



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR1289/14

In the matter between:

LTE CONSULTING (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

COMMISSIONER MALUBANE BUTI

Second Respondent

LOURENS FRANCOIS THERON

Third Respondent

Heard: 3 August 2017

Delivered: 8 August 2017

Summary: Employee misrepresenting qualifications in CV – commissioner’s finding that employee’s dismissal substantively unfair unreasonable – award set aside on review – employee’s dismissal determined as having been fair

JUDGMENT

MYBURGH, AJIntroduction

[1] The central issue in this section 145 review application is whether the commissioner's finding that the employee was not guilty of dishonestly misrepresenting his CV was reasonable.

[2] The essential background is this. With effect from 1 December 2009, the employee was employed by the company as its financial manager. Four years later, on 13 December 2013, he was charged with gross dishonesty -

“in that on your [CV] submitted to the employer for your employment application for the position of financial manager you indicated that you were qualified as a chartered accountant (South Africa) and that you confirmed this submission in your interview with the employer's interview panel on 26 November 2009.”

[3] On 20 January 2014, and following a disciplinary inquiry at which he was found guilty as charged, the employee was dismissed. A dispute arising from the employee's dismissal proceeded to arbitration before the commissioner. In an award dated 30 April 2014, the commissioner determined that the employee's dismissal was substantively unfair and awarded him six months' compensation amounting to in excess of R300 000. The company seeks to set aside this award on review.

Broad overview of evidence at arbitration

[4] The company called three witnesses: Mr Vantyi (the company secretary), Mr Moatswi (an HR officer) and Mr Chitenhe (the CEO). The employee then gave evidence, and did not call any witnesses in his defence. What follows is a broad overview of the evidence (which runs to in excess of 400 pages in transcript).

- [5] When the employee was appointed as financial manager with effect from 1 December 2009, he was turning 82, well beyond the company's ordinary retirement age of 65. Although unclear from the evidence, the employee may have performed the role of company secretary for a short while before his appointment as financial manager. Also noteworthy is that the employee was offered the position of assistant company secretary on a fixed-term contract running from 1 August 2013 to 31 January 2014, but refused the offer (and a subsequent offer of a permanent position of assistant company secretary). On the face of it, this appears to have been an attempt at effectively retiring the employee.
- [6] It was in the process of considering the fixed-term contract that Mr Vantyi came across the employee's CV (which was on file), which reflected that certain certificates were outstanding, including the employee's B.Com, "chartered accountant (SA)" qualification, and MBA from Wits. When he raised this with the HR department, Mr Vantyi was told that the certificates had been requested but never provided by the employee. This was substantially confirmed by Mr Moatswi. Mr Vantyi thus commenced with an investigation, which revealed that the employee was not a chartered accountant and that he did not have an MBA from Wits, with it also apparently being assumed that he did not have an under-graduate degree, i.e. a B.Com. The disciplinary charges against the employee followed upon the completion of the investigation.
- [7] In regard to the events of the interview of 26 November 2009 which form the basis of the charges, Mr Chitenhe, who was part of the interview panel, testified as follows. The interview was a competitive one with three candidates having been interviewed, including the employee. Although it was not expressly discussed during the interview, he had been provided with a copy of the employee's CV before the interview, and it was taken at face value, with there being no reason to doubt the contents thereof. The employee's interview scorecard reflects high scores for tertiary qualifications and job knowledge, with recorded annotations including that the employee was "financially qualified and experienced" and that he was a "chartered accountant".

According to Mr Chitenhe, the employee was the preferred candidate and he recommended his employment based on his CV and interaction during the interview. Asked if there was anything in particular in the employee's CV that had motivated him to make his recommendation, Mr Chitenhe made mention, *inter alia*, of the employee having a B.Com and being a chartered accountant. He did, however, accept that being a chartered accountant was not an express requirement for the job – stating that some companies would require a financial manager to be a chartered accountant, and others not.

[8] Turning to the employee's evidence, on his version, he was appointed as company secretary on 19 November 2009, and then as financial manager with effect from 1 December 2009, which position subsumed that of company secretary. Although he accepted that he attended a meeting on 26 November 2009, he denied that he applied for the position of financial manager or that the meeting constituted an interview for that position. On his own version, however, the meeting was "a discussion of my experience", and "I had my [CV] and my certificates, qualifications, and I handed it to the HR manager at the time".

