THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case Number: JR 1546/20
REPORTABLE
REPORTABLE: YES/~~NO~~
OF INTEREST TO OTHER JUDGES: YES/~~NO~~
REVISED
DATE:13/06/23

In the matter between:

LESEDI LOCAL MUNICIPALITY	Applicant
And	
MPELE, T.P.	First Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION (CCMA)	Second Respondent
MAHLANGU, L.D. *N.O.*	Third Respondent

Heard: **1 June 2023**
Delivered: **13 June 2023**

Summary: Employee misrepresenting qualifications in his curriculum vitae - commissioner's finding that employee's dismissal was unfair is unreasonable - award set aside on review - employee's dismissal determined as having been fair. The reasonable decision-maker test restated.

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLII. The date on which the judgment is delivered is deemed to be 13 June 2023.)

JUDGMENT

FORD,AJ

Introduction

> "Serious misfortunes, originating in misrepresentation, frequently flow and spread before they can be dissipated by truth[1]."

[1] The misrepresentation of qualifications is a pervasive and menacing evil that greedily devours and indelibly taints our employment landscape. It trivialises our institutions of learning, devalues the sanctity of honest educational pursuits and cheapens legitimate and hard-earned achievements. It can never be excused, rationalized or condoned. It is sickening to the core and detestable in every possible respect. It is not only morally offensive, it is also vocationally revolting. Every attempt to uproot it must be applauded and rigorously pursued. Any attempt to conceal or justify it, must be deprecated, not only as reprehensible but abominable too. If not stopped in its tracks, misrepresentation's cancerous grip will spread, wreaking unimaginable havoc to our economy and our social construct. We live in a world; where inauthenticity and fake credentials have become the norm, where quick wealth and instant gratification is valuable more than integrity, where the disgusting trend of augmenting one's qualifications and achievements have become fashionable.This rot must be resisted and exposed at all costs. The review application before me, turns on this very issue.

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[1] George Washington

[2] The third respondent ("the commissioner") found the first respondent's ("Mphele") dismissal substantively unfair and ordered his retrospective reinstatement. This, in spite of him having misrepresented his qualifications. The applicant alleges, as basis for this review application, that the commissioner's decision is one, a reasonable decision-maker could not reach.

[3] The application is opposed.

Brief factual matrix

[4] The applicant is a local municipality, established in terms of section 155 of the Constitution. In 2015, it sought to appoint a Chief Financial Officer and advertised the position accordingly.

[5] The requirements for the position were the following:

5.1 Preferably a BCom Hons in Accounting/degree in Finance or NQF Level 7 qualification with relevant experience;

5.2 A CA(SA) qualification will be an added advantage;

5.3 Compliance with the minimum competency levels prescribed in the Treasury Regulations;

5.4 Thorough understanding and knowledge of Local Government financial environment and administration including MFMA. Treasury Regulations, Supply Chain Management, GAAP, IFRS and GRAP;

5.5 A minimum of 7 years' managerial experience at senior and middle management level, of which 5 years must have been at senior management level.

[6] The closing date for the position was 31 July 2015

[7] Mphele duly completed an application, submitted his curriculum vitae (CV) to the applicant, was shortlisted, interviewed and appointed.

[8] II is unclear what precipitated the investigation, but on or about 2018, the applicant instructed Gobodo Forensic and Investigative Accounting (Pty) Ltd, to conduct a forensic investigation into Mphele's qualifications. It was found that Mphele had misrepresented his qualifications and professional memberships, in his CV.

[9] On or about 18 December 2018, the applicant instituted disciplinary action against Mphele on grounds of gross dishonesty.

[10] A disciplinary hearing was convened, Mphele was found guilty and dismissed on 19 April 2019.

[11] Mphele referred an unfair dismissal dispute to the CCMA. After a protracted arbitration, the commissioner found Mphele's dismissal to have been substantively unfair and ordered his retrospective reinstatement with backpay to the tune of R2,058 333.27(Two million, fifty-eight thousand, three hundred and thirty-three rand, twenty-seven cents).

[12] Unhappy with the finding, the applicant instituted review proceedings against the commissioner's arbitration award on grounds that it constitutes a decision, a reasonable decision-maker could not reach

The evidence before the commissioner

[13] The material evidence led before the commissioner is summarised below.

