IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Reportable/Not Reportable

Case no: CA 2/2015

In the matter between:

G4S SECURE SOLUTIONS (SA) (PTY) LTD **Appellant**

and

COMMISSIONER ANTHONY RUGGIERO N.O. **First Respondent**

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION **Second Respondent**

THANDABANTU NTLOKO **Third Respondent**

Heard: **6 September 2016**

Delivered: **25 November 2016**

Summary: Third respondent dismissed after 14 years service as security guard after it was discovered he failed to disclose his prior criminal convictions for rape and assault when applying for employment in 1996. At arbitration his dismissal was found substantively unfair and retrospective reinstatement was awarded. On review Labour Court found that while third respondent had committed misconduct, dismissal was unfair and retrospective reinstatement ordered. On appeal the third respondent's dismissal was found substantively fair. Given the serious nature of the misconduct committed, the sanction of dismissal was fair. Appeal upheld with no order as to costs.

Coram: Waglay JP, Landman JA *et* Savage AJA

JUDGMENT

SAVAGE AJA:

Introduction

[1] This is an appeal against the judgment and orders of the Labour Court (Lagrange J) in terms of which the third respondent, Mr Thandabantu Ntloko, was found to have committed misconduct in failing to disclose his criminal convictions in an application for employment in 1996 but his dismissal was found to be unfair and he was reinstated retrospectively into his employment with the appellant, G4S Secure Solutions (SA) (Pty) Ltd. Leave to appeal was granted in part by the Court *a quo* and in part by this Court on petition.

[2] At the outset of the hearing, and with no opposition raised, the appeal was reinstated and the limited delay in filing the appeal record was condoned. This followed the appeal having been deemed to have been withdrawn due to the record not having been filed within the time periods provided in rules 5(17) and 5(19) of the Labour Appeal Court Rules, with no extension of the period within which to do so having been granted by the Judge President. The explanation for the delay was that inaccurate and incorrect information was included in the appeal record which required correction following which an amended appeal record was filed.

Factual background

[3] The relevant facts in this matter are common cause. When the third respondent applied for employment with the appellant in 1996, he was asked in a written application for employment: "*Have you ever been convicted of a criminal offence?*" He indicated that he had not and the appellant employed him as a security guard.

[4] Fourteen years later, on 30 July 2010, the third respondent applied for promotion to the position of controller with the appellant. A criminal record check was undertaken. It indicated that he had two previous criminal

convictions: one for rape in 1982 for which he, being 17 years old at the time, received six lashes; and the second for assault with intent to do grievous bodily harm in 1991 for which he paid a fine of R200.

[5] On 1 November 2010, the third respondent was notified to attend a disciplinary hearing to answer to an allegation of –

> 'misrepresentation and/or dishonesty concerning an application for employment and/or breach of PSIRA Regulations code of conduct'.

[6] The employer's disciplinary code states that:

> 'Dishonesty Concerning An Application For Employment – This offence occurs where information provided in support of an application for employment is subsequently found to be false, and such information has a material effect on the employer/employee trust relationship.'

[7] Section 23(1)(d) of the Private Security Industry Regulation Act 56 of 2001 (PSIRA Act), the operation of which post-dated the third respondent's employment with the appellant, provides that a person may be registered as a security service provider provided he or she "*was not found guilty of an offence specified in the Schedule within a period of 10 years immediately before the submission of the application to the Authority*".

[8] At the disciplinary hearing, the third respondent's defence was that he did not know that he had been convicted of a criminal offence as he had not gone to jail. Concerning his rape conviction he stated that:

> '*I was 17 and did not understand the law. It was not rape. She was my girlfriend. She agreed to it because she was not where she was supposed to be'*.

[9] He stated further that the assault case related to an incident in which –

> '(a)*nother man who came from jail to visit a lady in my mother's house. When he grabbed this lady I defended her, and assaulted him. He laid a charge against me. I had to go to court. My brother got a lawyer to defend me. I was given a fine and my brother paid the fine*.'

[10] After he returned to school in 1991 to complete grade 12, the third respondent was trained and registered as a security officer and in 1996 was employed as such by appellant. When he undertook National Key Point training in 2008 he was not advised that he had a criminal record.

