DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO.~~
(3) REVISED.

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case No: JR 1402/14

In the matter between:

KAGISO GERALD GALESITOE	**First Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
PEARL MBEKWA ***N.O.***	**Second Respondent**
DELOITTE SOUTHERN AFRICA	**Third Respondent**

Heard: 7 December 2016

Delivered: 31 January 2017

Summary: (Review – duty to disclose litigation with former employer – distinguishable on facts from *Eskom Holdings Ltd v Fipaza & others* (2013) 34 *ILJ* 549 (LAC)

JUDGMENT

LAGRANGE J

Introduction

[1] The crux of this review application is whether the arbitrator applied the test in *Eskom Holdings Ltd v Fipaza & others* [1]correctly when deciding if the applicant ought to have disclosed the fact that he was litigating with his former employer, the Public Investment Corporation ('the PIC'), when he was being considered for employment by the third respondent ('Deloittes').

[2] The employee had been essentially dismissed for withholding or not disclosing material information to the applicant at the earliest opportunity, which information would have resulted in the applicant not employing him. The applicant was also charged with misrepresenting his ability to attend to all his employment obligations knowing that this would be impossible given the ongoing litigation between himself and the PIC. The importance of the information about his relationship with his former employer is encapsulated in part of the conclusion of his internal appeal where it was stated:

> "The evidence establishes that the ongoing litigation with the PIC has a material impact on your employment obligations and ability to fulfil the position that was created for you in the Corporate Finance division. The evidence support that you were appointed to be involved not only in National, Provincial and Local Government work, but also specifically assisting and being involved in approaching and winning business with the PIC due to your past work experience with the PRC. During both interviews the intention for you to assist Corporate Finance to grow business and obtain traction with the PIC was raised. The ongoing litigation would not only materially impact on any ability for you to win business with the PIC, but would negatively affect your ability to work with other Public Sector clients due to the significant role the PIC plays in the Public Sector."

[3] The arbitrator's key findings and reasoning in determining that the applicant had been fairly dismissed are set out in her award, in particular in paragraphs 35 to 48 thereof which are set out below:

> "35. In the case of the applicant, the evidence that the applicant accepted the respondent during the interview stage, mentioned its embarking on restructuring and a business strategy to get work/business from the public

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[1] (2013) 34 *ILJ* 549 (LAC)

sector. It was public knowledge that PIC had a major command in the public sector business domain.

36. The applicant was not coherent and consistent on the issue whether during the August 2013 interview, PIC was specifically referred to as a target and that his employment would be linked to sourcing business from the PIC. During the opening statements of the parties it was submitted on behalf of the applicant that in the interviews held with the applicant no mention was made of the PIC which was placed in dispute by the respondent. The applicant proceeded with the stance in absolute terms until under cross-examination covering a summary of his case when the applicant gave evidence to the effect that in the interviews PIC was discussed and that was not with regard to the litigation.

37 on the other hand, the evidence of the three respondents witnesses Larbi-Odam, Tabane and Daramlall was that in the interview, PIC was mentioned as a target and his appointment would be specifically attached to winning business from it. I find support for this piece of evidence in the fact that in the meeting since held on 3 October 2013, is name was recorded as specifically linked to the PIC in the respondents "key areas" for action. The meeting was held very shortly after his appointment on 1 October 2030. This also demonstrated the special purpose in considering the applicant for appointment and pointing [him] to the position. It follows that as early as August 2013, respondent considered the appointment of the applicant for the special key area of focus on PIC and that this was communicated in the interviews held and this was maintained as a trend in its interaction with the applicant. Based on this analysis and the evidence as a whole, in the particular case of the applicant there was a need to disclose the litigation in the interviews and in his subsequent interaction with the respondent before he disclosed it on 4 October 2013.

38. In the Eskom case, the employee had been previously employed by Eskom as the Court stated. The applicant in that case by disclosing her previous dismissal from Eskom, the applicant would be reminding Eskom if Eskom had not asked her during the interviews. In the applicant's case the special factors which existed before his appointment should be balanced with the evidence that his responsibilities after appointment demanded constant interaction with PIC for achieving the standards set by the respondent and managing the PIC account. It can hardly be said that he would be able to

meet the standard as in my view with the ongoing litigation the applicant posed a situation of conflict with this objective.