[14] The applicant's principal witness, Mr. Deon Wilson is an associate director at Gobodo. He testified that the primary objective of the investigation in respect of Mphele was, the fact that he (Mphele) misrepresented aspects of his CV when he applied for the position as CFO with the applicant.

[15] Wilson testified that Mphele factually misrepresented having the following qualifications and holding the following memberships[2]:

15.1 A BCom Accounting degree from the University of Durban- Westville, whilst in fact he only obtained a BCom degree;

15.2 An Honours Degree in GRAP (Generally Recognised Accounting Practice), from the University of Stellenbosch, whilst this was not an honours degree but an executive short course with a NQF 8 recognition level;

15.3 Memberships with the Institute of Internal Auditors of South Africa, entitling him to use the title of GIA (General Internal Auditor), whilst he had on 7 November 2013, cancelled his membership with the IIA SA and could not thereafter, have used that designation;

15.4 Holding out to be a Registered Accounting Officer with the Institute of Administration and Commerce (IAC) whilst he has not been a registered Accounting Officer with the IAC since 2008 and could accordingly not claim in 2015, to have been a registered accounting officer.

[16] Mr. Wilson conceded that Mphele met the general requirements for the position as CFO but that he was favourably considered, to the exclusion of other candidates, based on the fact that he presented himself to be a BCom Accounting graduate.

[17] He referred to the minutes of the shortlisting meeting in respect of the CFO

[2] Paginated Bundle, p. 23

position, dated 23 September 2015, and pointed out that the minimum selection criteria for shortlisting for the position of CFO was first and foremost, a BCom in Accounting[3]•

[18] Wilson referred to documentary proof obtained from the two universities that Mphele claimed to have received the degrees from. The university of Durban-Westville confirmed that Mphele obtained a normal BCom degree and not a BCom Accounting degree as alleged by Mphele. Furthermore, the University of Stellenbosch confirmed that he did not hold an honours degree with the university as claimed and that he merely completed a short course at NQF Level 8.

[19] In his testimony Mphele conceded, after being unnecessarily evasive[4], that he did not obtain a BCom accounting degree at Durban-Westville during the period 1993 to 1996. He explained that he stated on his CV that he had the qualification owing to the fact that he completed accounting modules 1, 2 and 3 at another university. The evidence however demonstrated that for the period that he claimed to have obtained the BCom Accounting qualification, he only had Accounting 1 from another university.

[20] When unable to adequately set out his reasoning for overstating his qualifications, Mphele attributed this to an error on his part, but he denied that it was dishonest as alleged by the applicant.

[21] Mphele testified that in respect of charge pertaining to the GRAP issue, he never represented that he held an honours degree. He stated that his interpretation that GRAP at NQF Level 8, was the equivalent of an honours degree and therefore had the same standing. This competes with what is reflected in his CV. In his CV he stated the qualification as an honours degree.

[22] In respect of the various professional memberships, Mphele stated that he included that information, simply to demonstrate his historical background. He conceded

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[3] Paginated Bundle. p.48
[4] Transcribed record p.39 (chronological number p. 662-663)

that the information reflected was incorrect.

[23] Mr Sydney Mofokeng testified that he was the chairperson of the audit commitee and formed part of the panel who shortlisted Mphele. He confirmed that Mphele met the minimum requirements for the position as CFO.

Analysis

[24] The test for review as set out in Sidumo, is that of a reasonable decision- maker.

[25] In a reasonableness review, a commissioner's decision is attacked on the basis of reasonableness. Here, the commissioner's decision is compared to that of a reasonable decision-maker. A commissioner's decision is ordinarily considered in respect of two interrelated components, namely the process followed in the enquiry and the assessment of the evidence placed before the commissioner in arriving at a decision. This constitutes the true nature of enquiries before commissioners.

[26] Where the process followed by the commissioner was unfair, or wrong, and / or the manner in which the commissioner considered the evidential material placed before him was unjustifiable, giving rise to an unreasonable result (decision), such conduct on the part of the commissioner runs contrary to the *"true nature of the enquiry"* and renders the decision reviewable on grounds that the commissioner misconceived the nature of the enquiry.