[9] Insofar as his CV is concerned, the employee admitted that he is not a chartered accountant and that he does not hold a B.Com from any university in South Africa or an MBA from Wits. What followed was an extraordinary explanation by the employee who sought to deflect his dishonesty either on the basis of recognition of prior learning or that he had equivalent qualifications. Incredibly, in relation to the chartered accountant issue, the employee testified that "I wrote the examination for B.Com first year accountancy, which is equivalent to CA". Equally striking is this passage which also bears testimony to the brazen and unremorseful attitude adopted by the employee (the quote is verbatim):

"... my impression is that very few people know that equivalent certificates and diplomas are very often better than degrees, and very few people know of, well, at least many people know that the Chartered Institute of Secretaries

is all round practical course which includes all these other little degrees than what you can do at university.”

- [10] Subsequent to this appointment, the employee drafted his own job description for the position of financial manager. In doing so, he set the required qualification as being a “B.Com degree or relevant qualifications”.
- [11] Moving forward in time, according to the employee, he was told on 3 June 2013 that he was removed as company secretary and that Mr Vantyi had been appointed in his place, which was motivated on the basis of BEE considerations. On 13 November 2013, and in circumstances where he had carried on his role of financial manager in the interim, a meeting was held to discuss the employee’s retirement. At this meeting, the employee was offered the position of assistant company secretary on a fixed-term contract running from 1 August 2013 to 1 January 2014. The employee refused to sign the contract because it was backdated to 1 August 2013. The employee also declined to accept a permanent position of assistant company secretary – this on account of the fact that he was not satisfied with the notice provisions in the contract (which replicated the BCEA provisions) and because he was already an employee.
- [12] Finally, as far as the employee was concerned, “the employer [was] looking for something to put me in a position where I have to retire ... and that is why they come up with all these stupid little things”.

The commissioner’s award

- [13] The commissioner’s award is, regrettably, not a model of clarity. But it seems to me that the central thrust of his finding is that the employee’s dismissal was (according to him) a sham designed, in effect, to secure his retirement. As the commissioner put it:

“The company realised that the applicant was the only employee in the company who was without a retirement age and came with the plan to force him to retire

The logical conclusion that I can make is that should the applicant [have] accepted the offer of a company assistant secretary there would be no need for the company to dig into his CV as a means to get rid of him.”

- [14] The commissioner also seems to have been of the view that the representations in question by the employee in his CV were not material in securing the position of financial manager, and, in any event, that he had equivalent qualifications. As the commissioner put it:

“One thing crystal clear is that the applicant’s CV was not an entry gate when he was appointed, it cannot be an issue now. However in trying to emphasise why the applicant’s CV should not be an issue in this case, in his evidence in chief, the applicant demonstrated that his F.C.I.S is equivalent to M.Com and his diploma business management from Damelin is equivalent to MBA. He mentioned B.Com in his CV because he was accredited B.Com courses when he joined the chartered secretaries of Southern Africa.”

- [15] In conclusion, the commissioner found:

“After having scrutinized the evidence of both parties, their mitigation[ing] and aggravating circumstances, the balance of probability favours the conclusion that the respondent failed to discharge its onus to prove that the applicant’s dismissal under the circumstances was substantively fair.”

- [16] Although confusing, from an overall perspective, it seems that the commissioner found that, insofar as the employee was guilty of any misconduct, he was not deserving of dismissal because: (i) his dismissal was a sham designed to, in effect, secure his retirement; (ii) the misrepresentations about qualifications were not material in securing the position of financial manager; (iii) in any event, the employee had equivalent qualifications; and (iv) an assessment of factors in mitigation / aggravation demonstrated that the sanction of dismissal was inappropriate.

Analysis and evaluation

[17] Mr Hayward, who appeared for the employee, made the following main submissions in oral argument. Firstly, the employee was technically not guilty of the charge of misconduct because the company had not established that he was not “qualified” to be a chartered accountant (as opposed to not being registered as one), and because the employee had not “confirmed this submission in [his] interview”.¹ Secondly, insofar as the employee had misrepresented that he was a chartered accountant, this was not material because this was not a requirement for appointment to the position of financial manager. Thirdly, there had been a failure to cross examine on certain aspects of the matter. Fourthly, the company’s pleaded grounds of review were limited and, in effect, prohibited it from attacking the reasonableness of the outcome of the award. Fifthly, in any event, the outcome of the award was reasonable.

[18] To my mind, there is no merit in any of these points. As to the first point, it is facile to contend that the employee is qualified to be a chartered accountant – he is not, *inter alia*, because he has not passed the board examination and because he is not registered as a chartered accountant with the relevant regulatory authority. It can also not be contended that the employee did not confirm that he was a chartered accountant during the interview – he did so by handing in his CV at or before the interview.