39. Unlike the ability to establish the information of the nondisclosure in the Eskom case, the applicant was not previously employed by the respondent. As it turned up while the respondent could [have] done pre-employment checks on the applicant, in the publication of the court case with the PIC, the applicant was only referred to as Bodigelo and not the name recorded in his CV which he used in his interaction with the respondent. I am therefore not convinced that the respondent would without his disclosure be successful in knowing that he was the person involved in the litigation.

40. I find Tabane's knowledge Ltd as he stated that he knew the litigation as a finalised matter. Tabane had the status of senior partner in another firm. Larbi-Odam was Head of corporate finance at the respondent and the final decision in appointing the applicant lay with him. Even though the firm operated with close ties with the respondent Tabane's dealings with the applicant could not be turned into those of the applicant's employer whether prospective or not. Arguing that Tabane should have been disciplined was clutching at straws on the part of the applicant. It was the applicant not Tabane who aspired to work at the respondent and the fact that Tabane introduced him to the respondent did not the track from the fact of his status and that of the applicant in the matter is related to the applicant's employment.

41 Before appointment, the applicant interacted with Omaruaye, who was a custodian of processes which were used for his appointment. Though he did not come clean regarding his queries to Omaruaye, before he signed the contract of employment I find the explanation by Omaruaye prompted disclosure and that the applicant deliberately omitted to consider disclosing the litigation with a view to secure his employment.

42. The applicant admitted disclosing the litigation to Nisha considering the allocation of his name and Nisha's linking it to PIC as stated under summary of key actions in the meeting of the 3 October 2013.

43. The applicant's evidence that in, approaching Nisha Daramlall, he was seeking to take leave to attend to his matters and only when he was prompted to state the reason he disclosed the fact of the litigation shows that the applicant did not forthrightly approach her to disclose the litigation and

that the applicant treated disclosing the litigation as a secondary issue even at that stage.

44. I find from the factors discussed above, that the fact the respondent considered appointing the applicant with the focus which of the evolving in working in the public sector with specific focus on the PIC, was communicated to the applicant in the August 2013 interview. I'm convinced from the undisputed evidence that the litigation was on going at the time of the interview the applicant was reasonably expected to disclose it. Informing the respondent about the litigation was material at that stage of applicant aspiring to work at the respondent as his employer. I do not agree with the argument advanced by the applicant and his team, that the respondent had to put a [clause] in his contract concerning the focus. 45. In omitting to disclose the litigation in the background of the discussions at the interview, at the time in September 2013 during the interaction with Omaruaye and in the section's meeting held on 3 October 2013, the applicant deliberately concealed it. His conduct had a negative impact on the respondent. Larbi-odam also testified that he could no longer trust the applicant based on the omission.

46. I do not agree with the argument advanced by the applicant and his legal team, that the respondent had to record the focus on the PRC expected of him, in his contract of employment.

47. The applicant by his conduct, and in more than one respect, breached rules which was reasonable and which were well known to him. Bearing in mind his background, he did not have to know the standards expected of him in the rule. I conclude from the evidence, judged as a whole, that the rules were consistently applied by the respondent. I therefore find that he committed the misconduct for which he was disciplined. I also find the misconduct as that of a serious nature and dismissal was appropriate.

48. I also noted that the applicant was under probation when the respondent disciplined him making it possible for the respondent to dismiss him in lawful is compelling reasons. The respondent by engaging him on 10 October 2013, in its attempt to resolve the problems emanating from his omission to disclose, did not act irregularly and was not unfair towards him as it was undisputed that it made an attempted mutual separation from the relationship which the parties had at the time."

The review application

Grounds of review

[4] The applicant raises four grounds of review, namely:

4.1 As a matter of public policy, the applicant was not obliged to disclose his litigation with the PIC because Section 5 (c) of the Labour Relations Act 66 of 1995 ('the LRA') prohibits an applicant for employment from being prejudiced on account of exercising any right conferred by the LRA or engaging in proceedings under the Act.[2]

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[2] Section 5 states:

"5. Protection of employees and persons seeking employment

(1) No person may discriminate against an employee for exercising any right conferred by this Act.

