



REPUBLIC OF SOUTH AFRICA

Not Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

CASE NO: JR 243/13

In the matter between:

NOKWANDA FIPAZA

First Applicant

and

MAPELO TSATSIMPE (N.O.)

First Respondent

CCMA

Second Respondent

ESKOM HOLDINGS LTD

Third Respondent

Heard: 13 March 2014

Delivered: 15 April 2015

Summary: (Review –)

JUDGMENT

LAGRANGE, J

Introduction

[1] This matter has a long and somewhat convoluted history, which is summarised in paragraphs 3.1 to 3.4 of the arbitrator's award. In essence, the applicant was

dismissed twice on two separate occasions by the third respondent. Her first dismissal in 2006 was referred late and had to be condoned, but the condonation ruling in her favour was rescinded and she was unsuccessful in seeking to have it set aside on review. Shortly after being employed again by Eskom in 2008, the applicant was dismissed again. On this occasion, the reason for the dismissal was her failure to disclose her previous dismissal to Eskom, even though it was Eskom that had dismissed her two years prior.

- [2] The matter came on review before myself and I found that the applicant's dismissal was unfair. On appeal, the LAC confirmed the unfairness of the applicant's dismissal and that the CCMA should determine the appropriate relief. It is the relief awarded by the arbitrator which is the subject of these review proceedings. At the commencement of proceedings, I did raise with the parties whether they had any difficulties with me dealing with the matter and given my prior involvement in the previous review proceedings, but neither party was of the view that the application should be heard by another judge and were content for me to deal with it.

The arbitrator's award

- [3] After hearing additional evidence, the arbitrator decided that the applicant should receive 12 months' remuneration by way of compensation, but declined to order her reinstatement. The arbitrator's reasons are set out in paragraph 5 of her award and I do not intend to repeat them verbatim here. By way of summary, the central features of her reasoning are as follows:

3.1 She correctly identified her role as simply to determine an appropriate remedy and not to consider the fairness of the applicant's dismissal which had already been determined by this Court and confirmed by the Labour Appeal Court.

3.2 Nonetheless, having heard evidence about Eskom's view of the applicant's lack of trustworthiness relating to her nondisclosure of her prior dismissal, the arbitrator concluded that she ought to have disclosed this and her failure to do so was in bad faith and the employer had a valid reason not to trust her.

- 3.3 In addition, the arbitrator also considered evidence about the applicant's conduct in the course of the condonation application arising from her first dismissal in 2006, which the employer had argued was also relevant to determining the appropriate relief even though it concerned conduct committed by her after her second dismissal in 2008. The arbitrator noted that the applicant's trustworthiness was impugned both by the findings of the CCMA arbitrator and the Labour Court in those proceedings.
- 3.4 In conclusion, despite saying that she found herself bound by the decision of the courts in relation to the finding that her dismissal in 2008 was substantively unfair, she nonetheless found that the applicant did have a duty to disclose her previous dismissal by Eskom and added that at least she should have shown remorse when it was pointed out to her that she should have done so.
- 3.5 The arbitrator found that she could understand why the respondent could not trust the applicant and decided that reinstatement was not practicable.

Grounds of Review

- [4] Firstly, the applicant claims that the arbitrator essentially contradicted her earlier statements that she was bound by the decisions of the Labour Courts by concluding that her failure to disclose her previous dismissal was in bad faith and the employer was entitled not to trust her.
- [5] Secondly, she alleges that the arbitrator failed to consider section 193(2)(a) of the LRA in terms of which, apart from other factors, an arbitrator is compelled to order the reinstatement or re-employment of an employee unless they do not wish to be reinstated or re-employed. In a directly related submission the applicant also says that the arbitrator failed to consider the requirements of section 193(2)(b) of the LRA which required her to determine if it would be intolerable to reinstate her. In this regard, the applicant further contends that the arbitrator found that her failure to disclose her prior dismissal amounted to a misrepresentation, contrary to what the Labour Appeal Court decided.
- [6] Further, she contends that the arbitrator was not entitled to consider circumstances arising after her first dismissal in 2006 as they did not relate to her

second dismissal. The applicant says the arbitrator was grossly unreasonable in taking account evidence that she was not remorseful for her failure to disclose her previous dismissal, as this entailed an assumption that she ought to have been remorseful about a misrepresentation which the Court found she did not make.

