal principles and cannot be said to have made a decision that could not be made by a reasonable decision maker on the *Sidumo*[3] test or that he committed a gross irregularity in determining the issues or construing all the evidence or otherwise.

15] In my view none of the grounds for review of the award can be sustained. The test, it must be borne in mind, is as the applicant correctly pointed out stated by Van Niekerk J in *Southern Sun Hotel Interest (Pty) Ltd v CCMA*

3 *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

and others [4] that the award must "fall within a band of reasonableness". It cannot in my view be said that the outcome is so unreasonable that it could not fall within a band of reasonable decisions. It is trite that a reasonable decision maker must consider all the facts and evidence placed before him and make a decision based on a balance of probabilities. There was no evidence led that the non-disclosure to the agency had influenced the employee's permanent appointment with the applicant to any extent. More importantly, the transgression was general knowledge among the interview panel which still recommended him for appointment. There was no evidence that the panel was simply going through the motions of a formal interview as the applicant seemed to suggest.

16] The applicant also relied on *Custance v SA Local Government Bargaining Council & Others* [5] as authority for the submission that off duty misconduct can constitute a valid reason for dismissal. The only relevance of this citation appears to relate to a reference (in para [29]) of the *Crown Chickens* decision[6] in which the Court found that calling a person a 'kaffir' was a dismissible offence and whether the word is uttered off duty was immaterial. The present matter is distinguishable in that although the dishonest conduct (if the non-disclosure in fact constitutes dishonesty) took place in relation to another employer it cannot be said that the commissioner was unreasonable in finding it irrelevant to his current employer in these circumstances. The facts in *Miyambo (supra)* are also distinguishable as there was direct evidence of dishonesty in relation to the employer and the Labour Appeal Court confirmed the finding of the Labour Court that the commissioner's finding that the employee was not guilty was irreconcilable with his factual findings that he knew he could not remove the scrap-metal from the premises without permission.

Order

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4 [2009] 11 BLLR 1128 (LC)

5 2003 (24) *ILJ* 1387 (LC)

6 Crown Chickens (Pty) ltd t/a Rocklands Poultry v Kapp & others (2002) 23 *ILJ* 863 (LAC).

17] Therefore, I make the following order :

The application is dismissed with costs.

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Bhoola J

Judge of the Labour Court of South Africa

APPLICANT:	M I Maunatlala Instructed by Mashiane, Moodley & Monama Inc., Sandton
THIRD RESPONDENT:	J Boshoff Instructed by Du Toit-Smuts and Mathews Phosa, Nelspruit