

**THE LABOUR COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG**

Not Reportable

Case no: JR2330/16

In the matter between:

**DOCTOR LEBEYA**

Applicant

and

**COMMISSIONER LAZARUS MATLALA**

First Respondent

**CCMA**

Second Respondent

**LONMIN PLATINUM MINE**

Third Respondent

**Delivered: 23 August 2019**

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**JUDGMENT IN THE APPLICATION FOR LEAVE TO APPEAL**

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**NORTON AJ**

**Introduction**

- [1] On 14 June 2019 my judgment dismissing the Applicant's review application was handed down.
- [2] On 8 July 2019 the Applicant filed an application for leave to appeal.
- [3] On 10 July 2019 the Third Respondent gave notice of its intention to oppose the Applicant's application for leave to appeal.

[4] On 17 July 2019 the Applicant filed its submissions, and about a week later, so did the Third Respondent.

### **Applicant's stated grounds**

[5] The Applicant's stated grounds in the application for leave to appeal are largely conclusions of law. In the submissions the Applicant's grounds may be distilled to the following:

5.1. The sanction of dismissal was too harsh: Noting that he had an unblemished disciplinary record; he was not suspended after he was charged and continued with his normal duties, the Security Superintendent who alleged at the CCMA that the trust relationship had broken down appointed him to act for a week in his position.<sup>1</sup>

5.2. Not every dishonest act justifies dismissal<sup>2</sup>: By implication the Applicant's claim for travel, which was unjustified and contrary to Lonmin's policy, whilst dishonest did not justify dismissal.

5.3. The Commissioner erred when he found that the Applicant had not incurred expenses travelling to work, when he had filled up his colleague's vehicles with petrol.

### **Third Respondent's opposition**

[6] There was no good reason to suspend the employee after the commission of the offence as the evidence of misconduct (video footage and the travel slips) was with the supervisor.<sup>3</sup> There was a shortage of staff and hence the Applicant was asked to act as a Security Superintendent for a short period of time.

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<sup>1</sup> Paragraph 19

<sup>2</sup> Paragraph 27.1

<sup>3</sup> Paragraph 7

- [7] Three employees charged with the same offence were dismissed, and one resigned.<sup>4</sup>
- [8] The Applicant did not produce any proof that he had incurred expenses travelling to work. In any event, he had not submitted a claim for reimbursement for petrol, but rather for kilometers travelled.<sup>5</sup>

### **Evaluation**

- [9] When deciding whether to grant leave to appeal, the Applicant is duty bound to set out the facts and the law which demonstrate that another court would come to a different decision. In other words, the Applicant must show that the apparent misdirection is material, and that there are prospects of another court arriving at a different decision, or there are compelling reasons why the matter should be heard by a higher court.
- [10] The Applicant has failed to pass the test for a successful application for leave to appeal. It is unlikely that the another would come to a different determination on the matter because:
- 10.1. The Third Respondent regarded the presentation of fraudulent travel claims as serious and had previously dismissed employees for the same offence;
  - 10.2. The Applicant was aware of the risk that he took when he did so, but presumably reconciled himself to that risk, assuming that he would not get caught; and
  - 10.3. The Applicant never acknowledged any wrongdoing, and a lesser sanction, noting the progressive discipline principles, would not have been appropriate in this case.

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<sup>4</sup> Paragraph 33

<sup>5</sup> Paragraph 21

[11] Whilst it is true that the Labour Court has acknowledged that not every dishonest act by an employee justifies dismissal, the ultimate test for fairness, according to Grogan AJ in *Carter v Value Truck Rental* (2005) 36 ILJ 711 (SE) is “*whether the employer can reasonably be expected to continue to trust the employee...*”<sup>6</sup>

[12] I conclude that the Third Respondent cannot reasonably be expected to continue to trust the employee: when there has been no acknowledgement of wrongdoing; the employee has wrongly persisted with his view that he was justified to claim for kilometers travelled (when he filled up his colleagues’ vehicles but brought no slips to his employer for reimbursement); when he knew that such misconduct would lead to dismissal; and his employer (represented by Mr. Pieterse) said he no longer trusted him.

[13] In the circumstances I am of the view that the LAC is unlikely to arrive at a different decision.

[14] Accordingly, I make the following order:

**Order**

[15] The Application is dismissed.

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**NORTON AJ**

Acting Judge of the Labour Court of South Africa

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<sup>6</sup> Para 46