- [7] Lastly, the applicant submits that there was no evidence provided by the employer other than her allegedly fraudulent conduct in her job interview as evidence of the impossibility of restoring the employment relationship, which was a matter which the Labour Court and LAC had already made a contrary ruling on.
- [8] For good measure, the applicant also argues that the arbitrator failed to consider if there was any evidence that, it is not reasonably practicable for the employer to reinstate or re-employ the applicant. The applicant contends in this regard that the arbitrator misconstrued the LAC decision in *Maepe v CCMA* ¹.

Argument

- [9] Mr. Bhoda reluctantly conceded that there were some difficulties with the arbitrator's reasoning in relation to her finding that the applicant had acted in bad faith in not disclosing her previous dismissal to the respondent. Nevertheless, he submitted that it was not beyond the arbitrator's remit for her to have considered factors canvassed and determined in the Labour Courts when considering an appropriate sanction.
- [10] Much of the argument focused rather on the other leg of the arbitrator's reasoning. This concerned her observations about the post dismissal conduct of the applicant in the course of the litigation over her first dismissal in 2006 which was only referred to the CCMA after her second dismissal.
- [11] The applicant's referral of her first dismissal to the CCMA was exceptionally late and was only done after she had been dismissed on the second occasion in 2008. The lateness necessitated the applicant obtaining condonation for the late referral. The applicant was granted condonation on a default basis and

¹ (2008) 29 ILJ 2189 (LAC)

Eskom applied to rescind that ruling. In the arbitration proceedings to determine the appropriate relief for her second dismissal, Eskom had relied in particular on certain remarks made by the Commissioner who upheld the rescission application and observations by her Ladyship, Pillay J, who heard the review application of the rescission ruling. The employer took those to be evidence of the applicant's trustworthiness and it appears that the arbitrator agreed with this. Mr Van Graan argued that none of the observations were warranted and consequently there was no basis for the arbitrator taking them into account in determining appropriate relief in particular under section 193(1)(b) of the LRA.

- [12] It was also argued that if the Court was minded to set aside the award and order reinstatement, that the Court should have regard to the time which had lapsed.

Evaluation

- [13] There is little doubt that the arbitrator only paid lip service to the findings of the Labour Appeal Court and of this Court that the applicant had no obligation to disclose her previous dismissal by Eskom to it. Despite expressly acknowledging the Courts' finding in this regard the arbitrator nonetheless concluded that:

"The applicant's view was that she had no duty to disclose, implied or expressed. It is trite that nothing in the Labour Relations Act and slashed? the other acts of the employment relationship required a jobseeker to disclose why s/he left the way of previous employer/s. It is my view though that common law requires such a jobseeker to disclose material information. Being dismissed by the respondent is in my view material and although no statute required the applicant to disclose, failure to disclose was in my view acting in bad faith."

(emphasis added)

In arriving at this conclusion, the arbitrator implicitly suggested that neither the Labour Court nor the Labour Appeal Court had considered whether there was a separate common law obligation on the applicant to disclose her prior dismissal quite apart from the absence of any such obligation being imposed by the LRA. This conclusion is directly at odds with that of the LAC, when it found:

“[59] I am satisfied, accordingly, that the contemplated ground(s) of I dismissal or withdrawal of the offer, as stipulated in the contract and the recruitment form, pertained either to any false or inaccurate information which Fipaza would have wilfully provided to the appellant by way of a positive act on her part or a failure on her part to provide true and accurate information as reasonably required of her in terms of the contract or the law, thus constituting a material non-disclosure justifying the appellant to resile from the contract. However, in my view, on the facts of this case, there was no legal or contractual duty on Fipaza to have disclosed the circumstances under which she left the employ of the appellant in 2006, either in her CV, in the recruitment form or during her interview.”²

(emphasis added)