[27] A commissioner could be accused of having misconceived the nature of subject of the enquiry, as it relates to the subject of the enquiry itself or what has been referred to as *"the real dispute between the parties".* For example, if the commissioner deals with an unfair labour practice dispute where the real dispute is in fact an unfair dismissal dispute, the commissioner would have misconstrued the nature of the enquiry. Similarly, if a commissioner deals with an unfair dismissal dispute arising from misconduct, as if he was dealing with an incapacity dispute and vice versa, he would have misconceived

the nature of the enquiry. This court have directed that a commissioner, must determine the true nature of the dispute placed before him. If he doesn't do so, he misconceives the nature of the enquiry. In this regard, the principle set out in *CUSA v Tao Ying Metal Industries and Others*, by the Constitutional Court is instructive:

> A commissioner must, as the LRA requires, "deal with the substantial merits of the dispute". This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.[5]

[28] When dealing with the real dispute between the parties, a reasonable decision-maker will ensure that he complies with the true nature of the enquiry, by upholding a fair procedure, by warranting that the evidential material placed before him is properly assessed, and that his decision is rationally connected with the material placed before him. This is the standard required of commissioner as a decision-makers.

[29] Where a commissioner followed a process and/or an assessment of evidence that gave rise to an irregularity which caused an unreasonable result, he clearly misconceived the nature of the enquiry. A reasonable decision-maker, tasked with

[5] [2009] 1 BLLR 1 (CC) para 65

presiding over statutory arbitration proceedings will not misconceive the nature of the enquiry. To this end, a reasonable decision-maker will ensure that he conducts the arbitration proceedings in a manner that is procedurally fair and that he properly considers the evidential material placed before him.

[30] In an enquiry that is procedurally fair (*"the procedural considerations"*), a reasonable decision-maker will ensure, subject to section 138[6] of the LRA, that:

30.1 The parties are allowed to make opening statements at the commencement of the arbitration proceedings, if they so wish;

30.2 The parties are allowed to lead evidence in the form of calling witnesses or tendering documentary evidence;

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[6] 138(1) The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly but must deal with the substantial merits of the dispute with the minimum of legal formalities.

(2) Subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, calf witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner.

In *Naraindath v Commission for Conciliation Mediation and Arbitration and Others (2000) 6 BLLR 716 (LC). the Arbitrator's* role was summed up in paragraph 27 as follows: *"[27] In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings (see section 145(2){a)(i) and (ii) of the LRA; McKenzie The law of Building and Engineering Contracts and Arbitration 5ed at 188-189)."*

30.3 The parties are allowed to examine and cross-examine witnesses;

30.4 The parties are not denied the right to call witnesses;

30.5 He does not interfere in the arbitration proceedings[7], by taking over the examination or cross-examination of parties (this excludes asking questions for clarity or conducting proceedings in an inquisitorial manner);

30.6 The parties are allowed to address him in concluding arguments, either orally or in writing.

[31] A reasonable decision-maker will properly assess and consider the evidential material placed before him in arriving at a decision, (*"the evidential considerations"*) by ensuring that (not an exhaustive list):

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[7] 7 *In Innovation Maven (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* where the following observation was made by Van Niekerk J: *'In the present instance, in my view, and after a careful perusal of the record, the commissioner's conduct was such that she overstepped the mark. ft is difficult to convey the magnitude of the extent to which the commissioner actively engaged in the proceedings, but read as a whole, the transcribed record reflects that the commissioner failed to respect the roles of the parties' respective representatives and assumed to herself the role of leading evidence and conducting cross-examination.'*

In *Arends & others v SA Local Government Bargaining Council & others* (2015) 36 ILJ 1200 (LAC) the LAC considered a case in which the Arbitrator had proceeded to hear the dispute in arbitration on insufficient facts. II had the following to say*: 'The enquiry was undertaken in the wrong manner with the result that the appellants were denied their rights to have their case fully and fairly determined. The principal cause of their denial or failure was the inept manner in which the case was put before the arbitrator. Be that as it may, the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of s 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair.*

31.1 He applies his mind properly to the evidential material placed before him[8];

31.2 He conducts a proper assessment and evaluation of the evidence;

31.3 He only considers relevant evidence and excludes irrelevant evidence;

31.4 He applies the correct test when evaluating the evidence and determining the probabilities when faced with mutually destructive versions;

31.5 He provides reasons for his decision;

31.6 The decision he arrives at aligns with the evidence presented.

[32] An allegation that a decision-maker enquiry and thus arrived at an unreasonable result, simply means that the decision-maker failed to apply procedural and / or evidential considerations which gave rise to an irregularity, that in turn caused an unreasonable result (decision) which no reasonable decision-maker could have reached.

