THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 1211/17

In the matter between:

ELIZABETH LEE MING **Applicant**

and

MMI HOLDINGS LTD **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

TSHEPISO MASHIGO N. O **Third Respondent**

Heard: **21 August 2019**
Delivered: **28 August 2019**

Summary: *Point in limine* – peremption of review – Not entertained. Review enrolled – the award is one that a reasonable commissioner may arrive at. Held: (1) The application for review is dismissed. (2) No order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] Although salivating arguments were presented from both sides on the issue of peremption, I chose not to entertain this point of law for two reasons. The Registrar of this Court enrolled a review application and duly notified the parties on 6 June 2019. The review application stands opposed. In opposing the application, the first respondent raised a preliminary point of peremption. The first respondent contended that by demanding payment of the compensation ordered by the third respondent, the applicant perempted her right of review. That being the case, this Court must dismiss the review on that basis only. The applicant contended otherwise and persisted with the review aimed at reversing the decision of the third respondent to the effect that the dismissal of the applicant is substantively fair.

Why the Court chose not to decide the peremption point?

[2] Key and fundamental is that given the view this Court takes at the end, it would be purely academic for this Court to pronounce itself on the issue. Secondly, counsel for the applicant submitted that if the review is dismissed, it would serve no purpose for the Court to pronounce itself on the point. In my view, it is a submission well made.

Background facts

[3] The applicant was employed by the first respondent in the position of Chief Marketing Officer. Certain allegations of misconduct were levelled against the applicant. The veracity of those allegations were to be tested in a disciplinary enquiry which was scheduled to occur on 21 and 22 July 2016. The enquiry was postponed at the behest of the applicant to seek legal representation. The request for external legal representation was refused. The hearing was scheduled to proceed on 15 August 2016. On this day, the hearing was postponed on account of the unavailability of the applicant's internal representative. The hearing was then scheduled to proceed on 26 August

2016. A day before, the applicant submitted a sick note stating that she was indisposed until 30 August 2016.

[4] On 30 August 2016, the applicant launched an urgent application in this Court seeking to interdict the continuation of the hearing. On 9 September 2016, my brother Van Niekerk J heard the application and dismissed it on 12 September 2016. Owing to that, the hearing was scheduled to proceed on 26 September 2016. Prior to the commencement of the scheduled hearing and on 17 September 2016, the applicant injured her shoulder in an ice hockey match.

[5] On 16 September 2016, the HR Business Partner, Bronwyn Swanson sent an email[1] communication to the applicant advising her of the continuation of the hearing. On 23 September 2016, a reminder of the hearing date was sent to the applicant. In response to the notification, the applicant stated the following:

> "Unfortunately I will not be able to be at the office next week Monday. I was ***injured very badly*** in my ice hockey game and my doctor booked me off until Monday 3 October.
> Please see attached medical certificate…"

[6] As a result, the hearing could not proceed on the scheduled date. On 1 October 2016, the applicant submitted a note stating that she should be booked of between 3 and 10 October 2016. The first respondent discovered that on 18 September 2016, a day after her shoulder injury, the applicant participated in a hockey match. On 21 to 22 September 2016 she drove herself to Cape Town for a conference. On 27 September 2016 she participated in ice hockey practice. On 29 September 2016 she attended the annual "Assegai" awards held in Johannesburg as a judge in the awards.

[7] Upon discovery of those facts, on 4 October 2016, the applicant was notified of the second disciplinary enquiry. A detailed notice signed by Mr. Juan De Beer stated that this enquiry was to investigate allegations of gross

[1] "*Please note that your hearing will continue on 26 September 2016 at 09:00. The venue that the hearing will be held in is Meeting Room Macro in the Annex Building at Head Office*."

misconduct which includes dishonesty as well as her absence without leave. The notice detailed what the first respondent discovered after the email alleging bad injury. The hearing to investigate these allegations was scheduled to happen on 7 October 2016. On 6 October, the applicant sent a detailed email to Mr Juan De beer. In it she stated that she was booked off until the 10th and that she was unavailable until October 24th.

[8] On the scheduled date, 7 October the applicant failed to attend. The hearing continued in her absence and she was found guilty and dismissed. Aggrieved by her dismissal, she referred a dispute to the second respondent for resolution. The third respondent was appointed to resolve the dispute alleging unfair dismissal through arbitration. On 3 May 2017, the second respondent published his award in which he found that dismissal of the applicant was substantively fair but procedurally unfair. He awarded the applicant four months compensation for procedural unfairness. On 16 May 2017, the applicant's attorneys, Welman and Bloem Inc demanded payment of the compensation amount into their trust account. After the necessary deductions, the first respondent effected the demanded payment.

[9] On or about 21 June 2017, the applicant launched the review application effectively seeking to challenge the finding that the dismissal is substantively fair.

Grounds of review

[10] In her founding papers, the applicant simply recited the provisions of section 145 of the Labour Relations Act[2] (LRA). Further, she stated that the award is not one that a reasonable commissioner may arrive at. In amplification of the grounds, the applicant contended that the third respondent made an incorrect decision and/or assumption when he held or assumed that she exaggerated the extent of her injury in order to avoid attending the first hearing. She further contended that the third respondent failed to correctly consider the issues before him which was to determine whether or not the first respondent had in fact proven a break in trust between her and her employer. Because of the

[2] Act 66 of 1995, as amended.

alleged irregularities, she did not enjoy a fair trial. The third respondent missed the issues he had to determine. The applicant supplemented her grounds and alleged that the third respondent failed to properly identify the issues. The decision that the sanction of dismissal was appropriate is not one that a reasonable commissioner may arrive at.