This unqualified finding of the LAC leaves no doubt in the circumstances of the case that no legal duty required the applicant to disclose her prior dismissal to Eskom. It was therefore disingenuous of the arbitrator to suggest that the LAC had based its decision on duties imposed by statute as a way of avoiding the implications of the judgement which the arbitrator could not stomach. It would seem that the arbitrator was unduly swayed by the evidence of Mr Stein, Eskom’s Management and Verification Manager, who was equally reluctant to accept some of the courts’ findings

[14] However, even though she did disclose her prior employment by Eskom, the evidence concerning the applicant’s failure to disclose the reasons for her termination, was not the only evidence led at the arbitration to persuade the arbitrator that her reinstatement would be intolerable. As mentioned, the respondent also placed considerable reliance on the applicant’s conduct following her original dismissal in 2006. This had not featured as a factor in the previous review proceedings in which the focus had been on the fact of her nondisclosure of her previous dismissal by Eskom.

[15] The applicant’s original dismissal in 2006 had occurred when she had failed to report for work by a certain date after she had been released from duty to

² *Fipaza* (LAC) at 565-6. The arbitrator’s finding was also at odds with the finding of the Labour Court in the original review application, viz ***Fipaza v Eskom Holdings Ltd* (2010) 31 ILJ 2903 (LC)** at 2915, para [54].

undertake postgraduate studies in the United Kingdom. Originally, she had been due to return to work on 5 July 2006. When she did not do so the deadline for returning to work was extended to 5 September 2006. The letter extending the deadline was accompanied by a warning that if she did not report for work on that day it could result in disciplinary action taken against her that could lead to the termination of her employment. Following her failure to report on 5 September 2006 a disciplinary enquiry was convened on 29 September 2006, which proceeded in her absence. On the date of the enquiry, Eskom had received a letter from the applicant acknowledging receipt of the notice of the enquiry.

[16] Subsequently, the applicant was dismissed. Her internal appeal was unsuccessful. In the letter conveying the outcome of the appeal, the applicant was nonetheless advised that she could apply for vacancies in the future.³ It appears to have been common cause that at the time the disciplinary enquiry was convened the applicant was still residing in the United Kingdom. She had claimed to have been unable to comply with the deadline to return to work because of financial constraints.⁴ Had there been no further interaction between the applicant since receipt of that letter and her ill-fated appointment and the dismissal in 2008, Eskom might have had little reason to have qualms about re-employing her.

[17] However, the applicant did not accept her dismissal in 2006 but challenged it as unfair, though she only did so more than two years later when she referred a dispute to the CCMA on 30 October 2008. Because the applicant's referral was approximately two years late, she was obliged to apply for condonation, which was granted by default on 1 December 2008. Eskom successfully applied for the rescission of this ruling, and the applicant's condonation ruling was reconsidered and dismissed. The applicant took the Commissioner's ruling on review, but was unsuccessful.

³ See *Fipaza* (LAC) at 553-4, paras [4] – [7]

⁴ *Eskom Holdings (Pty) Ltd v N Fipaza*, GATW 11414-09 dated 18/05/09 (unreported rescission ruling by Commissioner MH Marcus) at 2.

[18] In the course of considering the rescission application, the Commissioner noted that in her condonation application the applicant had made no mention of the fact that she had taken up alternative employment with the Department of Minerals and Energy from September 2007 until she was briefly employed again by Eskom on 1 June 2008. He also found that the applicant had been disingenuous in stating in her founding affidavit that her second dismissal on 4 June 2008 was “due to the existence of the (first) dismissal of 29 September 06” (emphasis added), when she was well aware that she had been dismissed on that occasion for failing to disclose to Eskom that she had previously been dismissed by it and that the CCMA Commissioner presiding in that matter had already found her guilty of a fraudulent non-disclosure of that fact. The Commissioner considering the rescission application specifically disregarded that finding, which is the one subsequently set aside in the later review and appeal proceedings in the Labour Courts. He stated:

