



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 2049/15

In the matter between:

NTOMBIZODWA PORTIA JIJANA

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER WILLEM KOEKEMOER M.O

Second Respondent

TELKOM SA SOC LTD

Third Respondent

Heard: 8 March 2018

Delivered: 28 August 2018

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] The applicant was dismissed on 27 March 2015 after twenty years of service with the third respondent (Telkom). At the time of her dismissal, she was employed as Specialist, Human Resources Business Partner. She was dismissed following upon an enquiry into three allegations of misconduct, viz;

- a) Violation of the Conflict of Interest Policy in that she shortlisted her son for a job interview.

- b) Violation of the Business Code of Ethics and the Conflict of Interest Policy
- c) Intimidation of a Superior/Colleague

[2] In respect of the third charge, the applicant having lodged an internal appeal was issued with a final written warning. An alleged unfair dismissal dispute subsequently referred to the Commission for Conciliation Mediation and Arbitration (CCMA) came before the second respondent (Commissioner) for arbitration. In an award issued on 10 September 2015, the Commissioner found that the dismissal of the applicant was procedurally and substantively fair. The applicant now seeks to have the arbitration award reviewed and set aside. The application is opposed by Telkom.

The evidence:

- [3] The allegations against the applicant flowed upon the execution of her duties in respect of a recruitment process for a level S6 position that was advertised in December 2012. It was not in dispute that once the advertisement of a post was approved, the applicant was *inter alia* responsible for facilitating the process of recruitment by receiving the internal and external applications from Telkom's staffing department, which would have done shortlisting.
- [4] The applicant was responsible for forwarding the applications to the line manager that requested the position. The line manager would conduct a further shortlisting and where necessary, request the applicant to assist in the shortlisting process. In some instances, the applicant might also be required to be present in the interviews.
- [5] The applicant's son was one of the external candidates that had applied for the post. He was shortlisted, and his application was one that was forwarded to the applicant, which was thereafter to be forwarded to a line manager who had requested the post. The applicant's contention in respect of the allegations was that she was not involved in the shortlisting nor had she attended the interviews in respect of the position. She further contended that she had simply forwarded the list of external applications including that of her

son to the line manager, Mr Siwela (Siwela). Siwela was not in the office at the time and upon being contacted on his mobile phone, he had requested the applicant to take the applications to his colleague, Ms. Maruma (Maruma), which the applicant had done. She had further testified that during her telephonic conversation with Siwela, she had informed him that since one of the candidates was her son, she would recuse herself from any steps in the appointment of a suitable candidate.

- [6] Telkom's case was however that the applicant having placed the name of her son on the shortlist, she had proceeded to misrepresent to Maruma that the shortlisting had been conducted by Siwela, in whose division the post arose, and that Siwela had mandated her to request Maruma to stand in for him and to conduct the interviews for the position, including interviewing her son, when that was not the case.
- [7] Siwela's testimony was that he had taken leave between 18 December 2012 and January 2013 and had not seen the applications. Maruma had called him in December 2012 to confirm that the applicant had requested her to stand in for him for the job interviews scheduled for January and was agreeable to the request. He had nonetheless denied having participated in the shortlisting process or having requested Maruma to stand for him in the interviews. Since he was not involved in the shortlisting process, he had advised Maruma to cancel the scheduled interviews. Siwela's further testimony was that an e-mail was sent to him by the applicant on 30 January 2013 when she recused herself from the recruitment process. He however became aware for the first time in June 2015 that one of the candidates for the post was the applicant's son, when the applicant sent him an e-mail seeking to be recused from the recruitment process.
- [8] Maruma's testimony was that the applicant called her on 20 December 2012 and invited her as a panellist in the interviews to be conducted for the position in her section. The applicant had further requested her to invite the candidates and arrange for interview dates with them, and informed her that she would be standing in for Siwela who was on leave. The applicant had confirmed with her that Siwela was happy with the arrangements, and was given the names

and contact details of the candidates. Upon recognising from the list that one of the candidates was the applicant's son, Maruma had asked the applicant whether she was related to the candidate. The applicant had confirmed that there was a relationship, but that she was however going to recuse herself from the interviews. Maruma further confirmed that she had called Siwela about the arrangements as related to her by the applicant, and Siwela had expressed surprise at those arrangements, as he was not even aware of the proposed interviews and had also not made a request for Maruma to stand in for him at any interviews.

[9] Further evidence was led in the arbitration by Ms. Langa (Langa), the applicant's direct superior, in regard to an incident leading to the third charge. In that regard, the evidence was essentially to the effect that in a meeting convened by the applicant in January 2013 to discuss HR related matters, the latter had threatened her when they were alone, by further daring her to proceed with a disciplinary enquiry against (which was not at that stage planned as investigations had still been on-going in respect of the breaches of the policy), and told her that she should 'watch her back'. The applicant had nonetheless denied the allegation, contending that she had merely enquired from Langa about the investigations, and that she and Langa had a good relationship.