Evaluation

[11] The role to determine whether a dismissal for reasons of misconduct is fair or not is a role approbated to arbitrators in terms of the LRA. The supervisory role of this Court using its review powers is to determine whether the outcome arrived at by arbitrators is one that falls within the bounds of reasonableness. Therefore, it is not the role of this Court to, at will, interfere with the outcome arrived at by the arbitrator even in the circumstances where the outcome falls within the bounds of reasonableness.

[12] Critical in this matter is the statement made by the applicant on 23 September 2016. She represented to the first respondent that she was badly injured. This, it follows as day follows night that she did in order to not attend the hearing she was reminded of. The consideration then becomes whether the applicant was honest and truthful when she represented to her employer that she was badly injured? It does not require a rocket scientist to take note that a person who is badly injured like the applicant alleged cannot shortly thereafter play in the sport that got her injured in the first place, drive a car for a long distance and also perform judging duties. If a person performs those activities, it is not wrong to take a *prima facie* view that the injury was exaggerated.

[13] This Court disagrees with a submission that the first respondent was behoved to present medical evidence to show that the injuries are such that the applicant could not have been able to perform the discovered duties. On the contrary, given the discovery made, it was perfectly in order for the first respondent to take this *prima facie* view:

> "In the light of the above, it is Momentum's considered opinion that based on your recent social behaviour during the period of your alleged incapacity you

> were indeed able to attend a disciplinary inquiry which would have required modest physical exertion. Momentum can only deduct that you have intentionally used the alleged injury of your shoulder to not attend the disciplinary inquiry and to frustrate the process as to finalise the disciplinary inquiry."[3]

[14] Given the conduct of the applicant, it is not too difficult to observe that she did not wish to be subjected to a disciplinary process. She did everything she could to avoid this process. Regard being had to the pattern followed by the applicant, it is probable that when she represented to her employer that she was badly injured, she was not being honest and truthful. She is a person, given the pattern, who would stop at nothing to avoid the continuation of the hearing. The following finding by the third respondent is reasonable or falls within the bounds of reasonableness in light of the common cause facts that the applicant indeed was involved in the discovered activities.

> "All these activities the applicant was involved in needed her to concentrate and she could have done the same in the disciplinary inquiry. It would appear that the applicant exaggerated the extent of her injuries in order to avoid attending to her disciplinary hearing."

[15] Exaggerating injuries is misrepresentation of something as true which is in fact false. When reporting her injuries to her employer, the applicant used the expression *"very badly*". The word 'very' is an adverb that seeks to denote something in a high degree. It is often equated with the word "*too"* which suggest an excessive and undesirable amount.

[16] Clearly, the injury of the applicant was not of a high degree. If it was, to justify her failure to attend an inquiry, she should not have been able to attend to the activities mentioned above. By definition, dishonesty means lack of honesty or integrity or improbity. In *Nedcor Bank Ltd v Frank*[4] the Court held that dishonesty entails lack of integrity or straightforwardness, in particular a willingness to steal, cheat, lie or act fraudulently. There is no doubt in my mind

[3] Statement made in the notice to attend a hearing,

[4] [2002] 23 ILJ 1243 (LAC).

that the applicant exaggerated her injury. This exaggeration is an act that lacks integrity or straightforwardness with a clear willingness to lie. Therefore, it can never be doubted that the applicant was indeed guilty of dishonesty. That being the case, a finding that her dismissal was for a fair reason cannot be faulted.

[17] A submission was made that not in every case of dishonesty that dismissal is an appropriate sanction. In support of that submission, reliance was placed on the decision of the Labour Appeal Court in *Absa Bank Ltd v Naidu and Others*[5]. Before I consider this judgment I need to say that arbitrators are not, at large, to interfere with the sanction of the employer. If the sanction is fair, it is a reviewable irregularity for an arbitrator to interfere with such a sanction. The question then becomes, is it fair to dismiss an employee guilty of dishonesty? The answer is a resounding yes.

[18] Turning to the *Absa* decision *supra,* the Court stated that "*of course, it is accepted that not every misconduct offence involving dishonesty warrants a sanction of dismissal*". However, it concluded that generally a sanction of dismissal is justifiable and, indeed warranted where the dishonesty involved is of a gross nature. In confirming the fairness of dismissal of Naidu, the Court took into account the senior position in which she operated. Similarly, the applicant was a senior employee to whom a premium of trust was placed. The Court accepted as being correct its earlier decision in *Shoprite Checkers (Pty) Ltd v CCMA and Others*[6].

[19] Accordingly, in my view, *Absa*, is not authority for the proposition that dishonesty does not always destroy trust. In my view, the third respondent cannot be faulted when he concluded thus on the issue of the sanction of dismissal:

> "Although the respondent made no attempts whatsoever to prove that the trust relationship had broken down, having been established that the applicant was dishonest, an offence of dishonesty in itself destroys the very fabric upon which employment relationship is based"

[5] [2015] 36 ILJ 602 (LAC).
[6] [2008] 9 BLLR (LAC).

[20] The above finding resonates with what was said in *Shoprite Checkers* and approved in *Absa*. Quintessentially, the finding that the dismissal was substantively fair is one that a reasonable commissioner can arrive at.

[21] For all the above reasons, the application for review falls to be dismissed. With regard to costs, much as I was tempted to make an order as to costs, I take note of the fact that the review was not dismissed on the basis of the peremption point. Had it been dismissed for that, I would have been minded to make an order as to costs. When it comes to costs, this Court retains a wide discretion in terms of section 162 of the LRA. In my view an appropriate order to make is that of no order as to costs.

[22] In the results, the following order is made:

Order

1. The application for review is dismissed.
2. There is no order as to costs.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Advocate R Grundlingh
Instructed by : Welman and Bloem Inc, Pretoria

For the First Respondent : Advocate G Leslie SC
Instructed by : Louis Van Zyl, Claremont.