(2) Without limiting the general protection conferred by subsection (1), no person may do, or threaten to do, any of the following-

(a) require an employee or a person seeking employment-

(i) not to be a member of a trade union or workplace forum;

(ii) not to become a member of a trade union or workplace, forum; or

(iii) to give up membership of a trade union or workplace forum;

(b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or

(c) prejudice an employee or a person seeking employment because of past, present or anticipated-

(i) membership of a trade union or workplace forum;

(ii) participation in forming a trade union or federation of trade unions or establishing a workplace forum;

(iii) participation in the lawful activities of a trade union, federation of trade unions or workplace forum;

(iv) failure or refusal to do something that an employer may not lawfully permit or require an employee to do;

(v) disclosure of information that the employee is lawfully entitled or required to give to another person;

(vi) exercise of any right conferred by this Act; or

(vii) participation in any proceedings in terms of this Act.

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment in exchange for that person not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.

However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute.

(4) A provision in any contract, whether entered into before or after the commencement of this Act, that directly or indirectly contradicts or limits any

4.2 The arbitrator failed to appreciate on the common cause facts that a member of the interview panel (Tabane) was aware of the litigation and the litigation was in the public domain. Consequently, as in the *Fipaza*'s case, the employer could not require the applicant to disclose this information.

4.3 The arbitrator failed to consider that the HR manager of corporate finance of the applicant conceded that the applicant did not do its usual background checks on the applicant. Had these checks been conducted, the applicant would have learnt of the PIC litigation.

4.4 The arbitrator misconstrued the evidence relating to the significance of the applicant's ability to secure business from the PIC when she decided that it was significant that during his interview, it was pointed out to him that his appointment would be designed to win business in the public sector with a specific focus on the PIC, whereas the applicant merely hoped to leverage or utilise his PIC experience and that securing business from the PIC itself was not his primary focus. By misconstruing the evidence and attributing importance to it, the arbitrator arrived at an unreasonable finding.

[5] In evaluating the application, it is important to re-emphasise that the court is not deciding whether the arbitrator came to the correct conclusion on the evidence but whether, in applying the relevant legal test, the arbitrator arrived at findings which no reasonable arbitrator could have reached on the evidence before her. In this regard, it is important to bear in mind that an applicant wishing to challenge the factual evaluation of an arbitrator has a difficult burden to discharge, as the leading decisions on reviews demonstrate. See in this regard *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* where the SCA stated:

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the B LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as

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provision of section 4, or this section, is invalid, unless the contractual provision is permitted by this Act."

contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."[3]

and *Head of the Department of Education v Mofokeng and others* in which the LAC held:

"[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted section 145 of the LRA, confining review to "defects" as defined in section 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to

[3] (2013) 34 *ILJ* 2795 (SCA) at 2806

at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination."[4]

(footnotes omitted)

Evaluation

[6] As regards the first ground, I agree with the third respondent that the litigation the applicant was pursuing with the PIC was not litigation pursuant to the exercise of any of his rights under the LRA. The applicant had sued his former employer for director's fees and bonuses amounting to R 2, 3 million which he claimed he was entitled to by virtue of having sat on the boards of those companies owned by the PIC. This was not litigation relating to the exercise of any of his rights under the LRA. Accordingly, he was not entitled to claim that on-going civil litigation against the PIC could not be legitimately considered a material factor affecting his eligibility for employment.

[7] As far as the claim that Tabane's prior knowledge of the litigation should have been ascribed to Deloitte, I do not think that the arbitrator's findings in this regard are ones that are incapable of being reasonably drawn on the evidence before her. It is important to stress that to the extent that Tabane had prior personal knowledge of the litigation, it was limited and as far as he knew it had already been concluded. Given that he believed it was water under the bridge, it would not have obviously been information it was

[4] [2015] 1 BLLR 50 (LAC) at 60-61.

necessary to raise in the interview process. Moreover, although the applicant's CV was sourced by him in his capacity as an employee of a related company, Deloitte's consulting, he was not employed by Deloitte's and his knowledge could not simply be ascribed to it. In any event, unlike in Fipaza's case where Eskom had correct information in its personnel records of the circumstances of her termination, in the applicant's case such knowledge which Tabane had was not even accurate in any event.

