



THE LABOUR APPEAL COURT OF SOUTH AFRICA, PORT ELIZABETH

Not Reportable

Case no: PA8/2014

BUFFALO CITY METROPOLITAN MUNICIPALITY

Appellant

and

SOUTH AFRICAN LOCAL GOVERNMENT

BARGAINING COUNCIL

First Respondent

NTOMBEKHAYA SESANI N.O.

Second Respondent

PATRICK MANGASHE

Third Respondent

Heard: 15 September 2015

Delivered: 03 May 2016

Summary: Dismissal - misrepresentation of qualifications by an employee-procedural and substantive fairness – Labour Court finding setting aside the award of the arbitrator and ordering the remittal of the matter for fresh arbitration – whether Labour Court should have determined sanction.

Coram: Waglay JP, Coppin JA et Makgoka AJA

JUDGMENT

MAKGOKA AJA

- [1] This is an appeal against part of the order of the Labour Court (Lallie J) in terms of which the arbitration award made by second respondent in favour of the third respondent was set aside. Having set aside the award, the Labour Court remitted the dispute to the first respondent, the South African Local Government Bargaining Council (SALGBC) for a fresh arbitration before a different arbitrator. The appellant's appeal is directed only against the latter part of the order, i.e. remitting the dispute to SALGBC. The appellant contends that, instead of remitting the matter to SALGBC, the Labour Court should have substituted the arbitrator's award with a finding that the dismissal of the third respondent was substantively and procedurally fair.
- [2] The appellant (the municipality) is a municipality established in accordance with s12 of the Local Government: Municipal Structures Act 117 of 1998, and which in terms of s2(d) of the Local Government: Municipal Systems Act 32 of 2000, has a separate legal personality. The first respondent is a dispute resolution body established voluntarily in terms of the Labour Relations Act 66 of 1995 (the LRA) by agreement between the employer organisation (SALGA) and trade union parties, IMATU and SAMWU. The second respondent (the arbitrator) is an appointed panellist of the first respondent, who conducted arbitration proceedings under the auspices of the first respondent. The third respondent (Mr Mangashe) is an erstwhile employee of the municipality.
- [3] The municipality appeals with leave of the Labour Court. The appeal is opposed by Mr Mangashe, who supports the order of the arbitrator. In his heads of argument filed in this Court, however, Mr Mangashe adopts a slightly different approach, in which he submits that the order of the Labour Court remitting the matter to SALGBC should be replaced with an order dismissing the municipality's application for review of the second respondent's decision. The insurmountable hurdle for Mr Mangashe in this regard is that there is no cross-appeal against the order of the Labour Court.
- [4] The facts are simple. Mr Mangashe was employed by the municipality in July 2008 as a constituency co-ordinator. The position required the incumbent to have either matric, a three-year post matric qualification and two years of relevant experience, alternatively, matric and four years of relevant

experience. In his application, Mr Mangashe represented that he had passed matric in 1979 and subsequently obtained a diploma in transport management. He did not, however, provide copies of his qualifications prior to his appointment. He was nevertheless appointed, apparently on the understanding that he possessed the qualifications which he claimed to have.

- [5] After his appointment the municipality, repeatedly requested Mr Mangashe to furnish proof of his qualifications. When this did not happen, the municipality charged him with gross misconduct in that he had misrepresented his qualifications by stating that he had matric, when in fact this was not true. He was called to attend a disciplinary enquiry to answer to that charge, but he did not attend. The hearing proceeded in his absence. Mr Mangashe did not attend his disciplinary hearing, which proceeded in his absence. He was found guilty of gross misconduct for misrepresenting his qualifications. He was dismissed on 18 November 2009.
- [6] Aggrieved with that decision, Mr Mangashe referred the dispute to arbitration. The arbitration proceedings, came before the arbitrator, during which the municipality called five witnesses and Mr Mangashe testified on his behalf. The x municipality last witness, Mr Deshaan Naidoo, testified briefly about the short-listing of the candidates for the position to which Mr Mangashe was eventually appointed. His evidence therefore has no bearing on the issues in dispute, and shall not be referred to in this judgment. – Only the evidence of the remaining four witnesses will be considered. It is not necessary to set out in detail the evidence of each witness but a brief summary would suffice.
- [7] Mr Sizwe Mbuyazwe, a messenger employed by the municipality, testified on the procedural aspect relating to the service of documents on Mr Mangashe. He testified that he was tasked with the delivery of notices relating to disciplinary hearings. On 29 September 2009, he delivered a notice of a disciplinary hearing at the residence of Mr Mangashe, who was not present. The notice was received by a person who identified himself only as Sthembele. On 6 October 2009, he again visited Mr Mangashe's residence and delivered another letter concerning the disciplinary hearing. Again, Mr Mangashe was not present, and he left the letter with Mr Mangashe's