[33] When applying the *"reasonableness test"* the arbitrator's conduct is assessed against that of the reasonable decision-maker. If the decision taken by the arbitrator is one that no reasonable decision-maker could have reached, such a decision is reviewable. Whereas, when applying the *"correctness test",* the arbitrator's conduct is not compared to the reasonable decision-maker, it is simply whether the arbitrator's decision right or wrong. A decision is wrong when it is at variance with the objective

[8] 8 In *IN2FOOD (Ply) Ltd V CCMA & Others* (unreported) Case No: JR 848/18 Labour Court - Johannesburg, at para 14, the court held as follows: *To the extent that the Commissioner failed to apply his mind to the issues before him or have regard to those issues, he not only acted in breach of the right to administrative justice, but also failed to arrive at a reasonable decision. It therefore follows that this matter ought to be remitted to the CCMA for a hearing de novo.*

factual or legal position.

[34] It is not enough for a party seeking to review a decision on reasonableness, simply to state *"the commissioner misconceived the nature of the enquiry" or "the commissioner failed to apply his mind"* or *"the commissioner committed gross misconduct by failing to properly assess the evidence"* etc. A lot more is required. A litigant must at the very least:

> 34.1 Set out the irregularity that he complains about, and adduce sufficient evidence to support such a contention;
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> 34.2 If the irregularity arises from the failure of the decision-maker to comply with procedural and / or evidential considerations, a litigant must go further and adduce evidence to demonstrate how the irregularity complained about, gave rise to an unreasonable result (decision); and
>
> 34.3 How the decision arrived at, is one no reasonable decision-maker could reach.

[35] A decision is unreasonable if it is not justifiable when regard is had to the evidential material placed before a decision-maker. A decision is reasonable if it is just, rational and appropriate in the circumstances. Similarly, a decision is unreasonable if it is unjust, irrational and inappropriate.

[36] The commissioner in the present matter, notwithstanding the overwhelming evidence placed before him, concluded as follows;

> Based on the submissions of the parties, the applicant's evidence was more persuasive than that of the respondent on the balance of probabilities, that the applicant met the requirements of the position, and therefore eligible for appointment as CFO. There was no compelling evidence of misconduct, on the

balance of probabilities[9].

[37] The conclusion arrived at by the commissioner does not align with the evidence at all. The commissioner does not set out the respective versions presented by the parties, or how he arrived at the conclusion that the one version is more compelling than the other. The issue was not whether Mphele met the requirements for the CFO position as advertised, it had to do with the fact that in his application he presented himself as the holder of certain degrees and professional memberships, which he did not have. This evidence remained largely uncontested. Mphele was, as the applicant correctly contended, grossly dishonest.

[38] I am not persuaded by the fact that Mphele claimed he made an error when he reflected his qualifications and professional memberships as set out in his CV. If this was so, he would have admitted this at first and earliest opportunity, and would have been extremely penitent. He failed to do so, and only made such concession when he was cornered in cross-examination. Towards the end of his testimony, he nevertheless retained the view that he had done nothing wrong.

[39] The commissioner quite evidently failed to properly assess the evidential material placed before him. Had he done so, he would have found that Mphele misrepresented his educational qualifications and his professional standing.

[40] In *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration and Others*[10], the employee misrepresented the fact that she had a driver's licence in her application for employment and was dismissed for dishonesty. The arbitrating commissioner at the CCMA found her dismissal substantively unfair ordering her reinstatement. The award was upheld on review by this court, but was reversed by the LAC on appeal, with Waglay DJP (as he then was) concluding that the award was unreasonable.

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[9] Arbitration Award, p.9, par 45
[10] (2011) 32 ILJ 2442 (LAC).