“As indicated earlier, I am not concerned with the merits of the Commissioner’s ruling in that dispute expressed no opinion thereon. What concerns me for present purposes is the false and misleading averment by respondent in her condonation application that her dismissal on 4 June 2008 was “due to the existence of the (first) dismissal of 29 September 06” and the false averment following hereon claiming that “therefore I need closure on this first dismissal” when, as Respondent well knew, the one dismissal had nothing to do with the other, save in the sense alluded to. These facts, which respondent must have known what highly pertinent ones to be disclosed in the determination of her application for condonation, are conspicuous by their absence from any mention in respondent’s affidavit filed in support of the condonation application; an omission which, together with other material omissions from her application such as the failure to disclose the fact that she had in the meantime taken up alternative employment with the Department of Minerals and Energy... would have led me to strongly consider issuing an adverse costs awarded against the respondent had I have the jurisdiction to do so,...”

(emphasis added)

[19] In the course of considering the merits of the condonation application, the arbitrator also found that the referral of the first dismissal dispute had been

actuated by her second dismissal on 4 June 2008. As mentioned, the applicant was unsuccessful in reviewing the arbitrator's rescission ruling.

- [20] In the judgement of Justice Pillay J concerning the review of the rescission ruling the learned judge considered the merits of the original unfair dismissal dispute and found that because the applicant had, at the time of her dismissal, failed to elaborate in any detail about what she vaguely referred to as her 'pecuniary restrictions' and her 'British obligation', which she had cited as the reasons for being unable to return to work, there would have been no merit in allowing her to ventilate her dispute at arbitration. Turning to an application by Eskom for a punitive cost order against the applicant, the learned judge made the following observations:

"The court has considered this application, but declines to grant it because the applicant is already penalised by lodging these frivolous proceedings which are now a matter of public record. From the record she emerges as an employee who has not made material disclosure in litigating against her former employer about her unavailability to return to work. Furthermore, as an employee who has been employed in management, and who is probably well known in financial circles where trust is a high priority, anyone seeking to employ her, anyone looking into her past record, may discover the information in this file; that could count against it. The fact that she had returned to South Africa, found employment somewhere else, but nevertheless persisted in applying for employment with this employer for the second time also suggests that her employment situation is not stable."

- [21] Plainly, the learned judge was of the view that the applicant's conduct in the proceedings arising from her original dismissal would count against her if she applied for appointments in the future and that this was sufficient penalty for launching the ill-considered review application. In particular, what appears to have attracted the court's attention was the applicant's lack of candour in explaining fully the circumstances which prevented her from returning to work in 2006.
- [22] Under cross-examination in the arbitration proceedings under review in this application, the applicant was reluctant to accept the Commissioner's conclusion that she had not been honest in her condonation application when

she said that her second dismissal was due to the 'existence' of the first dismissal. She pointed out that in the pre-arbitration minute signed between herself and Eskom, the parties had agreed that her second dismissal "relates to circumstances surrounding the previous termination of employment." This demonstrated that it was understood that there was a link between the two dismissals, which was not merely about the fact that she had previously been dismissed. In relation to the observations of Pillay J, the applicant said that the learned judge had not been aware of the fact that there was a contract which said that Eskom would pay for her flight tickets back from the United Kingdom. She conceded that her own contract with Eskom, which would have been before the judge, did not provide for this, and that the contract of her husband which she was relying on had not been placed before the arbitrator.

- [23] Obviously, the arbitrator could not revisit the findings which had already been made by the Labour Courts on whether or not the applicant had acted in breach of her duties towards Eskom by not disclosing that the reason for her services being terminated was that it had dismissed her, in circumstances where she had disclosed her previous employment with it. It is also true that the LAC concluded the following:

"[54]... As Fipaza correctly stated in her representations, the reason for her dismissal in 2006 had absolutely nothing to do with dishonest or immoral behaviour on her part. In Sidumo, the Constitutional Court observed the significance of dishonesty or lack thereof in a misconduct charge, when it stated, amongst others, that 'the commissioner cannot be faulted for considering the absence of dishonesty a relevant factor in relation to the misconduct simply because '[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal'. Clearly, the commissioner did not bother to consider this aspect of the matter and in doing so he failed to apply his mind to the evidence presented before him.