neighbour's son. Lastly, on 9 November 2009, and once more in the absence of Mr Mangashe, he delivered another letter yet again to his neighbour's son.

- [8] Ms Elva Diedericks, who was employed as a receptionist and typing clerk in the Human Resources section of the municipality, testified that it often happened that employees would attend interviews without being requested to submit proof of their qualifications, but would be requested to do so later during "data check". After Mr Mangashe's appointment, she was instructed by the Manager: Personnel and Labour Relations, Mr Andrew Owen, to obtain and verify Mr Mangashe's qualifications. She called the latter on several occasions and sent him e-mails requesting verification of his qualifications. Mr Mangashe indicated to her that he had obtained a diploma in transport management in Zambia and he was trying to obtain verification through a private Zambian citizen and with the assistance of the South African Embassy in Zambia. However, Mr Mangashe failed to submit copies of his qualifications until he was called to a disciplinary hearing.
- [9] Mr Vuyo Zambodla was the Director of Executive Support Services at the municipality and Mr Mangashe's immediate manager. He testified that because of the role and centrality of the position held by Mr Mangashe as being crucial for communication with the community, there was no room for dishonesty or misrepresentation in that regard. He also testified that he decided to institute disciplinary proceedings against Mr Mangashe after he had discussed with him about his failure to submit his qualifications despite being instructed to do so. He further testified that Mr Mangashe was advised by his office to collect his notice to attend the disciplinary hearing, but he failed to do so. As a result, it was decided that the notices would be delivered to his place of residence. During cross-examination, he stated that in terms of the municipality's policy, the appointment of employees is confirmed only after an employee had submitted his or her qualifications during the interview. He could not explain why Mr Mangashe was appointed without submitting his qualifications.
- [10] Mr Andrew Owen was Manager: Personnel and Labour Relations at the municipality during the relevant period. He sat on the panel that interviewed

Mr Mangashe when he applied for the position of constituency co-ordinator. He confirmed Mr Zambodla's evidence on the appointment policy of the municipality (regarding the submission of qualifications during the interview). However, in Mr Mangashe's case, he was appointed despite not having submitted copies of his qualifications. In this regard, Mr Owen testified that he was instructed by management of the municipality to make the appointment of Mr Mangashe "happened" even if he did not have copies of the required qualifications. Regarding Mr Mangashe's application, he testified that the application form was not completed properly, in that in the space provided for details about matric certificate, Mr Mangashe had not indicated when he acquired such a certificate. He telephonically contacted Mr Mangashe and during that conversation, Mr Mangashe informed him that he matriculated in 1979 and acquired a diploma in transport management several years later. On that assurance, Mr Owen endorsed the application form accordingly.

[11] After Mr Mangashe's appointment, he instructed Ms Diedericks to obtain from him proof of his qualifications. He also requested them from Mr Mangashe, who informed him that he was in the process of getting proof of his qualifications from Lesotho and Zambia, respectively where he obtained them. Mr Mangashe also pointed out to him that his workload did not permit him to dedicate time on getting his qualifications, and requested extension of time to submit them. Up to the time he left the employment of the municipality in September 2009, Mr Mangashe had still not submitted proof of his qualifications.

[12] In his evidence, Mr Mangashe testified that he did not attend the disciplinary hearing because he did not receive the notice to attend the hearing. He was also not advised of the outcome of the disciplinary hearing, and only became aware of his dismissal when he was not paid his salary at the end of November 2009. He denied that he ever represented to the municipality that he had passed matric. To this effect, he testified that Mr Owen was the one who said that he had a matric. He further testified that he explained during his interview that he would have difficulties in obtaining proof of his qualifications, due to that fact that they were obtained outside South Africa. He also informed

the interviewing panel that he only had a diploma in transport management and that was the only qualification he was able to submit.

