THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

CASE NO: JR158/17

In the matter between:

INTERCAPE FERREIRA MAINLINER

(PTY) LTD **Applicant**

and

RORY MARK MCWADE **First Respondent**

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **Second Respondent**

EVELINE MOLEFE N.O. **Third Respondent**

Heard: 13 September 2019

Judgment delivered: 18 September 2019

JUDGMENT

VAN NIEKERK J

[1] This case concerns the nature and extent of the obligation that rests on an applicant for employment to disclose the circumstances surrounding a termination of employment with a previous employer.

[2] The first respondent (the employee) was employed by the applicant in May 2015 as a general manager. There is no dispute that it was anticipated that he would be groomed for and in due course be appointed to the position of the applicant's chief executive officer. This expectation was not realized. In June 2016, the employee was dismissed after a disciplinary hearing conducted by an independent senior attorney into four allegations of misconduct. The most significant of these, for present purposes at least, is that prior to his appointment, the employee failed to disclose to his then prospective employer the circumstances surrounding the termination of his employment with Cargo Carriers Zimbabwe.

[3] The employee contested the fairness of his dismissal and the matter was referred to arbitration. The third respondent (the arbitrator) issued the following award:

> 1. The dismissal of the Applicant was both substantively fair and procedurally unfair (sic).

2. The Respondent, Intercape Ferreira Mainliner (Pty) Ltd is ordered to compensate, the Applicant Mr. Rory McWade five (5) month's (sic) salary calculated as R 134 500 x 5 months = R672 500,00 by no later than 11 February 2016.

3. Interest is payable from the date of the award, at the same rate as prescribed from time to time in terms of the prescribed Rate of Interest Act 55 of 1975.

4. There is no order as to costs.

[4] The parties agree that paragraph 1 the award should read that the employee's dismissal 'was substantively unfair and procedurally unfair'.

[5] Before drawing her conclusion, the arbitrator summarised the evidence and reviewed the case law. Her reasoning is apparent from the following paragraphs:

> (74) From case law it is clear that the courts differentiated between instances where false information was given and when the prospective employee failed to disclose certain information about the previous employment. With the first instance the court have viewed giving false information as misrepresentation of facts which is a dishonesty offence related to fraud. In this instance intention to defraud must be shown to find the employee guilty of the misconduct. However, when the employee has failed to disclosed (sic) certain information during recruitment cannot be viewed as submitting false information and therefore there is no misrepresentation of facts or any element of dishonesty as there is no legal duty to disclose.
>
> (75) The Respondent have also in this case erred in submitting that the Applicant submitted false information and referred to its Disciplinary Code which provides that submitting false information in the CV or during employment is a dishonesty offence with the competent sanction of dismissal. Therefore, it was imperative for the Respondent to specified exactly what information it required from the Applicant during the recruitment process and if the Applicant lied about the circumstances related to his departure, the non-disclosure agreement and the mutual separation agreement, he would then be dismissed for

misrepresentation of facts. In this case the Applicant merely, did not disclose the facts surrounding his previous employment and that led to his departure.

(76) Therefore, in the absence of any obligation to disclose circumstances of the Applicant's departure from his previous employer which includes allegations of fraud and bribery, relations with the unions and the government of Zimbabwe, the allegations that the Applicant was arrested for failure to heed to a summon by the government, the non-disclosure agreement and the mutual separation agreement, I cannot find that the applicant broke any rule.

[6] Reduced to its basics, what the arbitrator appears to conclude is that the employee committed no misconduct because the applicant failed to establish that it had sought specific information during the interview process regarding the employee's termination of employment with Cargo Carriers, and that the responses given by the employee were false. The arbitrator does not appear to recognise that outside of the category of deliberate, false representations of fact, a prospective employee may nonetheless be required to disclose information not specifically requested, if that information is material to the decision to employ; or where (as in the present instance) a question is asked, that a less than honest and complete answer might form the basis of a dismissal when the truth is ultimately discovered. The applicant thus submits that in reaching her conclusion, the arbitrator committed a material error of law and that in any event, the conclusion to which the arbitrator came falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence. The first challenge amounts to a 'correctness' enquiry; the second is one of reasonableness.

