



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS 533/16

In the matter between:

NTSELISENG KHUMALO

Applicant

and

UNIVERSITY OF JOHANNESBURG

Respondent

Heard: 24 & 25 August 2017

Delivered: 6 February 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] In her statement of claim, the applicant (Ms Khumalo) seeks an order that her dismissal by the respondent (University) be declared to constitute unfair discrimination within the meaning of the provisions section 6¹ of the Employment Equity Act.² Her claim is premised on the allegation that the

¹ Section 6: **Prohibition of unfair discrimination.** —

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground

² Act 55 of 1995 (as amended)

University dismissed her on a listed discriminatory ground being her social origin or citizenship. The University opposed the claim and disputed that Khumalo was subjected to discrimination. It contended that she was instead dismissed for gross dishonesty.

Background:

[2] The University is a tertiary educational institution established in terms of the provisions of the Higher Education Act³. Khumalo was offered and had accepted a contract of employment as a Lecturer in the University's Industrial Psychology and People Management School. She had not commenced her employment in earnest when she was dismissed.

[3] The facts of this dispute are to a large extent common cause and may be summarised as follows:

3.1 On or about 9 April 2015, the University published an advertisement wherein it called upon interested individuals to apply for a position of an Academic in the Faculty of Management. The advertisement called upon the prospective candidates to possess the following minimum requirements for the position:

"...

- A Master's degree in Human Resource Management. Organisational Behaviour. Human Resource Development or closely related area.
- Teaching / training experience at the reputable higher education institution, locally or internationally.
- An excellent ability to speak and write in English.
- Proof of well-developed research background;
- Published articles in accredited, peer-reviews journals would be an advantage; and
- You may be expected to undergo psychometric testing."

³ Act 101 of 1997 (as amended)

- [4] On or about 13 May 2015, Khumalo applied for the position by submitting her *Curriculum Vitae* (CV) as attached to her application. In her CV, Khumalo recorded that she was a South African citizen. Khumalo had also completed a form referred to as “statistical data sheet” as part of the recruitment, wherein she stated that she was a South African citizen with residential status.
- [5] On 17 August 2015, Khumalo was interviewed for the position. She was recommended and offered the position on 10 September 2015. The written offer outlined her remuneration package. She was required to confirm acceptance of the position by 14 September 2015.
- [6] On 11 September 2017, Khumalo wrote to the University in acceptance of the offer of employment. On or about 15 September 2015, the University wrote a letter to Khumalo titled “*Letter of Appointment: Lecturer*”. The letter of appointment outlined the terms and conditions of her employment. Clauses 10 and 15 of the letter are pertinent for the purposes of these proceedings and read as follows:

“...

10. NON-SOUTH AFRICAN RESIDENTS:

This appointment is subject to the condition that you provide the University of Johannesburg with the confirmation of your valid work *visa*/permanent residence of this country. Kindly utilise this letter of appointment to facilitate the processing of such via the relevant authority.

You are advised to submit an application for the extension of your *visa* at least six weeks before it expires. Should you intend applying for permanent residence, you are required to do so as soon as possible after arrival in this country and are required to continue extending your work *visa* until such time as permanent residency is granted. Should your services with the University of Johannesburg terminate for any reason during the period of your temporary residence the University is obliged to advise the Department of Home Affairs of such termination. Please submit a

copy of your work permit/visa and any extension thereof, and your permanent residence certificate, to Human Resource Administration for retention on your personal file.

And

15. DISCLOSURE OF MATERIAL FACTS:

Should any information come to the attention of the University after you have been employed which at the time of your employment would have materially impacted on whether you would have been offered a position by the University or not, then this may constitute grounds for the termination of your employment.

- [7] In a letter dated 24 November 2015, the University alleged that it had offered Khumalo the position believing that she was a South African Citizen. The letter *inter alia* read as follows:

“ ...

As you may recall, we advertised the position of Lecturer indicating amongst others that the institution could make an appointment in line with its obligations towards individuals from historically disadvantaged grouping.

It is for this reason that you were specifically questioned regarding your citizenship on which you confirmed in the interview that you indeed a South African Citizen.

We are of the view that you may not be a citizen as per the provisions of the Employment Equity Act (as amended) and as a result do not qualify for the appointment as we were placed under the impression that you were a candidate as listed above.