[13] Mr Mangashe further testified that his dismissal was politically motivated. In support of this, he made reference to an article in the Daily Dispatch of 1 April 2009, which posited that him and other employees alleged to be members of (Congress of the People) COPE,¹ were locked out of their offices with the instruction that they be moved to other departments from the mayor's office. During cross-examination, Mr Mangashe conceded that he had received a notice of a disciplinary hearing delivered to Sthembele (mentioned in para 7 above) because they lived together. He, however, stood firm that he did not recall informing Mr Owen during their telephonic conversation that he had a matric. What he recalled telling Mr Owen, was that he had enrolled at a high school in Maseru during 1979 and during November of that year he joined the Umkhonto Wesizwe movement (MK). During those proceedings, Mr Mangashe furnished a copy of a National Diploma in Transport Management, issued by the examination council of Zambia in the name of one Hamilton Ntshinga. Mr Mangashe explained that this was his nom de guerre which he assumed as a MK² operative during the struggle years. He also submitted a confirmatory letter from MK Military Veterans Association (MKMVA) stating that he joined MK in 1978 under the name of Hamilton Ntshinga.

[14] That is in brief a summary of the evidence before the arbitrator, who identified two issues for determination. First, whether Mr Mangashe was in possession of the required qualifications for the position to which he was appointed. Second, whether the dismissal of Mr Mangashe was substantively and procedurally fair. With regard to the diploma certificate and the letter from MKMVA submitted at the arbitration, the municipality's representative objected to their admissibility. However, the arbitrator accepted these documents as conclusive proof that Mr Mangashe had indeed acquired the diploma referred to in the certificate, and that he was in fact the person referred to as Hamilton Ntshinga.

¹ A break-away political party formed mainly by former leaders and members of the African National Congress (ANC) after the party's 52nd Conference in Polokwane in December 2007.

² The erstwhile military wing of the ANC.

[15] The arbitrator's reasoning for that conclusion was that '[n]one of these documents were interrogated (by the municipality).' Having made the determination that Mr Mangashe was in possession of the diploma in question, the arbitrator then considered whether Mr Mangashe had misrepresented that he had a matric certificate. In considering this question, the arbitrator reasoned as follows:

'None of the documents submitted by the applicant to the respondent during his application suggests that he passed matric. The only information to that effect is the endorsement made by Mr Owen. The applicant could not recall the alleged conversation, however, one needs to state that Mr Owen had no reason to fabricate such evidence. Also at these proceedings the applicant did not submit such certificate, which forms part of the charges against him. Further, at no stage did the applicant admit or deny to be in possession of this certificate. This then left me with one conclusion, that the applicant does not have such certificate.'

[16] Having made that finding, the arbitrator continued as follows:

'Ms Diedericks, who was the person instructed to contact the applicant and yet in evidence she made it clear that the only certificate she required from the applicant was that of the national diploma and not standard ten. Taking this testimony with that of Mr Owen on the fact that the applicant has no reason to lie about having standard ten, as it would not have made any difference in his application considering that he had the required diploma. The applicant argued that the charges against him were trumped up, citing the article from the Daily Dispatch as proof. He subpoenaed Ms Faku to answer to such document but he failed to attend. Having read the article and the fact that every employee mentioned in it was removed from the mayor's, I cannot help but accept the applicant's contention in this regard. Having considered the above, it is my finding that the respondent failed to prove that the applicant misrepresented himself/lied about his qualifications. It is also my finding that the respondent failed to prove that the applicant refused to obey a lawful instruction.'

[17] However, the arbitrator found that the misrepresentation made no difference, since Mr Mangashe had obtained a diploma in transport management. She

therefore found the dismissal substantively unfair on that basis. As to the procedural fairness, the arbitrator found that because there was no conclusive evidence that Mr Mangashe had received the notice to attend the disciplinary enquiry, the holding of the disciplinary enquiry in his absence renders his dismissal procedurally unfair. The arbitrator then ordered the municipality to pay Mr Mangashe compensation in the amount of R384 000.00, which is equivalent to 12 months' remuneration.