[7] The relevant factual matrix, which is not disputed, is that prior to his appointment by the applicant, the employee was employed by the Cargo Carrier Group in Zimbabwe. During the period August to October 2014, Cargo Carriers made allegations against the employee that extended to bribery and corruption, and the use of company assets without prior permission. On 15 October 2014 the employee was suspended. During the course of the suspension, the presidency of Zimbabwe, the Zimbabwean Labour Court and the Zimbabwean Trade Union

Congress became involved in the dispute. The employee was summoned to appear at the Presidency and at the Labour Court on different occasions during his suspension, although he did not heed the summonses in question. Military personnel physically took the employee to the Zimbabwe Department of Labour to answer questions regarding his suspension. After some 38 days of suspension, he employee took the advice of his legal representatives to institute action against his employer. The papers were not served because the parties commenced negotiations on a mutually acceptable basis on which to part ways. These resulted in a settlement agreement.

[8] In the interview process preceding his appointment as the applicant's general manager, the employee was specifically asked about the circumstances of his leaving cargo carriers. On his application form, the employee stated that his reasons for leaving the employ of Cargo Carriers were 'New owners, Zim economy'. At the first meeting conducted as part of the interview process, the employee was asked about the circumstances of his departure from Cargo Carriers. He did not mention any of the above circumstances. At a meeting with the applicant's CEO in Harare, and in response to the same question, the employee stated that there was a 'difference of opinion' on ethical standards. Again, no mention was made of any of the events recorded above. At a further meeting with the applicant's board, the applicant was specifically asked if there was anything that should concern the applicant in relation to his departure from Cargo Carriers, the employee did not mention any of the events referred to above.

[9] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. The *locus classicus* remains *Head of Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), where the LAC said the following:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…

[32] …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 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, if 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.

[10] The applicant's grounds for review extend to both an incorrect interpretation of law by the arbitrator, and to the unreasonableness of her finding. There is nothing inconsistent with this approach, indeed, is not often, if ever, that an incorrect decision by or a decision made on the basis of a material error of law will meet the reasonableness threshold (see *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & others* [2016] 2 BLLR 151 (LC)). The applicant's correctness challenge is specifically founded on the decision by the Labour Appeal Court in *National Union of Metalworkers of SA v Assign Services & others* (2017) 38 *ILJ* 1978 (LAC) where the court said:

> [32] An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable.

[11] The nature and extent of the obligation to disclose facts during the recruitment process where defined by this court in *Galesitoe v CCMA & others* [2017] 7 BLLR 690 (LC), where the court said the following, at paragraph 11 of the judgment:

> Accordingly, it is not unreasonable to ensure 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 v Fouche* which the LAC and the LC followed in the *Fipaza* case.

[12] What escaped the arbitrator in the present instance is that the applicant's case was not that the employee had made a material misrepresentation of fact or that

he had given false information during the course of the interview process. The applicant's case before the arbitrator was that given the circumstances, the employee ought properly in response to the question regarding the termination of his employment with Cargo Carriers to have disclosed the facts surrounding the termination of his employment with Cargo Carriers, and that his failure to make that disclosure constituted a serious act of misconduct. Of course, the failure to make disclosure must be material, at least in the sense that the prospective employer would have conducted its own enquiry into the relevant events and determined eligibility or suitability for employment as a consequence.

[13] In these circumstances, and particularly given the fact that the employee was being interviewed for the post (in effect) of CEO designate of a family business whose operations extend to Zimbabwe, the employee committed an act of serious misconduct by failing to disclose the circumstances of his parting of the ways with Cargo Carriers. It is not sufficient to say, as did Mr. van As on the employee's behalf, that the settlement agreement had the consequence that the employee had no contractual duty to disclose the circumstances surrounding the termination of his employment with Cargo Carriers, since he voluntarily resigned and was never found guilty of any misconduct. In essence, the employee's case was that he had nothing to disclose, and that it was never proven that anything he did disclose was false. I have some difficulty with this approach, based as it is on the contractual principles of non-disclosure and misrepresentation by silence or omission. We are not dealing with a contractual dispute – the issue in the present instance is ultimately one of ethics. For this reason, cases such as *Absa Bank Ltd v Fouche* 2003 (1) SA 176 (SCA), (which concerned the relationship of a banker and client) are useful to the extent that they fix the test for the lawfulness of a non-contractual non-disclosure as one premised on what 'would be mutually recognised by honest men in the circumstances (see paragraph 5 of the judgment). As Lagrange J put it in *Galetsitoe* [2017] 7 BLLR 690 (LC), it is not unreasonable to infer that a person applying for a senior position should realise that the nature of his or her relationship with a former employer is a material

consideration for a prospective new employer and could affect his or her employment prospects (at paragraph 11).