You are accordingly afforded an opportunity to respond in writing to the aforesaid provisional view. You are specifically invited to bring anything to our attention that may influence our view and reasons as to why your contract of employment should not be rescind[ed]”

- [8] Khumalo's reply to the above in a letter dated 27 November 2015, was as follows:

"Your correspondence dated 24th November 2015 instant bears reference. I confirm and reiterate that I am a South African citizen. This by virtue of my marriage to MOKHELE JOHN KHUMALO with ID number [...], a South African by birth. I hope to have advised you accordingly."

- [9] After numerous correspondence between the University, Khumalo and the parties' attorneys of record, the University took a decision to prefer charges of misconduct against Khumalo. On 14 January 2016, the University dispatched a notice to her to attend a disciplinary enquiry. The said notice recorded the following:

"...

1. You are hereby required to attend a disciplinary enquiry into allegations of gross misconduct against you.
2. The alleged transgressions of gross misconduct against you are as follows:-
 - 2.1 Gross dishonesty in that during your application to the University as a lecturer within the Department of Industrial Psychology and People Management, and subsequently, you misrepresented that you were a South African citizen in circumstances where you are not. But for your misrepresentation as aforesaid, the University would not have offered you employment.
 - 2.2 Alternatively and in any event, it is contended that it is just and equitable to terminate the employment relationship on the grounds of impossibility of performance in that you are not lawfully permitted, in terms of the Immigration Act or otherwise, to work for the University of Johannesburg.

..."

[10] On 21 January 2016, Khumalo appeared before an internal disciplinary tribunal on the allegations of misconduct preferred against her. In an outcome dated 24 January 2016, the chairperson of the internal disciplinary tribunal found Khumalo guilty of the charge as outlined in clause 2.1 of the notice, and she was subsequently dismissed on 31 January 2016.

[11] Khumalo launched an appeal with the office of the Vice - Chancellor of the University. In a letter dated 5 February 2016 she was informed that;

“After reviewing the findings of the chairperson dated 21 January 2016 and considering your subsequent appeal dated 27 January 2016, I regret to inform you that I concur with the decision of the Chairperson, Larry Shear.

Subsequently this is to confirm that your services will be terminated as of 31 January 2016.

...”

[12] On 10 March 2016, Khumalo referred an unfair discrimination dispute to the Commission for Conciliation Mediation and Arbitration (CCMA). Conciliation having failed, a certificate of non-resolution was issued by the CCMA, hence the claim before the Court.

The evidence:

[13] Khumalo’s evidence in support of her claim may be summarised as follows:

13.1 She was previously employed by the University of KwaZulu-Natal (UKZN) as a Lecturer in Human Resource and Organisational Behaviour. In her CV, she had stated that she was a South African as she was married to a South African since 2008. A copy of her Identity Document was made available to the University’s representatives, in particular, to the Human Resource Management representative Ms Antoinette Kanfer before the commencement of the interview.

13.2 After the interview, she was informed that she had been appointed, and the University requested that she provide it with a copy of her

previous payslip. She subsequently accepted the offer of appointment.

- 13.3 In the University's letter of appointment there was no requirement that she must be a South African citizen. After the acceptance of the offer, she was required to sign another document in September 2015. She then resigned from her position at UKZN, as she had to assume her duties at the University.
- 13.4 On or about 24 November 2015, she received a letter from the University requiring her to provide reasons why her employment should not be rescinded taking into account that it had come to its attention that she was not a citizen of the Republic. Her reply to that letter was to the effect that she was of the view that she was a citizen of the Republic at the time of her application for employment.
- 13.5 In January 2016, when she reported for duty, she was given a copy of her employment contract. She was at the same time informed that the University intended taking disciplinary action against her. She was of the view that there was no condition in the advertisement that the position advertised was reserved for individuals from previously disadvantage groups, or that prospective applicants ought to have been citizens of the Republic.
- 13.6 On 14 January 2016, she was required to sign her contract of employment. She holds *inter alia* a Master of Business Administration (MBA) degree and understood the disciplinary processes to a certain extent. At the time of her response to the advertisement of the position, she was not certain what the terms or phrases "EE / AA" meant. She was further unaware that citizens of foreign origin could not be classified as EE/AA candidates. She nonetheless persisted with the contention that at the time of her application, she considered herself a citizen of the Republic.
- 13.7 In her online application and her CV, she recorded that she was a citizen of the Republic, even though a copy of her Identity document,

which she handed over to the University during the interview process, recorded that she was a '*Non-Citizen*' of the Republic.