[10] The Commissioner as already indicated found that the dismissal of the applicant was fair, and the reasons in that regard will be dealt with below.

The grounds of review and evaluation:

[11] The applicant contends that the award was reviewable on a variety of grounds including that the Commissioner committed gross irregularities in the conduct of proceedings; and/or committed misconduct in relation to his duties as he had placed undue weight on some evidence and thereafter arrived at conclusions that are not supported by evidence; and/or exceeded his powers; and/or acted unreasonably in that he failed to apply his mind to the issues before him; and incorrectly recorded and/or misconstrued the evidence before him, thus resulting in her not being afforded a fair hearing.

[12] Having had regard to the grounds of review, the transcribed record of the arbitration proceedings, the Commissioner's award, the pleadings and the submissions made on behalf of the parties, it is my view that the Commissioner's award and conclusions reached therein falls within a band of reasonableness based on the following reasons;

12.1 It was submitted on behalf of the applicant that taking into consideration her years of service and clean disciplinary record, the sanction of dismissal was unreasonable and that the Commissioner failed and/or neglected to consider all the circumstances, the importance of the rule allegedly breached, the reasons Telkom imposed the sanction, and the effect of the dismissal.

12.2 It is trite that the mere fact that the applicant had 20 years of service and a clean record is not a bar to imposing a sanction of dismissal¹. A determination of whether a sanction of dismissal is appropriate involves a consideration of all relevant factors². This approach was reiterated in *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero N.O. and Others*, where the Labour Appeal Court, in further reference to *Toyota SA Motors*, held that;

"In determining the fairness of a dismissal, each case is to be judged on its own merits. Item 3(4) of the Code of Good Practice recognises that dismissal for a first offence is reserved for cases in which the misconduct is serious and of such gravity that it makes continued employment intolerable, with instances of such misconduct stated to include gross dishonesty. When deciding whether dismissal is appropriate, the Code requires consideration, in addition to the gravity of the misconduct, of personal circumstances including length of service and the employee's previous disciplinary record, the nature of the job and the circumstances of

¹ *Toyota SA Motors (Pty) Ltd v Radebe and Others* [2000] 3 BLLR 243 (LAC) at para 15, where it was held that;

"...Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty"

² *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) at para 79

the infringement itself. Other relevant considerations include the presence or absence of dishonesty and/or loss and whether remorse is shown”³

12.3 In this case, the Commissioner was clearly alive to the above principles, having made the Code of Good Practice his starting point in his analysis. The applicant's contentions therefore that the Commissioner failed to take into account the provisions of the Code is fallacious. In this regard, the Commissioner considered the first charge of violating Telkom's Conflict of Interest Policy to be the main charge and made the following significant conclusions;

12.3.1 The violation of the policy led to the applicant's follow-up acts of misconduct, when she attempted to get Maruma to conduct the interviews on behalf of Siwela and when the latter was on leave, thus attempting to bring to fruition her attempts to get her son to be appointed.

12.3.2 The misrepresentation and untruths by the applicant to Maruma merely highlighted the conflict of interest situation embarked upon and continued with by her;

12.3.3 The policy was in place not only to protect the interests of Telkom but also those of its employees, and the rationale behind the requirement to disclose any conflict of interest was for the employer to ensure that an employee was employed for the employer's best interests.

12.3.4 In the event of non-disclosure of a private interest, the good faith of the employee was placed into question, and the applicant's non-disclosure amounted to a material breach of the contract of employment, which had the consequences of breaching the relationship of trust between the parties. A genuine and timely disclosure of conflict of interest by her could have protected her if she had heeded the policy.

³ (2017) 38 ILJ 881 (LAC) at para 25

12.3.5 The overwhelming evidence was that the applicant compromised her position to such an extent that her conduct destroyed any meaningful employment relationship.

12.3.6 The applicant had lured her son through hundreds of job applications onto the shortlist of only three candidates, attempted to arrange interviews without Siwela being present; continued to manoeuvre her son to the next round of job applicants to be interviewed, and essentially allowed a situation where her personal agenda came into direct conflict with that of the employer.

12.3.7 She was aware of the policies, which were reasonable, fair and valid. Her explanation for her contraventions was baseless, and she had insisted that she had done nothing wrong. Her evidence was untruthful, and her vast experience in the Human Resources and recruitment environment was another factor that counted against her.

12.3.8 In view of the importance of the conflict of interest policy, the position that the applicant occupied, the fact that she could no longer be trusted as a consequence of her breach of the policy, a sanction of dismissal was appropriate, more particularly since she had persistently denied any wrongdoing, thus excluding any consideration of other corrective measures.

12.4 In my view, the conclusions reached by the Commissioner cannot be faulted in that as appears from the transcribed record and summary of her evidence, the applicant appears to have rushed, or sought to conclude the recruitment process in the absence of Siwela. Upon the intervention of Siwela and the concerns he had raised about the whole process, the position had to be re-advertised.