[55] Indeed, the fact that Fipaza was dismissed for 'misconduct' did not justify a carte blanche conclusion that her integrity level was not up to standard. It is clear that the circumstances surrounding her failure to report for duty timeously were somewhat unique, although these did not serve to exonerate her from blame, hence she was charged for misconduct and convicted

accordingly. However, without more ado, the fact that the misconduct did not involve dishonesty was a significant factor which, in my view, would tend to militate against the finding of an irreconcilable breakdown in the trust relationship.

[56] In any event, it was clear that the integrity assessment was conducted before the offer of employment was made to her, despite Mr Boda having initially argued that such situation could not have been the case. ...

[57] In other words, Fipaza was offered employment after the appellant was satisfied with her integrity assessment report. It is seriously doubtful that the appellant would have proceeded to offer her the position if the appellant was not so satisfied. Therefore, it appears to me that the condition in the contract in relation to the integrity assessment was adequately met to the satisfaction of the appellant.

[58] Be that as it may, the fact that in the letter of dismissal the appellant invited Fipaza to apply for any suitable vacancy in the future was, in my view, a further clear demonstration that, despite her 2006 dismissal, the appellant still regarded her as a person of integrity. Nothing was alleged or suggested — let alone proved — to have tarnished Fipaza's integrity during the period since she left the appellant in 2006 up to when she applied for the new position in 2008. Besides her failure to report back to work by the extended deadline, she was still of the same character and integrity as she was when she left in 2006, save that she was then possessed of better academic qualifications, experience and skills. These were characteristics and qualities in her favour, but which would benefit the appellant in its business operations.”⁵

(emphasis added)

[24] Despite this, the LAC did not find that was dispositive of the determination of appropriate relief. It held that “...the issue of the appropriate remedy was not properly canvassed during the arbitration proceedings. There is not enough information on the record to assist in the determination of this important aspect of the case. Both parties ought to be accorded the opportunity to present

⁵ At 565-6

*submissions thereon. The court a quo was therefore not wrong, in exercising its discretion, to remit the matter to the CCMA for the determination of this issue.*⁶

[25] Evidence which was led in the arbitration then did raise additional factors which had not been raised in the previous Court proceedings. The first concerned the representations made by the applicant in the course of the condonation proceedings following the late referral of her first dismissal dispute. That took place after she had already been dismissed on the second occasion in 2008 and after the integrity assessment referred to by the LAC. The second concerned the comments of Pillay J in the review proceedings relating to the condonation application. Thirdly, there was the evidence of Mr Stein about the level of trust expected in positions the applicant believed she should be placed in if she were reinstated, in particular, to the position of Senior Adviser Measurement and the Verification: Corporate Services Division to which she was briefly appointed for her dismissal in 2008. There was also some evidence given by the applicant that she was invited by Eskom to attend interviews for various positions and that the reason she had not returned from the UK timeously was that she had not been provided with air tickets in terms of her husband's contract with Eskom.

[26] As mentioned previously, the arbitrator's conclusions cannot be sustained on the basis of her impermissible reasoning that led her to conclude that the applicant did have a duty to disclose the fact that her previous employment with Eskom had ended on account of her dismissal. The question which must be answered is whether her decision not to reinstate the applicant is one that no reasonable arbitrator could have reached on the evidence before her, notwithstanding this flaw in her own reasoning. For the sake of completeness, the approach to reviewing an arbitration award on the grounds of reasonableness has been expressed in the following way in ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***⁷:

“... the award was one that a reasonable decision maker could not reach. That test involves the reviewing court examining the merits of

⁶ At 568, para [69]

⁷ (2013) 34 ILJ 2795 (SCA) at 2801, para [11]

the case 'in the round' by determining whether, in the light of the issue raised by the dispute under arbitration, the outcome reached by the arbitrator was not one that could reasonably be reached on the evidence and other material properly before the arbitrator. On this approach the reasoning of the arbitrator assumes less importance than it does on the SCA test, where a flaw in the reasons results in the award being set aside. The reasons are still considered in order to see how the arbitrator reached the result. That assists the court to determine whether that result can reasonably be reached by that route. If not, however, the court must still consider whether, apart from those reasons, the result is one a reasonable decision maker could reach in the light of the issues and the evidence.”⁸