13.8 During the interview, three (3) candidates were interviewed for the position including herself. She and another candidate a Zimbabwean National, Dr Herbert Kanengoni were appointed.

13.9 During the interview and subsequently thereafter, she was never asked if she was not a citizen of the Republic. However, if the University had asked her, she would have replied that she was in fact a citizen of the Republic.

[14] The University led the evidence of Ms Antoinette Kanfer (Kanfer) its Human Resources: Business Partner in the Faculty of Management in support of its case. Her evidence may be summarised as follows:

14.1 The advertisement for the post indicated that "EE/AA" was applicable. This was in reference to affirmative action and employment equity requirements. The purpose of the disclaimer in the advertisement was to notify prospective applicants, that persons from previously disadvantaged groups would be given preference.

14.2 She was present throughout the interview process. There were two (2) successful candidates, Khumalo and Dr. Kanengoni. The University had set itself 70% equity targets in favour of the previously disadvantaged group during the year Khumalo was appointed.

14.3 During the interview process, the chairperson of the interviewing committee asked Khumalo whether she was indeed a citizen of the Republic and she replied in the affirmative.

14.4 Kanfer contended that Khumalo on at least three occasions stated that she was a citizen of the Republic; and as such, there was no reason to doubt her version. She confirmed that Khumalo had also handed in a copy of her Identity document during the interview process.

- 14.5 Khumalo was found guilty on charges of dishonesty. The effect was the University could not trust her, as she had been dishonest in her conduct with the University. As an academic institution the University could not retain her due to her dishonesty and because a trust relationship could not be sustained.
- 14.6 She contended that the University did not discriminate against Khumalo. As it had equity targets to meet and further to create balance in its staff complement. Dr Kanengoni was a foreign national, and it could therefore not be correct that the University had discriminated against Khumalo based on her citizenship.
- 14.7 Khumalo met the minimum requirements of the advertised position. However, the disclaimer that EE/AA may apply did not constitute a minimum requirement of the position. The University reserved the right to make an appointment in accordance with its' EE/AA targets, and the disclaimer did not exclude non-South Africans from applying for the position.
- 14.8 Khumalo in her CV, her online application, and during the interview reiterated that she was a South African citizen. She maintained also at the Disciplinary Enquiry that she was a citizen of the Republic as a result of her marriage to a South African even though her Identity Document stated otherwise.
- 14.9 There was a four (4) months period between the date of the interview and the date the University discovered that Khumalo was not a citizen of the Republic. The delay in the discovery was due to the fact that the application and appointment had to go through the administration processes, and then be sent to the executive committee for approval. The issue of the Identity Document was discovered at a later stage when Kanfer went through Khumalo's documents. It was at that point when Kanfer contacted the Chairperson of the committee.

Evaluation:

[15] Central to this dispute is whether a case of discrimination was made out. In accordance with the parties' signed pre-trial minutes, the issues the Court was required to determine are:

- a) Whether or not the dismissal constituted discrimination on the basis of Khumalo's social origin and, if so, whether or not discrimination was unfair and in violation of the provisions of section 6 of the Employment Equity Act⁴ or;
- b) Whether or the dismissal was directly linked to Khumalo's gross dishonesty.

Alleged discrimination:

[16] The test for determining whether a claim based on unfair discrimination should be successful is that as enunciated by the Constitutional Court in *Harksen*⁵. In terms of section 11 of the Employment Equity Act (The EEA), the

⁴ Section 6 (1) provides that:

"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

Section 6(2) provides that: "

It is not unfair discrimination to— (a) take affirmative action measures consistent with the purpose of this Act; or (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

⁵ *Harksen v Lane NO and Others* [1997] ZACC 12; 1998 (1) SA 300 (CC); 1997 (11) BCLR 1489 (CC) at para 54 where it was held that;

"At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

- a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.
- b) Does the differentiation amount to unfair discrimination? This requires a two-stage analysis:
 - (i) Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

burden of proof is placed on the employer in every case where unfair discrimination based on the Equity Act is alleged, to establish that the discrimination did not take place or where it did, it was fair ⁶.

