



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: DA11/2012

In the matter between:

DEPARTMENT OF HOME AFFAIRS

First Appellant

THE MINISTER OF HOME AFFAIRS

Second Appellant

and

SIMPHIWE EMANNUEL NDLOVU

First Respondent

PATRICK STILLWELL N.O.

Second Respondent

THE GENERAL PUBLIC SERVICES

SECTORAL BARGAINING COUNCIL

Third Respondent

Heard: 17 September 2013

Delivered: 27 March 2014

CORAM: Tlaetsi DJP, Dlodlo et Mokgoatlheng AJJA

JUDGMENT

DLODLO AJA

- [1] This appeal concerns the first respondent's dismissal by his erstwhile employer, the first appellant. He referred a dispute of unfair dismissal to the third respondent. Conciliation of the dispute was unsuccessful and was referred to arbitration by the second respondent, a commissioner acting under the auspices of the third respondent. The second respondent issued an award in which he found the dismissal of the first respondent to have been fair.

- [2] Aggrieved by the award of the second respondent, the first respondent instituted review proceedings in the labour court seeking an order reviewing and setting aside of the award. He succeeded to persuade the Court *a quo* and it found that his dismissal was substantively unfair and reinstatement with retrospective effect was ordered accordingly. I hasten to add that no costs order was made by the Court *a quo*. Leave to appeal having been sought and granted the matter is now before this Court.
- [3] There is also an opposed application by the appellant for condonation of its non-compliance with the time period prescribed for the filing of the record and the reinstatement of the Appeal. In the interest of orderliness and practicality and to avoid piecemeal adjudication of the dispute, both the condonation application and the Appeal are heard together.

Background facts

- [2] On or about 18 September 2006, the first respondent applied for the advertised post of Area Manager, Kwazulu-Natal North, Richards Bay. He submitted an application form together with his *Curriculum Vitae* ("the CV") wherein he recorded his tertiary qualifications as follows:

'1992-2001: Natal Technikon Durban.

Academic Qualification: Natal Diploma in Marketing

2002-2003: Durban Institute of Technology

Academic Qualification: Bachelor of Technology Marketing

2005-2006: University of Kwazulu-Natal (UKZN)

Currently completing the Master in Business Administration – MBA The Graduate of Business (GSB).'

- [3] The first respondent was interviewed for the position by the appellant's interviewing panel of four persons on 18 January 2007. The interview of the first respondent was successful and he was appointed with effect from 9 July

2007. It subsequently came to the attention of the appellants that the first respondent had not yet attained the Bachelor of Technology Marketing Degree at the time that he was appointed to the post. He in fact only qualified for that degree on 10 December 2008. The degree was only conferred on the first respondent on 17 April 2009.

- [4] In November 2007, the first respondent was charged with several acts of misconduct which included the following allegations:

[a] On or about 18 September 2006 you signed and declared the following on the Z83 form:

"I declare that all the information provided (including any attachments) is complete and correct to the best of my knowledge. I understand that any false information supplied could lead to my application being disqualified or my discharge if I am appointed.

The declaration deposed to is not true in that on your CV it is stated that you are in possession of Technology Marketing Degree whereas you had no such qualification.

[b] Your actions or omissions set out above, individually or collectively:

- (i) constitute gross dishonesty alternatively gross negligence;*
- (ii) constitute misrepresentation;*
- (iii) breach your obligations of good faith, trust and confidence owed to the Department;*
- (iv) breach Chapter 7 of the SMSA Handbook, specifically item 6 of Annexure A in that your conduct prejudiced the administration, discipline and efficiency of a department, office or institution of the State.'*

Discussion

- [5] It is prudent to precede this discussion with consideration of a condonation application. Managie Pillay, the senior State Attorney and the deponent to the

Founding Affidavit in the application for condonation makes it clear that this condonation application is brought in terms of Rule 5(17) of the Rules of this Court. The appellants were required in terms of Rule 5(8) of the Rules to deliver the record within 60 days calculated from the date of the order granting leave to appeal. That did not happen. On the contrary, the record was filed on 22 November 2012 approximately two and a half weeks outside the stipulated time period. The stipulated time period expired on 5 November 2012. According to Attorney Pillay, on 26 September 2012, the State Attorney appointed Appeal Document Services to prepare the appeal record in this matter. There was some exchange of correspondence regarding this matter between the State Attorney and one Ms Gardner of the Appeal Document Services wherein certain queries were raised and attended to. The correspondence exchanged is annexed to the Founding papers and it speaks for itself. The Appeal record was delivered by Ms Gardner only on 21 November 2012. I hasten to mention that I gather from the founding papers that the appellants had outsourced the preparation of the Appeal record to Appeal Document Services which is a body that specialises in the preparation of such record. This (as we are told) is an effort to ensure that the record complies with the requirements set out in the Rules of Court. It would appear that the appellants had no control over the time it took the Appeal Document Services to compile the record and have same delivered back to them.