[18] Unhappy with that determination, the municipality applied in terms of s145 of the Labour Relations Act 66 of 1995 (the LRA) to review and set aside the award. It relied mainly on four grounds for the review. One of the grounds concerned the procedural fairness of the dismissal, while the rest related to the substantive fairness thereof. With regard to procedural fairness, the municipality assailed the arbitrator's finding that Mr Mangashe had not received notification of the disciplinary hearing. It was contended in this regard that the finding was not supported by the evidence and constituted misconduct and/or gross irregularity. It was argued that the arbitrator should have found that Mr Mangashe was aware of the date of the enquiry because he had responded to the charge sheet prior to the and as per the uncontroverted evidence of Mr Mbuyazwe. Moreover, Mr Mangashe's evidence during cross-examination is that he in fact had received the notice in issue.

[19] With regard to substantive fairness, three findings of the arbitrator were challenged. Firstly, it was contended that the finding by the arbitrator that Mr Mangashe had not misrepresented himself when he indicated he had a matric certificate was not supported by evidence, and was one which no reasonable decision-maker could reach in the circumstances. It was contended that the finding constitutes both a misdirection and a gross irregularity on the part of the arbitrator in that she had applied flawed reasoning and failed to find the conduct to amount to dishonesty justifying Mr Mangashe's dismissal. In essence, the municipality argued that having found that Mr Mangashe did not have a matric certificate, the arbitrator should have found that it was a

fraudulent misrepresentation which rendered Mr Mangashe's dismissal substantively fair.

- [20] Secondly, the municipality argued that the finding by the arbitrator that Mr Mangashe had obtained a diploma was unreasonable, as it was based on inadmissible hearsay evidence. The municipality contended that the arbitrator had misconstrued the evidence and the evidentiary burden in respect of proving the documentation in issue, and in not advising its lay representative on how to challenge the documentary evidence adduced by Mr Mangashe.
- [21] Thirdly, the municipality challenged the arbitrator's finding that Mr Mangashe was not afforded reasonable time to obtain proof of the diploma he claimed to have acquired. It was submitted that Mr Mangashe had repeatedly failed to produce the certificate of the diploma in question for a period of approximately 17 months, being the period between his appointment and the dismissal. The contention is that the arbitrator should have found that the repeated requests for extension of time had been acceded to and the resultant failure to produce proof of qualification was both unreasonable and unjustifiable, rendering Mr Mangashe's dismissal substantively fair.
- [22] The Labour Court found, with regard to substantive fairness of the dismissal, that the arbitrator committed a gross irregularity by finding that the municipality had failed to prove that Mr Mangashe misrepresented his qualifications to it. The Labour Court found this finding "discordant with, and flies in the face of the evidence (the arbitrator) elected to accept", in light of the arbitrator's express finding that Mr Mangashe did not have a matric certificate. The Labour Court also found that the arbitrator committed a gross irregularity in accepting the evidence of Mr Mangashe regarding the diploma certificate he furnished during the arbitration proceedings. The Labour Court agreed with the municipality that the arbitrator had failed to apply the provisions of s3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. With regard to procedural fairness, the Labour Court found that the arbitrator's rejection of the municipality's evidence on the service of the relevant notification notices on Mr Mangashe, was not supported by the evidence before her.

- [23] The Labour Court concluded that taking into account the nature of the gross irregularities committed by the arbitrator, her award, was one which a reasonable decision-maker could not reach on the evidence before her. It accordingly reviewed and set aside the arbitration award and remitted the matter to the first respondent, for arbitration afresh, by an arbitrator other than the second respondent.
- [24] The municipality appeals to this Court against the above order, on a number of grounds. The essence of the municipality's complaint is that having found that the arbitrator had accepted that Mr Mangashe did not have a matric certificate, and that he had misrepresented his qualifications to the municipality the Labour Court was more than adequately placed to determine the issue, since it was in possession of all relevant evidence.
- [25] In his written submissions, Mr Mangashe contended that the evidence did not support the Labour Court's finding that he had misrepresented his qualifications. He argued that the evidence showed only that he did not complete his matric. According to him, the evidence of Mr Owen that he had informed the latter that he had passed matric, should not have been accepted. This, according to Mr Mangashe, was because he had declared in his application form that he did not pass matric. Mr Mangashe also submits that Mr Owen's evidence should have been disregarded because he testified that he had been put under pressure to have him appointed to the post even if his qualifications had not been submitted and verified. Mr Mangashe also supported the arbitrator's finding that since he had a M3+ qualification (by virtue of the diploma in transport management and the relevant experience), the question whether he had a matric made no difference. Mr Mangashe also pointed out that in any event, he met the requirements for the position as he had an NQF Level qualification at the time he submitted his application form.
- [26] Mr Mangashe also argued that, on a balance of probabilities, Mr Owen's evidence should not have been accepted, if regard is had to the evidence of Ms Diedericks, who testified that Mr Owen had instructed her to ask him to submit his diploma certificate, and not his matric certificate. On the strength of this evidence, Mr Mangashe submitted, it would have been inconceivable that