- [17] It must be stated as a starting point that from both the pleadings and her evidence, it is not clear as to the basis upon which Khumalo had alleged that she was discriminated against. For a person to have duly qualified for the post in question, other than the requirements of the post as advertised, two other significant requirements had to be met.
- [18] The first was in respect of the disclaimer in the advertisement in terms of which the University had indicated its intentions to give preference to candidates from previously disadvantaged backgrounds. This essentially pertained to the University's own employment equity policies/practices and targets in accordance with the provisions of the Employment Equity Act.
- [19] A second significant consideration emanating from the offer of employment pertained to clause 10 of the offer in terms of which certain requirements had to be met by '*Non-South African Residents*' prior to commencing employment.

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- (ii) If the differentiation amounts to 'discrimination', does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

- (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (section 33 of the interim Constitution)."

⁶ Section 11 Burden of proof:

(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination

- (a) did not take place as alleged; or
- (b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that

- (a) the conduct complained of is not rational;
- (b) the conduct complained of amounts to discrimination; and
- (c) the discrimination is unfair.

- [20] In her statement of claim, Khumalo stated that she is a citizen of Lesotho. It was further not in dispute that she was married to a South African national, and further that her South African Identity Document is clearly marked '*Non-Citizen*'. In her CV, the on-line application form, and in her interview, Khumalo had always insisted that she was a South African citizen. Inasmuch as it was reluctantly conceded in her testimony and in the submissions made on her behalf that she was not a South African citizen, her main contention nonetheless was that her citizenship was acquired through marriage, and thus her dismissal was connected to her citizenship.
- [21] The issue of whether Khumalo was discriminated against on the grounds of her citizenship can only imply a concession that she was not a South African citizen, a point she had already made in her statement of claim. If I then understood Khumalo's case, her main challenge would be in respect of the University's employment policy or practice, which include *inter alia* recruitment procedures and selection criteria, and which in turn take into account employment equity plans and targets.
- [22] As already indicated, other than the requirements of the post as advertised, there was a disclaimer in the advertisement to the effect that in conjunction with the consideration of the requirements of the post and qualifications, the University was committed to providing equal employment opportunities to persons with disabilities and those from historically disadvantaged groups. Kanfer's testimony in this regard was that the University for that year was striving for a 70% equity target. According to Kanfer, Khumalo was during the interview, asked by the Chairperson of the panel whether she was a South African citizen for the purposes of 'designated persons'⁷ and she had answered in the affirmative.

⁷ Section 1 of the Employment Equity Act as amended:

'Designated groups mean black people, women and people with disabilities who-

(a) who are citizens of the Republic of South Africa by birth or descent, or

(b) became citizens of the Republic of South Africa by naturalisation:

(i) before 27 April 1994: or

(ii) after 26 April 1994 and who would have been entitled to acquire citizenship by naturalization prior to that date but were precluded by apartheid policies.'

- [23] The first hurdle Khumalo is faced with is that she acknowledged the disclaimer in the advertisement, even though she contended that she did not understand what affirmative action and employment equity was all about. Be that as it may, her contention that the advertisement had not required that applicants to be South African Citizens within the meaning of 'designated groups' is rejected. For her to have qualified for the position and further in accordance with the University's equity plans, she needed to have fallen within the definition of '*designated group*' and she clearly had not.
- [24] Clause 10 of the offer of employment specifically catered for non-South African citizens. Despite Khumalo's vacillation between whether she or was not a citizen, and further after having been afforded an opportunity to sort out her status, it is not my understanding that as at the time of her dismissal she had sorted out her status. Thus, to the extent that she was not a South African citizen, and further to the extent that the provisions of clause 10 of the offer of employment had not been complied with, the University was therefore within its rights to invoke the provisions of clause 15 of the offer of employment.
- [25] On the whole, I did not understand Khumalo's case to be that the implementation of the University's employment equity policies was flawed or that the policies themselves were discriminatory. It is further trite that she could not have complained of discrimination when those practices emanated from legislation or regulations. Thus, to the extent that there is any merit to the allegation of unfairness, the discrimination complained of is authorised by legislation insofar as the definition of '*designated group*' is concerned, and it is for Khumalo challenge the constitutional validity thereof⁸.
- [26] As at the time that she applied for the position she did not qualify for appointment by virtue of the University's employment equity plans and targets. She had not complied with the requirements set out in clause 10 of her offer of employment. To further put the matter to rest, at the time of the interviews, and prior to her appointment, there were two other candidates. One of the other appointed, Dr Herbert Kanengoni is Zimbabwean, whilst the

⁸ See *Sali v National Commissioner of the South African Police Service and Others* [2014] 9 BLLR 827 (CC); 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 16

unsuccessful candidate was a white South African. There is therefore no basis for any conclusion to be reached that the termination of her services was in any manner discriminatory.