- [6] Even though this application is opposed, my reading of the opposing papers has not revealed that the assertions by the appellants are disputed or even doubted. Importantly, in terms of Rule 5(17), the Appeal is deemed to have been withdrawn if the record is not delivered within 60 days and if the time period was not extended by consent between the parties prior to the *dies* expiring. Attorney Pillay did not request an extension of the time period for the filing of the record prior to it expiring. Importantly, on 16 November 2012, a letter addressed to the State Attorney from Forster Attorneys (acting on behalf of the first respondent) was received and it stated pertinently that *“For the record, our client would not have consented to any extension of time (had you*

requested same timeously)...” On the strength of the letter quoted above, it clearly would have served no purpose even if the appellants requested the first respondent (prior to the expiry time period) to consent to any conceivable extension. This application was thus necessitated by the above *scenario*. The appellants maintained that they have good prospects of success.

- [7] Essentially in applications for condonation, what is needed is an objective conspectus of all the facts. Thus the importance of the issues between the parties and the strong prospects of success may tend to compensate for a long delay. In *Brummer v Gorfil Brothers investments (Pty) Ltd and Others*,¹ the Court gave the following guiding exposition in matters such as the present one:

‘It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the administration of justice, prejudice and the reasonableness of the applicant’s explanation for the delay or defect.’

- [8] Of course it is well established that the factors in a condonation application “*are not individually decisive but are interrelated and must be weighed one against the other.*” See *Melanie v Santam Insurance Co Ltd* 1962 (4) SA 531. In *Jansen v General Public Service Sectoral Bargaining Council and Others*,² the Labour Court applying the decision in *PPWAWU and Others v AF Dreyer and Co (Pty) Ltd*¹ [1997] 9 BLLR 1141 (LAC) stated that:

‘Even if it is found that explanation does not constitute a reasonable explanation it will not necessarily be regarded as an absolute bar to condonation.’

¹ 2000 (5) BCLR 465 (CC) at para 3.

² Unreported decision case number JR1470/08 at para 5.

I am of the view that there are merits in the application for condonation. In any event, it is in the interests of justice that the issues between these litigants be ventilated in an open Court. Granting this application shall in no way prejudice the first respondent. On the contrary, this will enable him as well to have his day in Court. Even though the first respondent opposed this application, I am of the view that no order should be made that he pays costs associated solely with his opposition to the condonation application. It remains in the interest of the public as well that matters of this nature be fully ventilated so that a wrongdoer does not profit by his or her wrongdoing. The interest of justice warrants condonation being granted and that the merits are properly ventilated in an open Court.

- [9] Turning to the Appeal, clearly the enquiry made by the court *a quo* was somewhat narrowed in that it seemingly turned on whether the first respondent disclosed to the panellists that interviewed him that the degree Bachelor of Technology Marketing had not yet been conferred on him. Importantly, the first respondent faced the charges of misconduct as fully set out *supra*. It remains common cause that the information set out in the CV was not at all complete and accurate in that he did not hold that degree. Simply put, the first respondent had not even completed all the requirements for the Bachelor of Technology Marketing Degree nor had the degree been conferred upon him.
- [10] The first respondent's counsel sought to argue that the arbitrator ignored the evidence as to what transpired at the interview before the panellists recommended the appointment by the first appellant. I fail to fully comprehend this submission. The matter is made to appear complicated when it is in fact simple. The first respondent contended that he disclosed to the interviewing panellists that he had not completed the degree which is the subject matter of this matter. The fact is simply why did the first respondent misrepresent the factual situation in his CV. Notably in the same CV, the same first respondent did make it clear that he was not the holder of an MBA Degree. If he intended to be truthful with regards to the Bachelor of Technology Marketing Degree

why did he not describe that he had not completed same in the same manner as he did in respect of the MBA Degree? This is a rhetoric question that constantly comes to mind whenever I give consideration to this aspect of the matter. The fact is unlike his disclosure in respect of the MBA Degree, the first respondent failed to disclose in his CV that he was “currently completing (studying)” his Bachelor of Technology Marketing Degree.