12.5 Her excuse that she was pressurised by a Union member to hurry up the recruitment process and finalise it by January 2013 is indeed lame. It is trite that the prerogative to advertise positions and employ suitable

candidates is that of the employer. The entire recruitment process is driven by the employer, and I fail to appreciate what type of pressure could have been placed on the applicant that made her breach simple policies well-known to her, which breach was material as correctly concluded by the Commissioner, and which was clearly designed to advantage her son.

- 12.6 A significant factor with the applicant's evidence was that despite being found guilty of breaching the policy, she did not deem her conduct as being dishonest. Any HR practitioner involved in recruitment processes should know, without being asked or without even any specific rules in place, that a recusal from the process would be appropriate where there is a clear , let alone a potential conflict of interest. In circumstances where a candidate who had had responded to an advertisement may be related or known to HR personnel involved in the recruitment process, any such personnel must clearly not only declare such an interest but must also recuse him/herself from that process.
- 12.7 The applicant's contention therefore that there was nothing in the policy that suggested that she should have recused herself from the recruitment process where her son was a candidate is clearly misplaced. Oddly enough, the applicant appreciated that clause 7 of the policy dealt with possible conflict of interest situations and what to do under those circumstances. In essence therefore it can be said that she deliberately breached the policy.
- 12.8 On the applicant's own version, the first time that she formally recused herself from the process was by way of e-mail in January and June 2013 to Siwela. This can only be confirmation that she knew that she had to do so in the first place, especially since she would have known that her son had responded to the advertisement. Even when she did recuse herself, the recruitment process was long underway, with her son already having been shortlisted. Clearly the belated e-mail was an afterthought to minimise the effects of the harm already done.

- 12.9 The applicant's contentions that she was under no obligation to recuse herself from the recruitment process when her son was one of the candidates; or that she was not prepared to show contrition as she had done nothing wrong, or that even if her son was appointed Telkom would not have been prejudiced, is a further indicative of her failure to acknowledge or appreciate the gravity of her conduct. It is not suggested that her son ought not to have responded to the advertisement or be appointed at all by Telkom where he was suitably qualified for a position. All that is being said is that if the applicant's son were to be appointed, that appointment must have been untainted, in the sense that it was done properly and fairly, without him having gained some unfair advantage over other candidates through the applicant's conduct.
- 12.10 The submissions made on behalf of Telkom that the applicant's case centres around the issue of sanction rather than the overall merits of her case is correct. This is evinced from the arguments advanced on her behalf that the sanction of dismissal imposed on her 'induced a sense of shock', as the misconduct in question was not gross. The difficulty with this argument is that it is either an employee has acknowledged wrongdoing or not. The contention that a lesser sanction would have been appropriate can only infer an acknowledgement that there was indeed misconduct on the part of the applicant, which deserved censure.
- 12.11 The circumstances of this case are such that the applicant, despite seeking a lesser penalty nonetheless failed to acknowledge any wrongdoing, or to show some form of contrition. This was despite evidence from three senior co-employees, with whom it was not in dispute that she had a good relationship. The nature of the misconduct in this case as correctly found by the Commissioner, had the net effect of breaking a trust relationship. Accordingly, there can be no basis for any conclusion to be reached that a lesser sanction would have been appropriate.

- [13] The conclusions reached by the Commissioner in regard to the charges related to the breach of the Conflict of Interests Policy are unassailable. In respect of the third charge, even if it was intrinsically linked or flowed from the main charges, and further to the extent that on its own, it was met with a sanction of a final written warning after the appeal hearing, no purpose would be served by considering it for the purposes of whether the award is reviewable or not, particularly since not much was made of it in the pleadings. The only reference made by the applicant in regard to it was to acknowledge that she had received a warning,
- [14] In conclusion, and in line with the principles set out in *Goldfields*⁴, I am satisfied that on the whole, the Commissioner in terms of his duty to deal with the matter with the minimum of legal formalities, afforded the parties a full opportunity to have their say in respect of the dispute, duly identified and understood the dispute he was required to arbitrate, dealt with the substantial merits of the dispute and arrived at a decision another decision-maker could reasonably have arrived at based on the evidence placed before him. I have further had regard to the requirements of law and fairness in regards to the question of costs, and notwithstanding Telkom's insistence that a cost order was called for, I do not however share that view. Accordingly, the following order is made;

Order:

1. The application to review and set aside the arbitration award issued by the second respondent is dismissed.
2. There is no order as to costs

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⁴ *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC) at para 20

Judge of the Labour Court of South Africa

LABOUR COURT

APPEARANCES:

For the Applicant: Mr. TZ Tshabalala of Nkosi
Tshabalala INC

For the 3rd Respondent: Mr. M Mbuyisa of Maserumule Attorneys

LABOUR COURT