Mr Owen would have asked Ms Diedericks to only ask him for the diploma certificate if Mr Owen knew that he still had an outstanding matric qualification that he supposedly asked him to endorse on his application form as being in possession of. Mr Mangashe also made much of the fact that his dismissal was politically motivated as he had joined COPE, and that from the beginning, Mr Owen was pressurised into making his appointment to “happened” even without submission of the proof of his qualifications. With regard to procedural fairness, Mr Mangashe persisted with his stance that he did not receive notice to attend the disciplinary hearing.

[27] The procedural fairness argument can be disposed of fairly summarily. In this regard, the Labour Court, as pointed out earlier, found that the arbitrator’s decision was unreasonable and not supported by the evidence. The only logical conclusion of this finding should have been that Mr Mangashe had been properly and adequately notified of his disciplinary hearing, and therefore, his dismissal was procedurally fair. I therefore agree with the municipality’s contention that the finding of procedural unfairness should have been replaced with a finding that the dismissal was procedurally fair. The Labour Court erred in not doing so.

[28] I turn now to substantive fairness. In approaching this aspect, one should always bear in mind that the position which Mr Mangashe applied for and was appointed to, had, as a basic requirement, a matric certificate. In both alternatives, the incumbent had to be in possession of a matric either with a three year post matric qualification plus two years’ relevant experience, or matric plus four years’ experience. It is common cause that at the time of the application, Mr Mangashe did not possess a matric. The simple upshot of this is that he did not qualify for the position. The fact that he had obtained a diploma did not distract from the basic requirement of a matric qualification. He knew that he did not have a matric certificate. There is therefore no merit in his argument that he never held out to the municipality that he had a matric.

[29] The misrepresentation began by his application for the position, thereby presenting to the municipality that he meets all the requirements for the job, including the matric qualification. He does not suggest that he applied for the

position on any other basis other than that he met the requirements. It is clear from the manner in which he completed the application form that he was deliberately vague as to his matric qualification. This prompted Mr Owen to contact him telephonically to clarify this aspect. There is no other way of looking at it. It is significant that Mr Mangashe does not dispute that the telephone conversation between him and Mr Owen took place in which they discussed lack of clarity on his application form and in particular, his matric qualification.

- [30] The arbitrator concluded that there was no reason to doubt Mr Owen's evidence that Mr Mangashe had told him that he had passed matric in 1979, as a result of which Mr Owen made an annotation on Mr Mangashe's application form, accordingly. The Labour Court found no basis to interfere with this factual finding, and therefore agreed with the arbitrator. Mr Mangashe's argument that Mr Owen's evidence should have been rejected because he had instructed Ms Diedericks to enquire only about the diploma certificate, lacks merit, and is disingenuous. The Labour Court therefore correctly found that Mr Mangashe had misrepresented his qualifications to the municipality.
- [31] Regarding the argument that the charges were politically motivated, Mr Mangashe relies on the minutes of the municipality's council meeting held on 3 March 2009. During that meeting, the executive mayor bemoaned the fact that because almost all staff members in her office were COPE activists, she had requested in vain that they be transferred to other offices. The executive mayor added that, as an ANC executive mayor, she was being compromised because activists from the opposition party surrounded her. Mr Mangashe says that all people mentioned during that meeting were transferred to other offices. I do not think that anything turns on this aspect. It is instructive that in the minutes relied on by Mr Mangashe, there is no suggestion that any of the people identified as being members of COPE were to be dismissed. The mayor simply requested them to be transferred to other sections, for reasons of loyalty and trust. The arbitrator therefore misdirected herself in relying on

this aspect as part of her reasoning why the dismissal, was substantively unfair. The Labour Court did not uphold this finding, correctly so, in my view.