- [11] Why did the first respondent list the Bachelor of Technology Marketing Degree in his CV? I would be slow in concluding that he did not intend this to have certain consequences. Clearly he listed this degree amongst his “Academic Qualifications” with the sole intention of impressing the panellists. He was creating a false impression that he was in fact in possession of such a qualification. Undoubtedly based on common cause facts alone, in my view, the appellant proved the charge of gross misconduct on the part of the first respondent. We bear in mind though that because this was not a criminal case in that sense it was hardly necessary to prove that the first respondent’s misrepresentation induced the first appellant to appoint him to the post as it did.
- [12] That it made him a worthy candidate compared to others is not open to any doubt. However, in the determination of the question whether the first respondent was in any manner guilty of misconduct it certainly would suffice to show that the representation in his CV was false. Whether the first respondent, subsequent to the interview, disclosed to the panellists that the Bachelor of Technology Marketing Degree had not yet been conferred upon him, would not make him not guilty of the transgression. If established as a fact, it would probably serve as a mitigating factor which would have to be taken together with other factors both aggravating and mitigating in the assessment of the sanction. It does not mean that if such disclosure was accepted as having taken place the first respondent would not have deserved the sanction of dismissal from the employment of the appellant. Of course the substantive fairness of the dismissal does not seem to have turned on the latter aspect.

- [13] It is important to note that the first respondent was charged with making false disclosure in his CV. He was not facing a charge of “*perpetrating a lie during the interview*” as the court *a quo* apparently seemingly thought. As Mr Moerane correctly pointed out, there seems to be an apparent failure on the part of the court *a quo* to distinguish between the initial act of gross dishonesty as contained in the CV and any conceivable subsequent events at the interview. Indeed, the issue of alleged disclosure at the interview was not at all properly ventilated (as it were) in the evidence presented at the arbitration. Consequently there was no sufficient information on the record to have enabled the court *a quo* to reach the conclusion that the evidence “*indicate without doubt that the applicant indeed disclosed to the panelists that he did not have a Bachelor of Technology Marketing Degree.*” There is simply no evidential material that justifies the latter finding. In fact, the only witness who was part of the interviewing panellists stated categorically that he did not remember the alleged disclosure at all. The witness I have just referred to is one Jan Manji. He added that “*if we had these discussions I would have said ‘re-submit your CV’ I am not only taking notes. I am also checking compliance. I also advise.*”
- [14] The fact that the misrepresentation in the CV might very well not have induced the first respondent’s appointment to the post most certainly does not detract from the fact of the first respondent’s initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent’s dismissal. Why did the first respondent put in his CV that which is untrue? He knew how to describe MBA degree which was then unfinished. He could have described the Bachelor of Technology Marketing Degree similarly if he found it necessary to mention it at all in his CV. John Grogan in his work *Dismissal*, (Juta & Co. Ltd First published 2010, republished 2012) says the following about dishonesty at page 188):

“Dishonesty” is a generic term embracing all forms of conduct involving deception on the part of employees. In criminal law, a person cannot be convicted of dishonest conduct unless that conduct amounts to a recognized

offence. However, in the employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. The dishonest conduct of employees need not therefore constitute a criminal offence. "Dishonesty" can consist of any act or omission which entails deceit. This may include withholding information from the employer, or making a false statement or misrepresentation with the intention of deceiving the employer...'

The above extract was referred to with approval by the Constitutional Court in *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Hlebela and Lonmin Precious Metals Refinery* (2011) 32 ILJ 2782 (CC) at paragraph 69. A misrepresentation by an employee (as to his qualification and skills etc.) before the commencement of employment has been held sufficient to warrant dismissal even if it is discovered some time later and the employee has rendered satisfactory performance. In *Auret v Eskom Pension & Provident Fund* (1995) 16 ILJ 462 (LC), the dismissal of an employee was upheld because he had not disclosed the true extent of fraud in which he had been involved while working for his previous employer.

