

IN THE LABOUR COURT OF SOUTH AFRICA**HELD AT DURBAN****CASE NO D302/08**

In the matter between:

PRUSHOTHMAN SUBRAMONEY PILLAY

Applicant

and

COMMISSION FOR CONCILIATION,**MEDIATION AND ARBITRATION**

First Respondent

DR HILDA GROBLER N.O

Second Respondent

UNIVERSITY OF KWAZULU-NATAL

Third Respondent

RULING: APPLICATION FOR LEAVE TO APPEAL

VAN NIEKERK J

[1] This is an application for leave to appeal against part of a judgment by this court handed down on 1 September 2011, and in particular those parts of the judgment in which the court determined, on review, the applicant's challenges to the finding of the second respondent ('the commissioner') on substantive fairness.

[2] In its order, the court reviewed the commissioner's award to the extent that she failed to determine whether the applicant's dismissal was procedurally fair. For the sake of convenience, the terms of the order are the following:

- 1. The arbitration award issued by the second respondent under case no KNDB 11631-07 is reviewed, to the extent that it is declared that the second*

respondent committed a reviewable irregularity by failing to determine whether the applicant's dismissal was procedurally fair.

2. *The matter is remitted to the second respondent. The second respondent is directed to determine whether the applicant's dismissal was procedurally fair.*
3. *In the event that the second respondent determines that the applicant's dismissal was procedurally unfair, the second respondent is directed to make an appropriate order for compensation.*
4. *The determinations referred to in paragraphs 2 and 3 of this order must be made within 30 days of the date of this order.*
5. *The third respondent is to pay 50% of the costs of these proceedings, such costs to include the engagement of two counsel.*

[3] In essence, the grounds for the present application are that the court erred failing to set aside the commissioner's decision that the relationship of trust between the applicant and the third respondent had broken down to an extent that given the nature of his admitted misconduct, dismissal was an appropriate sanction.

[4] The applicable test was referred to in the judgment – the LRA makes provision for the setting aside on review of arbitration awards for both result-based defects, as well as for process-related irregularities (see *Ellerine Holdings Ltd v CCMA & others*¹ and *Maepe v CCMA & others*²). In *Ellerine Holdings*, Davis JA said the following (at 2903F):

"...When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity..."

[5] The court observed that the commissioner had correctly approached the issue of any breakdown in trust as a factual question – *"It is a simple question of fact: Either an employer trusts an employee, or it doesn't."* Further, the commissioner the

¹ (2008) 29 ILJ 2899 (LAC)

² [2008] 8 BLLR 723 (LAC)

commissioner took into account the relevant facts, and came to a decision. In so far as the attack on the commissioner's finding is result based, the fact that the commissioner's decision is not correct is irrelevant – what matters is whether the decision falls within a band of decisions to which reasonable people could come on the available material. In so far as the applicant's attack is process-based, a review court similarly deals with a test of reasonableness. It is only where a commissioner makes a finding that is based on speculation, or is not supported by evidence that is sufficiently reasonable to justify the decision, or that is made in ignorance of evidence that was not contradicted, that the commissioner arrives at a decision to which no reasonable decision maker could reach.

[6] In the present matter, the facts before the commissioner were that the applicant had intentionally and on a number of occasions told an elaborate lie under oath fully appreciating that if believed; his lie could harm the third respondent, undermine the findings of a commission of enquiry and lead to adverse credibility findings against persons who held senior positions. Further, the applicant held a senior position of trust. Finally, the independent chair of the disciplinary enquiry recommended his dismissal, a recommendation that was unanimously upheld by the third respondent's council. In so far as the third respondent's evaluation of the evidence is concerned, there was only the evidence of a Mr Young to the effect that he would continue to trust a person in the applicant's position. This view was modified in cross examination, and is hardly the basis for a finding that the unanimous decision by council was unfair. The commissioner's finding also resonates with recent decisions by the Labour Appeal Court to the effect that minor acts of dishonesty generally justify dismissal (see, for example, *Miyambo v Commission for Conciliation Mediation and Arbitration*, (2010) 31 ILJ 2031 (LAC), in which the Labour Appeal Court (per Patel JA) emphasised the importance of trust between employer and employee. I am not persuaded that that court might reasonably come to a the conclusion that it was unreasonable of the commissioner to uphold a finding by council that the applicant should be dismissed for deliberately intending to mislead a tribunal headed by a retired judge given the potential consequences that existed.

I accordingly make the following order:

1. Leave to appeal is refused, with costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

6 October 2011

LABOUR COURT