[41] In *Department of Home Affairs & another v Ndlovu & others*[11], the employee also misrepresented in his CV that he had a degree in technology marketing and was dismissed for dishonesty. The arbitrating commissioner at the bargaining council upheld the dismissal. This court set the award aside on review. The LAC however reversed this court's decision on appeal, upholding the commissioners' decision. Dlodlo AJA held:

> The fact that the misrepresentation in the CV might very well not have induced the first respondent's appointment to the post, most certainly does not detract from the fact of the first respondent's initial dishonesty. The dishonesty as contained in the CV is ultimately what underpins the substantive fairness of the first respondent's dismissal. Why did the first respondent put in his cv that which is untrue? He knew how to describe the MBA degree which was then unfinished. He could have described the bachelor of technology marketing degree similarly if he found it necessary to mention it at all in his CV.[12]

[42] The court referred to the celebrated author, John Grogan in his work *Dismissal*[13]*,* where says the following about dishonesty:

> "Dishonesty" is a generic term embracing all forms of conduct involving deception on the part of employees. In criminal law, a person cannot be convicted of dishonest conduct unless that conduct amounts to a recognized offence. However, in the employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded. The dishonest conduct of employees need not therefore constitute a criminal offence. “Dishonesty” can consist of any act or omission which entails deceit. This may include withholding information from the employer, or making a false statement or misrepresentation with the intention of deceiving the employer...

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[11] (2014) 35 ILJ 3340 (LAC)
[12] Department of *Home Affairs & another v Ndlovu & others* (2014) 35 ILJ 3340 (LAC) para 14
[13] Juta & Co. Ltd First published 2010, republished 2012, page 188

[43] In *Hoch v Mustek Electronics (Pty) Ltd*[14] this court held that an employer was justified in terminating the contract of an employee who had misrepresented her qualifications prior to her appointment. This was also the case in *Boss Logistics v Phopi and Others*[15] where a senior employee was found to have inflated both his qualifications and his experience in his CV.

[44] In *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others*[16], the employee failed to disclose a criminal conviction in his application for employment as a security guard. The employee was accordingly dismissed for dishonesty (some 14 years later). At the CCMA the arbitrating commissioner found the dismissal substantively unfair and awarded the employee compensation. The award was upheld on review by this court, but reversed by the LAC, who held as follows per Savage AJA:

> The false misrepresentation made by the third respondent was blatantly dishonest in circumstances in which the appellant is entitled as an operational imperative to rely on honesty and full disclosure by its potential employees. It induced employment and when discovered was met with an absence of remorse on the part of the third respondent. The fact that a lengthy period had elapsed since the misrepresentation, during which time the third respondent had rendered long service without disciplinary infraction, while a relevant consideration, does not compel a different result. This is so in that the fact that dishonesty has been concealed for an extended period does not in itself negate the seriousness of the misconduct or justify its different treatment. To find differently would send the wrong message.

[45] In *Rainbow Farms (Pty) Ltd v Dorasamy*[17] the employee claimed to have a BTech Quality management and a BTech: Business Administration degree. Both these

[14] (2000) 21 ILJ 365 (LC)
[15] [2010] 5 BLLR 525 (LC)
[16] (2017) 38 ILJ 881 (LAC) para 30
[17] (2014) 35 ILJ 3462 (LC)

degrees were in fact “in progress” thus not fully achieved. The employee was advised to amend her CV to correctly reflect her first qualification. It later transpired that, the second qualification was also in progress. When the dishonesty was discovered, she was dismissed.

[46] The commissioner's decision to reinstate Mphele in circumstances where he misrepresented his qualifications and professional status, was unreasonable and constitutes a decision a. reasonable decision-maker could not reach.

[47] It would serve little purpose to have the matter remitted to the CCMA for hearing afresh, when this court, having had the benefit of a complete record, is in a position to determine the matter finally.

[48] In the result I make the following order:

Order

1. The third respondent's arbitration award is reviewed and set aside and substituted with the following order:

    1.1. The applicant's unfair dismissal referral is dismissed;

    1.2. The applicant's dismissal is both procedurally and substantively fair.

2. There is no order as to costs.

Bart Ford

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr. K. Nondwangu form MNS Attorneys
For the Respondent:	Adv. A.M. Pheto
Instructed by:	Mandla Ncongwane Attorneys