The dismissal:

- [27] Khumalo was charged and dismissed for gross dishonesty in respect of her application for appointment. The nub of the charge is that she had misrepresented to the University that she was a South African Citizen in circumstances when she was not, and but for the misrepresentation, the University would not have offered her employment.
- [28] Myburgh AJ in *LTE Consulting (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*⁹ considered various authorities where the courts had dealt with instances of misrepresentation made by applicants for posts. The message that comes from the judgments referred to by Myburgh AJ is that misrepresentations made in *curriculum vitae* or interviews, or an omission to disclose certain pertinent facts in *curriculum vitae* should be dealt with harshly by the courts, even if the misrepresentations or omissions are discovered after the employment had commenced.
- [29] In this case, it was argued on behalf of Khumalo that to the extent that she had insisted that she was a South African citizen when she applied and was offered the post, it cannot be said that there was intent on her part to misrepresent the true state of affairs in regard to her status. It was argued that as a result of her marriage to a South African, she believed (mistakenly) that she was indeed a citizen. It was further argued that at most, and on the common cause facts, she was guilty of innocent misrepresentation, as intention had not been established, and there can be no grounds to conclude that she was grossly dishonest.
- [30] Whether the misrepresentation was intentional or innocent as contended on Khumalo's behalf ought to be considered within the context of these facts;

⁹ [2017] 12 BLLR 1259 (LC); (2017) 38 ILJ 2787 (LC)

- a) In her *Curriculum Vitae*, her on-line application form and in the interview, she had confirmed that she was a South African citizen. On Kanfer's version, Khumalo had persisted with that version in the internal disciplinary enquiry.
- b) In her letter of appointment dated 15 September 2015, and before she commenced her employment on 1 January 2016, it was alluded in its clause 10 that non-South African residents must be in possession of a valid work visa or permit/permanent residence of the country, and if not, to facilitate the processing of such via relevant authorities. In her evidence, Khumalo, despite her persistent contention that she was a South African, testified that at the time that she signed the contract of employment on 14 January 2016, there were already 'issues' surrounding her citizenship, and that she was in the process of resolving those issues. Be that as it may, the issue of citizenship had previously been raised with her in a letter dated 24 November 2015.
- c) Significant with the above is that even if Khumalo believed that she was a citizen, she was aware at least at the time that she signed the contract of employment that there were concerns already raised in regards to her status. On her version, she was either in the process of sorting out her citizenship/naturalisation, and yet in the same token, had not done anything to sort out the 'error' on her identity document that indicated that she was a 'non-citizen'.

[31] In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others*¹⁰, Savage AJA in addressing the question of dishonesty in respect of candidates for employment held that;

"The employment relationship by its nature obliges an employee to act honestly, in good faith and to protect the interests of the employer. The high premium placed on honesty in the workplace has led our courts repeatedly to find that the presence of dishonesty makes the restoration of trust, which is at the core of the employment relationship, unlikely.

¹⁰ (2017) 38 ILJ 881 (LAC) at para 26

Dismissal for dishonest conduct has been found to be fair where continued employment is intolerable and dismissal is “a *sensible operational response to risk management*”. Obtaining employment on false pretences whether by misrepresenting qualifications, skills, experience or prior work history has been found to justify dismissal, with it stated in *Boss Logistics v Phopi and others* that if this were not so, a sanction short of dismissal would only serve to reward dishonesty.” (Authorities omitted)

- [32] There are various difficulties with Khumalo’s contentions that her misrepresentation was merely innocent. The first as correctly pointed out by Mr. Lennox on behalf of the University is that in terms of the provisions of section 14 of the Citizenship Act¹¹, marriage does not confer citizenship. Thus, Khumalo’s claim that she was of the view that she was a South African citizen by marriage is unsustainable.
- [33] Even if it could be said that Khumalo was under the mistaken belief that she was indeed a South African citizen by virtue of her marriage, at the very least, and prior to commencing her employment, she was aware that the University had raised concerns about her status. In fact, in letters dated 7 December 2015 and 13 January 2016, she was again granted an opportunity to provide proof of citizenship/naturalisation or at least proof of her application for citizenship.
- [34] On her own version, Khumalo had not corrected the ‘error’ pertaining to her being labelled ‘*Non-Citizen*’ in her Identity Document. She was on her version, busy prior to the commencement of her employment, with the issue of her naturalisation. In the light of these considerations, it is my view that any mistaken belief that she was a South African citizen ought to have dissipated when she received the correspondence from the University, and further when she engaged the services of her attorneys of record as at 9 December 2015.