[8] Secondly, even if the applicant had been suing PIC under the same name he used in his job application and therefore the litigation might have been detectable by a thorough search of pending litigation, I do not think that an employer has any duty to research what litigation, if any, a job applicant might be engaged in. It might be prudent to do so, and many employers do follow such a practice, but an applicant for employment cannot assume that a prospective employer has done this. It would also be perverse if a prospective employee could say, in effect, to a prospective employer "I am entitled to assume that you have done diligent research into my history of litigation with my previous employers, to the extent it may be relevant to my engagement, and consequently, I do not need to mention the fact that I have a significant civil claim against my last employer with whom you seem to be expecting I will assist you to engage with in a fruitful business relationship if I am employed." Further, it is not disputed that even if Deloitte had done such research, it would not necessarily have learnt of the litigation because the applicant was litigating under a different name.

[9] In *Fipaza's* case, a distinctive feature of that matter was that, it was common cause that the information she was accused of withholding was known to the employer and she had disclosed her former employment with Eskom, which could easily have checked her employment record with it.[5] Eskom did not have to conduct research in the public domain to obtain it. It is also worth mentioning that in that case, when Ms Fipaza applied for a new appointment it was barely a year and a half since her previous relatively lengthy employment of approximately twelve years with Eskom had been terminated. Moreover, at the same time Eskom had communicated to her

[5] *Eskom Holdings Ltd v Fipaza & others* (2013) 34 *ILJ* 549 (LAC) at 566-7, paras [60] – [65]

that it was satisfied it complied with all its procedures in terminating her services, it simultaneously advised her that she could apply for future vacancies.[6] In this instance, the information that there was still pending litigation between the applicant and the PIC was not known to anyone at Deloitte's and not even known to Tabane. Further, it was not information ascertainable from Deloitte's own records as it was in *Fipaza's* case.

[10] Regarding the arbitrator's conclusions on the applicant's obligation to mention his pending litigation, the arbitrator's assessment of the evidence was essentially to the effect that the applicant ought to have realised during the interview process that Deloitte saw his previous employment with PIC as an added advantage in securing work in the public sector and that this made him more attractive as an employment prospect. In considering the conflicting evidence about what transpired in the interviews, the arbitrator carefully weighed up the evidence for and against the probability that the applicant's prior relationship with the PIC was seen as a significant factor in offering him the position and was understood as such. It is possible another arbitrator might have read the evidence differently, but the inferences she drew in this regard are not implausible ones.

[11] Accordingly, it was not unreasonable to infer that a person applying for the senior level of post in question would have realised that the nature of his relationship with his former employer was a material consideration for his prospective new employer and could affect his employment prospects. That would have given rise to the obligation to disclose having regard to the principle enunciated in *Absa Bank Ltd v Fouche* [7] which the LAC and the

[6] As set out in the labour court judgment in *Fipaza v Eskom Holdings Ltd* (2010) 31 *ILJ* 2903 (LC) at 2906-7, paras [4] – [9].

[7] 2003 (1) SA 176 (SCA) at para [5], viz:

> "'The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context — a non-disclosure — have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (Speight v Glass and Another 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful (BOE Bank Ltd v Ries 2002 (2) SA 39 (SCA) at 46G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him "would be mutually recognised by honest men in the circumstances"

LC followed in the *Fipaza* case. It is important in this regard to distinguish the applicant's own obligation and that of Tabane. The issue is whether the applicant ought to have realised he had an obligation to disclose his ongoing litigation with the PIC in the circumstances. Fipaza knew as a certainty that her former employer ought to have known the circumstances of her previous termination. She reminded Eskom of her previous employment and it had the relevant to records pertaining to the termination of that relationship. She did not have to rely on speculating what a member of the interviewing panel might have known and might have disclosed to the other members of the panel. It is true that if Tabane had been more diligent he might have sought confirmation from the applicant that his understanding of the status of the litigation was correct, but there was no basis for the applicant assuming that Tabane and by extension Deloitte's itself knew that the litigation was still ongoing. In this regard it is also important to mention that it was never put to Tabane under cross-examination that the applicant had informed him of the state of the litigation.

[12] On the basis of the analysis above, I am satisfied that the arbitrator's award is not reviewable on the grounds raised. There is also no reason in this instance in my view why costs should not follow the cause.

Order

[13] The review application is dismissed.

[14] The applicant must pay the third respondent's costs.

Lagrange J

Judge of the Labour Court of South Africa

(Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management) 1965 (3) SA 410 (W) at 418E-F"

APPEARANCES

APPLICANT: S L Shangisa assisted by M C Nthangase instructed by Mabuza Attorneys Inc.

THIRD RESPONDENT: A Myburgh SC instructed by Bowman Gilfillan Attorneys