- [32] Mr Mangashe also places much reliance on the evidence of Mr Owen that he had been instructed by the management of the municipality to make his appointment happened so as to suggest that because his appointment was politically motivated, so was his dismissal.. Even assuming in his favour that the above assertions are correct, the fact remains that he did not qualify for the position he was appointed to. When Mr Owen was instructed to make his appointment happened, it was on the understanding that he met all the requirements for the position. I did not understand Mr Mangashe to suggest that the municipality wanted to appoint him at all costs, even if he did not meet the basic requirements for the position.
- [33] It is not clear from the judgment of the Labour Court why it remitted the matter to the SALGBC for fresh arbitration. This is because the judgment is silent on the considerations which could have impelled the learned Judge to reach that conclusion. In light of all the evidence before it, I am of the view that the Labour Court was well placed to substitute its own decision to that of the arbitrator, by considering an appropriate sanction, instead of remitting the matter for fresh arbitration.
- [34] In light of the common cause fact that Mr Mangashe did not have a matric certificate – a requirement for the position – there was no purpose in referring the matter for fresh arbitration. This is so because of Labour Court's finding that the dismissal of Mr Mangashe was procedurally and substantively fair. In my view, the Labour Court misdirected itself in this regard, and this Court is entitled to interfere with its decision and substitute it with one this Court deems just in the circumstances. I turn now to consider the appropriate sanction.
- [35] Dishonesty concerning one's qualifications constitutes a serious misconduct, and has often attracted the sanction of dismissal. This is so because trust is at the core of employment relationship. As indicated earlier, there was no doubt that Mr Mangashe, right from the very beginning, misrepresented to the

municipality that he had the necessary formal qualification for the position he was appointed to. Counsel for the municipality cited examples where the Labour Court had confirmed the dismissal of employees for dishonesty. See *Hoch v Mustek Electronics*(Hoch),³ *Hullet v Bargaining Council*,⁴ *Standard Bank v CCMA*,⁵ and *Metcash v Fobb*.⁶

[36] In *Hoch*, above, the Labour Court, faced with a situation where an employee was dismissed for falsely representing to the employer that she possessed certain qualifications in education and accounting. The Labour Court confirmed the dismissal and did not consider her long service and the fact that the qualifications were irrelevant to her position. The Court observed that the employer was entitled to consider that the employee's dishonesty was serious so as to irreparably damage the unique trust relationship enjoyed by her.⁷ Similarly, in the present case, I do not see any mitigating factors that outweigh the option of dismissal as an appropriate sanction.

[37] To sum up. The Labour Court misdirected itself in remitting the matter for fresh arbitration and in not considering the sanction, which under the circumstances, could only be that of dismissal. As a result, the appeal has to succeed. With regard to costs, I am of the view that the considerations of equity and law dictate that no order as to costs should be made.

[38] In the result, the following order is made:

1. The appeal is upheld;
2. The order of the Labour Court is set aside and in its stead the following is substituted:
 - '1. The award issued by the arbitrator is reviewed and set aside;
 2. The dismissal of the third respondent was substantively and procedurally fair;

³ *Hoch v Mustek Electronics* [1999] 12 BLLR 1287 (LC).

⁴ *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others* [2008] 3 BLLR 241 (LC).

⁵ *Standard Bank of South Africa Ltd v CCMA and Others* [1998] 6 BLLR 622 (LC).

⁶ *Metcash Trading Ltd t/a Metro Cash & Carry v Fobb and Others* [1998] 11 BLLR 1136 (LC).

⁷ *Hoch* at para 40.

3. No order is made as to the costs.'

3. There is no order as to costs.

TM Makgoka AJA

I agree

Waglay JP

I agree

Coppin JA

APPEARANCES:

FOR THE APPELLANT:

Adv. F. Le Roux

THE THIRD RESPONDENT:

Instructed by Smith Tabata Inc. FOR

In person

LABOUR APPEAL COURT