[11] At the conclusion of the disciplinary hearing, the third respondent was found guilty of misconduct and was in November 2010 dismissed from his employment with the appellant.

Arbitration award

[12] Aggrieved with his dismissal, the third respondent referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration, initially seeking reinstatement but subsequently, in his referral to arbitration, seeking compensation. At the arbitration hearing, the appellant accepted that the third respondent had a clean disciplinary record. It relied on the third respondent's obligation, as reflected by the rule contained in its disciplinary code, to disclose truthfully his criminal record to his employer. In addition, it placed emphasis on s23(1)(d) of the PSIRA Act.

[13] The third respondent's evidence was that he was not aware that he had a criminal record and understood that all criminal records before 1994 had been scrapped. Since the PSIRA Act only came into operation in November 2001, he contended that s23(1)(d) did not apply to him as he had been convicted of an offence contained in the schedule to the Act more than 10 years before it came into operation.

[14] The commissioner was "*not convinced that the* [third respondent] *contravened the rule*" or that he had misrepresented himself in his 1996 application for employment given that he was not aware that he had a criminal record at the time and found it "*plausible*" that he had not wilfully misrepresented the facts. The third respondent was found not to have breached the PSIRA code of conduct in that his convictions fell outside of the 10-year period prescribed by s23 (d) of the PSIRA Act.

[15] Given his 14 years' good service, his clean disciplinary record and his national key point training, the commissioner found the appellant's application for the third respondent's deregistration by PSIRA "*caustic*" on the basis that it would have been more constructive for the appellant to have assisted the third respondent in having his criminal record expunged. The third respondent's dismissal was accordingly found to be substantively unfair. As to the issue of relief, the commissioner stated:

> '*I find no reason why the Applicant should not be reinstated in this matter. In terms of compensation I am of the view that retrospective compensation from the date of dismissal (14 November 2010) up to the arbitration hearing on 8 March 2011 would not be just and equitable under the circumstances. I cannot hold the Respondent accountable for the matter taking almost three and a half months to be referred by the Applicant and heard at arbitration. I find that two months compensation would be just and equitable*.'

Judgment of Labour Court

[16] The appellant sought the review of the arbitration award by the Labour Court taking issue with the arbitration award on the basis that the decision reached was not one that a reasonable commissioner could have made on the material before him. The Labour Court found it "*difficult to understand how the arbitrator could reasonably have concluded that* [the third respondent] *was unaware of the status of his criminal record and could have denied having any criminal conviction*". The Court found that the third respondent had committed misconduct in failing to disclose his criminal convictions and that the commissioner's finding was not reasonably justified on the evidence. The Court agreed with the commissioner that the third respondent had not acted in breach of the PSIRA Act in that the last conviction predated the 10-year period prior to the commencement of the Act.

[17] Turning to sanction, the Labour Court found that the apparent breach of the PSIRA Act had been the appellant's primary concern. The Court had regard to the third respondent's clean disciplinary record, good work history and the fact that the "*trust issues arising from the misrepresentation do not appear to have been* [the appellant's] *principal concern despite the fact that* [the third

respondent] *was guilty of dishonesty*". It found that it was reasonable to conclude that the appellant would not have dismissed the third respondent had it believed his employment would not be contrary to the PSIRA Act. The Court noted that had the appellant's witnesses testified that in light of the misrepresentation, the third respondent would have been unable to trust him, irrespective of whether the PSIRA Act was breached, a different conclusion might have been warranted. In the result, the Court *a quo* reinstated the third respondent into his employment with the appellant retrospective to 1 August 2011.

Issues in appeal

[18] In issue in this appeal is whether the Labour Court erred in finding that –

18.1 the dismissal of the third respondent was not for a fair reason; and

18.2 reinstatement was the appropriate remedy.