¹¹ The South African Citizenship Act, No. 88 of 1995, Section 14 provides that:

‘A married person shall, subject to the provisions of this Act, be capable of acquiring and losing South African citizenship in all respects as if he or she were an unmarried person, and no person shall acquire or lose South African citizenship by reason merely of a marriage contracted by him or her.’

- [35] In Khumalo's attorneys of record's reply to the University, the contention that she was a South African had persisted. One would have expected that on a reading of section 14 of the Citizenship Act, Khumalo and her attorneys would have seen the folly of her contentions that she was a citizen by virtue of her marriage. But this was not to be, and accordingly, it cannot be said that the misrepresentation was innocent.
- [36] It is trite that for an offence of misrepresentation to be established, it also has to be shown that it was at least material and persistent and had induced another party to act in a particular manner. The University in this case has established these requirements. Thus, based on the persistent misrepresentations made by Khumalo starting in CV, her on-line application and interview, the University had no reason to doubt her status, and had thus appointed her.
- [37] To the extent that the dishonest conduct was established, this clearly impacted negatively on any continued employment relationship between the parties. It is trite that a dismissal for misrepresentation made by a candidate for a post before commencement of employment, or even one discovered after the commencement of employment would be justified¹². Khumalo was about to commence her employment with the University when the misrepresentation was discovered. Given the nature of the position she was to assume, and the level of integrity expected in that position, it would not have made any sense to let her continue with her employment¹³.
- [38] It did not assist Khumalo's case to contend that the University should have raised alarm bells at the time that she was interviewed and when she handed in a copy of her Identity Document. The University had indeed done its checks *albeit* after the interview. Upon the discovery and concerns raised, it had

¹² See *Department of Home Affairs and Another v Ndlovu and Others* [2014] 9 BLLR 851 (LAC); (2014) 35 ILJ 3340 (LAC) at paragraphs 14 - 15

¹³ See *SA Post Office Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2442 (LAC) at para 34, where Waglay DJP (as he then was) held that;

'To place an employee who was guilty of dishonesty back in her position where honesty and integrity are paramount to the execution of duties, is to my mind grossly unreasonable, but more importantly, it cannot be right and proper to reinstate or re-employ a person in a position that was secured by the making of false statements.'

alluded Khumalo to these and the latter had instead persisted with that misrepresentation.

- [39] Even if there was a duty upon the University to verify the information, the central issue however remains that the onus was still upon Khumalo at all material times to have displayed high levels of honesty and integrity in her application and interviews. Accordingly, there is no basis for a finding to be made that the dismissal was substantively unfair. Khumalo did not take issue with the procedural fairness of her dismissal, and accordingly, she should not be entitled to any relief.

Conclusions and costs:

- [40] In summary, there is no basis to conclude that the dismissal of Khumalo constituted discrimination on the basis of her social origin. Her dismissal was directly linked to her dishonesty, and procedurally and substantively fair.
- [41] I have further had regard to the issue of costs. Khumalo failed to establish any basis for a discrimination claim, and I am of the view that her claim was ill-conceived and had clearly burdened the University with unnecessary costs. I have further taken into account that Khumalo had resigned from her previous employment with the University of KwaZulu-Natal with the expectation that she would be employed by the University having accepted the offer of employment. In a sense she is the author of her own misfortune in that but for the misrepresentation, she would still be employed by the University. The fact that as at the time of the proceedings she still found herself without a permanent job is purely of her own making. Notwithstanding my views on the ill-conceived nature of this claim, considerations of law and fairness nonetheless dictate that each party must be burdened with its costs.

Order:

- [42] In the premises, the following order is made:

1. The applicant's claim of unfair discrimination is dismissed.
2. The applicant's dismissal was fair.

3. There is no order as to costs

E. Tlhotlhemaje

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant:

Mr S. Sukwana of Kekana Hlatshwayo
Radebe Inc.

For the Respondent:

Adv. M.A Lennox

Instructed by:

Eversheds Attorneys

LABOUR COURT