- [27] The comments by Pillay J were obviously intended as a critical observation about the applicant's failure to provide a full explanation of her inability to return to South Africa at a time when she could, and should, have done so. The learned judge clearly found the vague references to the applicant's "pecuniary obligations" and her "British obligation" were unnecessarily obscure in the circumstances and were a poor reflection on the applicant's degree of candour. The findings of the Commissioner in the condonation application were somewhat more serious. Effectively, he found that the applicant had been deceptive in cryptically referring to her second dismissal as being due to the 'existence' of the first dismissal, when it was plainly due to her nondisclosure of the fact of her previous dismissal, whether that dismissal was fair or not. The arbitrator also found that she should have disclosed her employment in the interim since her original dismissal. Obviously, these issues would have been very pertinent to determining the *bona fide* nature of her condonation application for the very belated pursuit of that dismissal claim. Quite apart from the fact that the applicant did not have an obligation to disclose to Eskom her previous dismissal in circumstances where the fact of her prior employment was already disclosed to it, the observations of Pillay J and in particular those

⁸ At 2802, para [12].(emphasis added)

of the Commissioner concern other situations in which the applicant could be expected to have been more candid and transparent in her explanations.

- [28] In so far as she offered only the vaguest references to obligations as being the reason for not being able to return to work or to attend the disciplinary enquiry, her coyness in expanding on those references led to Pillay J deciding that there would have been no merit in affording her a later opportunity to defend herself in arbitration proceedings. The principal victim of her lack of candour on that occasion was the applicant herself. However, in the case of her misrepresentation about the relationship between the two dismissals, that representation was clearly intended to persuade an arbitrator that her challenge to the original dismissal had become necessary by reason of its connection to her second dismissal, as part of the motivation why it had not been brought earlier. The applicant's own attempt to explain this away in her evidence under cross-examination does not inspire much confidence that in future she would not see any difficulty, if it served her interests, in using the broadest language to conceal important issues which she ought to bring to light.
- [29] The evidence of Stein was that the position the applicant had applied for would involve her working with contract management and the allocation of work as well as the approval of finances. There was no dispute that the position is a senior one and it is obvious that Eskom ought not to have to appoint someone to that post about whom it has legitimate concerns about their openness and integrity.
- [30] The applicant also argued that it was impermissible for the arbitrator to consider evidence relating to events after her dismissal, and in particular what transpired in the course of her belated attempt to launch an unfair dismissal dispute about her original dismissal in 2006. However, in ***First National Bank – A division of First Bank Ltd v Language & others* (2013) 34 ILJ 3103 (LAC)** the LAC made it unambiguously clear that:

“An employee’s misconduct following dismissal is relevant to determining whether the employee though shown to be unfairly dismissed, should be reinstated. See Zilwa Cleaning & Gardening Services CC v CCMA & others.”

Obviously, evidence concerning a former employee's lack of candour in circumstances where there is a duty not to conceal material information, is plainly relevant to the appropriate remedy. Accordingly, the applicant's carefully worded condonation affidavit, which was designed to obscure the relationship between the first and second dismissals and which omitted the fact that the applicant had been employed in the interim, was relevant to whether Eskom could say it had significant concerns about her trustworthiness.

[31] Consequently, notwithstanding the flawed reasoning of the arbitrator, her ultimate finding that it would be inappropriate to reinstate the applicant is not one that no reasonable arbitrator could reach. Accordingly, I do not believe that grounds have been established for reviewing and setting aside the award.

Order

[32] The review application is dismissed.

[33] No order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court

APPEARANCE

For the Applicant: E.Van Graan SC and P.Kirstein

Instructed by: Van Der Merwe Du Toit Inc

For the Second Respondent: F. Boda

Instructed by: Norton Rose South Africa

LABOUR COURT