Discussion

[19] The Labour Court cannot be faulted for its finding that it is "*difficult to understand how the arbitrator could reasonably have concluded that* [the third respondent] *… could have denied having any criminal conviction*" when as much was apparent from the evidence before the commissioner. On the third respondent's version at the disciplinary hearing – that he did not know he had been convicted as he did not go to jail – he was aware that he had committed two criminal offences for which he had been punished. On his version at arbitration – that he did not know he had a criminal record as he understood all records before 1994 had been scrapped – he was aware that he had been convicted of two criminal offences for which he had been punished and in respect of which he understood that he may have had a criminal record.

[20] It followed that when the third respondent was asked "*Have you ever been convicted of a criminal offence?*" the evidence clearly indicated that he knew that he had. It did not matter whether he knew that these offences were

recorded in his criminal record. What the evidence showed was that he chose not to disclose the offences when he was expressly asked to do so.

[21] With it an offence in the appellant's disciplinary code to provide false information in support of an application for employment, the commissioner's finding that he was "*not convinced that the* [third respondent] *contravened the rule*" or that he had misrepresented himself, is not one borne out by the evidence. It followed that the finding of the commissioner that the dismissal was substantively unfair on the basis that no rule had been breached was a decision that a reasonable decision-maker could not reach on the material before him.[1]

[22] Having determined that the commissioner's decision fell to be reviewed and set aside, the Labour Court, having regard to the evidence on record found that the third respondent had committed misconduct insofar as he had been dishonest in his application for employment. In addition, the Court correctly found that the appellant's reliance on the PSIRA Act was misplaced given that the third respondent's convictions fell outside of the 10-year period prescribed by the Act and given that the Act was not in existence when the appellant employed him.

[23] With the third respondent having been found to have committed the misconduct alleged, it fell to the Labour Court to determine whether his dismissal was fair. In doing so, the Labour Relations Act 66 of 1995 (LRA) does not compel deference to the decision of the employer but requires rather a consideration of "*all relevant circumstances*". [2]

[24] The Labour Court's finding that the third respondent's dismissal was unfair was predicated on what it considered to have been the primary concern of the appellant, namely that the provisions of the PSIRA Act had been breached. The Court noted that the appellant did not contend that any trust issues had arisen from the third respondent's misconduct. This led the Court to find that it was reasonable to conclude that the third respondent would not have been

[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 110 (*Sidumo*).
[2] *Sidumo (supra)* at para 79.

dismissed but for the appellant's view that employing him was contrary to the provisions of the PSIRA Act.

[25] In determining the fairness of a dismissal, each case is to be judged on its own merits. Item 3(4) of the Code of Good Practice recognises that dismissal for a first offence is reserved for cases in which the misconduct is serious and of such gravity that it makes continued employment intolerable, with instances of such misconduct stated to include gross dishonesty. When deciding whether dismissal is appropriate, the Code requires consideration, in addition to the gravity of the misconduct, of personal circumstances including length of service and the employee's previous disciplinary record, the nature of the job and the circumstances of the infringement itself. [3] Other relevant considerations include the presence or absence of dishonesty and/or loss and whether remorse is shown. [4]

[26] The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer.[5] The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely.[6] Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is "*a sensible operational response to risk management"*.[7] Obtaining employment on false pretences whether by misrepresenting qualifications, skills, experience or prior work history has been found to justify dismissal,[8] with it stated in *Boss Logistics v Phopi and others*[9] that if this were not so, a sanction short of dismissal would only serve to reward dishonesty.

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[3] Item 3(5).
[4] *Gcwensha v CCMA and Others* [2006] 3 BLLR 234 (LAC) at para 36; *Irvin & Johnson* (1999) 20 ILJ 2302 (LAC) at para 29.
[5] *Sappi Novoboard (Pty) Ltd v Bolleurs* (1998) 19 ILJ 784 (LAC) at para 7; *CSIR v Fijen* [1996] 6 BLLR 685 (AD) 691; *Murray v Minister of Defence* [2008] 3 All SA 66 (SCA); [2008] 6 BLLR 513 (SCA); 2009 (3) SA 130 (SCA); 2008 (11) BCLR 1175 (SCA); (2008) 29 ILJ 1369 (SCA) at para 6.
[6] *Miyambo v CCMA and Others* [2010] 10 BLLR 1017 (LAC); (2010) 31 ILJ 2031 (LAC) at para 16*; Toyota SA (Pty) Ltd v Radebe supra;* and *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* [2008] 3 BLLR 241 (LC) at para 42.
[7] *De Beers Consolidated Mines Ltd v CCMA and Others* [2000] 9 BLLR 995 (LAC) at para 22.
[8] *Auret v Eskom Pension & Provident Fund* (1995) 16 ILJ 462 (LC); *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 ILJ 365 (LC); *Boss Logistics v Phopi and Others* [2010] 5 BLLR 525 (LC).
[9] [2010] 5 BLLR 525 (LC).