[14] Much was made in the arbitration hearing about a non-disclosure agreement signed by the employee on his departure from Cargo Carriers. There is no dispute about the existence of the agreement; the employee claimed (and the applicant denied) that he had disclosed the agreement at all three stages of the interview process. The employee's evidence in this regard was found to be unreliable, and the applicant's version (that there had been no disclosure) upheld. While there is no basis to interfere with the arbitrator's credibility finding against the employee, I agree with Mr. Malan, who appeared for the applicant, that the issue of the non-disclosure agreement is a red herring. What matters for present purposes are the factual circumstances that led to the signature of the agreement, not the agreement itself or its contents, which in any event provide for little more than the notice and other payments to which the employee was in any event entitled.

[15] Had the arbitrator applied the principle established by *Galesitoe*, she would have appreciated that given the seniority of the position for which the applicant had applied, and given the nature of the circumstances surrounding the employee's termination of employment with Cargo Carriers, notwithstanding the fact that it was effected by mutual consent, the employee ought to have made full and proper disclosure of those facts. Objectively considered, a failure to disclose matters that included allegations of bribery, corruption, intervention by the military, the president, and litigation against his former employer is material – any reasonable employer would wish to investigate these facts before concluding a recruitment process. This is particularly so when the prospective employer (as the applicant is), is a family owned business with business in Zimbabwe, and where the employee was appointed specifically as a successor to the applicant's CEO. The materiality of the non-disclosure was the subject of uncontested evidence by the applicant's witnesses that had the circumstances of the

employee's termination of employment with Cargo Carriers been known, their decision to appoint the employee might well have been different.

[16] In summary: the arbitrator failed to ask the right question – the enquiry before her was whether in all the circumstances the employee was obliged to disclose the facts surrounding the mutually agreed termination of his employment with Cargo Carriers. The arbitrator's award thus stands to be set aside on the basis that it is incorrect. Even if this is not a sufficient ground for this court to interfere, the outcome of the arbitration proceedings (as represented by the arbitrator's decision) fails to meet the reasonableness threshold, and the award stands to be set aside on that basis. The facts surrounding the employee's termination of employment by Cargo Carriers are patently material, and their disclosure was required. The applicant's failure to make disclosure constituted an act of misconduct sufficiently serious to warrant his dismissal.

[17] Given my conclusion in relation to the charge of non-disclosure of material information, it is not necessary for me to consider the applicant's remaining grounds for review, or the arbitrator's findings in relation to the balance of the charges of misconduct brought against the employee.

[18] There is no merit in remitting the matter to the CCMA for rehearing. The disciplinary hearing was conducted over some 6 days; the arbitration hearing (a rehash of the disciplinary hearing) was conducted over the same period. The costs of the various proceedings must have outstripped the value of the award, and the interests of finality are now paramount. I intend therefore to substitute the arbitrator's' decision for one that to the effect that the employee's dismissal was substantively and procedurally fair.

[19] Finally, in relation to costs, in *Long v South African Breweries* 2019 (5) BCLR 609 (CC), the Constitutional Court affirmed the approach to the exercise of a discretion in terms of s 162 and awards of costs in this court:

> [27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply…This principle is based on section 162 of the LRA, which reads:

(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court."

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

"In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct…"

[20] This court is ordinarily reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is not an immutable rule. In the present instance, the employee is clearly not without means, but the length of the record is likely to have the consequence of a significant sum being taxed and allowed by the taxing master. On the other hand, the applicant has been obliged to incur costs in filing and pursuing the review application, and it has succeeded in having the award reviewed and set aside. It seems to me that in the present circumstances, the interests of the law and fairness require that the employee pay at least a portion of the applicant's costs. In my view, a sum equivalent to 20% of the applicant's costs will best serve those interests.

I make the following order:

1. The arbitration award issued by the third respondent under case number GATW 8726/16 on 16 January 2016 is reviewed and set aside.
2. The arbitration award is substituted by the following:
   'The applicant's dismissal was substantively and procedurally fair'.
3. The first respondent is to pay the costs of the application, limited to 20% of the applicant's taxed costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Mr. F Malan, ENS Africa Inc.

For the first respondent: Adv. E van As, instructed by JC van der Walt attorneys