- [15] In *Hoch v Mustek Electronics (Pty) Ltd* (2000) 21 ILJ 365 (LC), the court held that the employer was justified in terminating the contract of an employee who had misrepresented her qualifications prior to her appointment. The same conclusion was reached in *Boss Logistics v Phopi and Others* [2010] 5 BLLR 525 (LC) where a senior employee was found to have inflated his qualifications and experience in his CV. In the latter case, the court held that to accept that such an employee is entitled to guidance, training or assistance before work performance would be to reward the employee for his dishonesty.
- [16] Courts and commissioners frequently use the 'test' in assessing whether dismissals are appropriate and the effect that the employee's misconduct would have on the employment relationship. See, for example, *Korsten v Macsteel (Pty) Ltd and Another* [1996] 8 BLLR 1015 (IC). It is appropriate to quote from the Award by the Commissioner in order to demonstrate this. At paragraph 5.8 of the award, the Commissioner had the following to say:

'5.8 Having found that respondent has proved the first aspect of the charge it remains to consider whether the sanction imposed was fair. Applicant occupied a very senior position in the Department of Home Affairs. He occupied it at the time when our society was being sensitized, daily, to the need for clean government and integrity on the part of officials. Applicant's behaviour in my view fell considerably short of what is required and expected of senior government officials. In the light thereof I am of the view that the sanction imposed was fair.'

There are many ways courts use in this regard. Sometimes it would be said that the employment relationship has been rendered intolerable. These are ways and means of establishing whether employer can reasonably be expected to continue with the contractual relationship with the employee concerned. In *casu* a larger employer of the size of the first appellant will certainly have fundamental difficulty if it does not adopt a very strict stance in misconducts similar to the one the first respondent was found guilty of. Virtually all its prospective and present employees will simply do the same. However, there is no evidence on record in the instant matter that the misconduct complained of has resulted in an irreparable damage to the employment relationship. It is obligatory that an employer should produce such evidence to justify a dismissal unless of course that conclusion of a broken employment relationship is apparent from the nature of the offence and/or the circumstances of the dismissal. See *Edcon Ltd v Pillemer N.O. and Others* (2008) 29 ILJ 614 (LAC).

- [17] Serious offences often attract the sanction of dismissal. The Code of Good Practice gives as examples of offences that may justify dismissal as gross dishonesty, wilful damage to employer's property, assault and gross insubordination. The list is not intended to be a complete one nor does it take away the power to determine appropriate sanctions regard being had to evidence led and circumstances of each individual case. In my view, the arbitrator's decision was not shown not to have been a decision which a reasonable decision-maker could not have reached. (See *Sidumo and*

Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC)).

- [18] There are numerous respects pointed out in the record of proceedings that show that the first respondent has an inclination to shy away from the truth. I am not going to document these in this judgment. But the record speaks louder in this regard. The first respondent was dishonest in many other respects in this matter.

Costs

- [19] Ordinarily in civil proceedings, the normal rule with regards to costs is that a successful party is entitled to recover its costs from the unsuccessful party. However, the Labour Court which is described as a Court of law and equity may make orders for the payment of costs *'according to the requirements of the law and fairness'*. See Section 162(1) of the LRA. There are certain considerations documented in section 162(2). In the instant matter, the first respondent knew fully well that he dishonestly disclosed an untruth in his CV with regard to the qualification he did not have. At the initial stage of hearing he was found guilty and he persisted with the matter up to the third respondent. He was correctly found at this stage to have been properly dismissed. He then moved to the Labour Court. That he is responsible for all the costs that built up in this matter is, in my view, beyond any question. In my view, it shall not accord with justice to expect the appellant not to recover its costs. I hold the view that to order that costs be paid by the first respondent accords with the requirements of the law and fairness.

Order

- [20] In the circumstances, I make the following order:
- (a) Condonation application is granted.
 - (b) The appeal succeeds.

- (c) The first respondent shall pay costs hereof including those occasioned by employment of two counsel by the appellant.

Dlodlo AJA

Acting Judge of the Labour Appeal Court of South Africa

Tlaletsi DJP and Mokgoatlheng AJA concur in the judgment of Dlodlo AJA

Appearances:

For the First and Second Appellants: Adv M.T.K Moerane SC

Adv L.R. Naidoo

Instructed by:

The State Attorney

For the First Respondent:

Forster Attorneys