[27] A conviction for rape and assault is antithetical to employment in the position of a security guard given the nature of that position. The fact that the PSIRA Act bars the employment of a person in the security industry until 10 years has elapsed from the date of a criminal conviction illustrates the seriousness with which criminal infractions are, for obvious reason, viewed in the industry. An employer is entitled to full disclosure of all relevant information when a decision is being made to employ a person as a security guard given the trust implicit in the nature of that position; and where an express question is asked of a potential employee, an employer is entitled to expect an honest answer in response.

[28] It is so that the third respondent's years of service and clean disciplinary record provided mitigation and, as stated in *Edcon Ltd v Pillemer NO and Others,*[10] were "*an important consideration in determining the appropriateness of…dismissal*".[11] However, as was stated by this Court in *Toyota SA Motors (Pty) Ltd v Radebe and Others:*[12]

> '*…Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty*…'[13]

[29] It is so that there existed no risk of repetition by the third respondent of the offence in its precise form and that the damage suffered was limited to his employment in circumstances in which the appellant may otherwise not have employed him. However, the fact remained that the third respondent was employed on false pretences in circumstances in which he had deliberately concealed the true state of affairs from the appellant. His conduct was dishonest and constituted a serious breach of the appellant's disciplinary code. When confronted with evidence of his misconduct, the third respondent

[10] [2010] 1 BLLR 1 (SCA).
[11] At para 22.
[12] [2000] 3 BLLR 243 (LAC).
[13] At para 15.

did not express any remorse but blamed his dishonesty first on his lack of knowledge that his offences amounted to convictions and then later on his belief that after 1994 his criminal record no longer existed.

[30] Having regard to all of these relevant factors, and in spite of the absence of direct evidence showing the breakdown in the trust relationship and the appellant's misplaced reliance on the provisions of PSIRA, I am satisfied that the sanction of dismissal imposed by the appellant on the third respondent was fair. The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself negate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message.

[31] In spite of the LRA's emphasis on progressive discipline, given the nature of the misconduct committed and the absence of any remorse shown and having regard to considerations of fairness, the appellant was entitled to cancel the employment contract and dismiss the third respondent. It is, in any event, relevant to note that the third respondent in the referral of his dispute to arbitration sought compensation and not reinstatement as a remedy for unfair dismissal. Having regard to the real dispute between the parties[14] and the provisions of s193(2),[15] the imposition of a sanction short of dismissal was therefore unwarranted.

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[14] *CUSA v Tao Ying Metal Industries and Others* [2009] 1 BLLR 1 (CC) at para 65.

[15] Section 193(2) provides that '(t)he Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

(a) the employee does not wish to be reinstated or re-employed;
(b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
(c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or

[32] It follows that the appeal must succeed. The orders of the Labour Court are set aside and replaced with an order that the dismissal of the third respondent was fair. An order of costs would be neither just nor fair.

Order

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

1. The appeal is upheld with no order as to costs.

2. The order of the Court *a quo* is set aside and replaced with the following order:

'(1) The arbitration award issued by the first respondent is reviewed and set aside; and replaced with the order that the dismissal of the applicant was substantively fair.

(2) There is no order as to costs.'

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Savage AJA

Waglay JP and Landman JA agree.

APPEARANCES:

FOR THE APPELLANT:	Mr W Hutchison Instructed by Moodie Robertson Attorneys
FOR THIRD RESPONDENT:	In person

(d) the dismissal is unfair only because the employer did not follow a fair procedure."