[19] Regarding the second point, it is clear from the evidence of Mr Chitenhe and the employee’s interview scorecard that the fact that the employee was (purportedly) qualified as a chartered accountant was a material factor in his appointment as financial manager (and understandably so). In any event, accepting that such a qualification was not a requirement for the job, this does

¹ See the text of the charge quoted in para 2 above.

not detract from the employee's dishonesty in misrepresenting that he was a chartered accountant.²

[20] Regarding the third and fourth points, the employee was cross examined over the material aspects of the matter, and the company's pleaded grounds of review (albeit brief) are framed widely enough to permit an attack on the reasonableness of the outcome of the award.

[21] That leaves the central controversy between the parties, namely whether a reasonable commissioner could have found the employee's dismissal substantively unfair.³ To my mind, the answer is clearly "no". Manifestly, the employee was grossly dishonest in misrepresenting that he is a chartered accountant. To aggravate this grave misconduct, he also lied about having a B.Com and MBA, and showed no remorse whatsoever. This to the extent of describing the company's concerns as being about "stupid little things". Dismissal was patently warranted.

[22] I am fortified in my view that the commissioner's decision was unreasonable by three judgments of the LAC, which are directly in point. The first is *SA Post Office Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2011) 32 ILJ 2442 (LAC). The employee had misrepresented that she had a driver's licence in her application for employment⁴ and was dismissed for dishonesty. A CCMA commissioner found her dismissal substantively unfair and reinstated her, with the award having been upheld on review by this court. But the LAC reversed this court on appeal, with Waglay DJP (as he then was) finding the award unreasonable, *inter alia*, on this basis:

"[34] ... 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

² See the quotation from *Department of Home Affairs & another v Ndlovu & others* (2014) 35 ILJ 3340 (LAC) in para 23 below.

³ *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 ILJ 2405 (CC) at para 110.

⁴ She only had a learner's licence, but obtained a full licence during the course of her employment.

and proper to reinstate or re-employ a person in a position that was secured by the making of false statements.”

- [23] The second judgment is *Department of Home Affairs & another v Ndlovu & others* (2014) 35 ILJ 3340 (LAC). The employee had misrepresented in his CV that he had a degree in technology marketing and was dismissed for dishonesty. A bargaining council commissioner upheld the dismissal, with the award having been set aside on review by this court. But the LAC reversed this court on appeal, and restored the commissioner’s award. In the process, 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.”

- [24] The third and most recent judgment is *G4S Secure Solutions (SA) (Pty) Ltd v Ruggiero NO & others* (2017) 38 ILJ 881 (LAC). The employee failed to disclose a criminal conviction in his application for employment as a security guard and was dismissed for dishonesty (14 years later). A CCMA commissioner found the dismissal substantively unfair and awarded the employee compensation, with the award having been upheld on review by this court. But, again, the LAC reversed this court on appeal and set aside the award, with Savage AJA finding:

“[30] ... 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.”

[25] Turning to the five findings made by the commissioner identified in para 16 above, I consider each of them to be unreasonable in themselves. To begin with the commissioner’s central finding that the dismissal was a sham designed to effectively secure the employee’s retirement, it is unreasonable in that it cannot be reconciled with Mr Vantyi’s (unchallenged) explanation about how he came to learn of the problems with the employee’s CV. What further belies the finding of a sham is the fact that, objectively, the employee’s misconduct was very serious and deserving of dismissal. Regarding the finding that the misrepresentation about the chartered accountant qualification was not material, as already mentioned, there is also no justifiable basis for this in the evidence. Regarding the finding that the employee had equivalent qualifications, this is unreasonable because it misses the point, and, in any event, did not extend (on the commissioner’s own findings) to the employee’s claim that he is a chartered accountant. That leaves the commissioner’s unarticulated assessment of factors in mitigation / aggravation in favour of the employee in relation to sanction, which is unreasonable on the basis of the three LAC judgments referred to above.

[26] In relation to the issue of relief, the parties agreed that, in the event of it being found that the award is reviewable, this court should finally determine the dismissal dispute. In circumstances where I have found that the commissioner’s decision not to uphold the employee’s dismissal was unreasonable, it follows that I consider it to have been substantively fair.

[27] Regarding costs, in circumstances where the employee cannot be held responsible for the commissioner’s unreasonable award, I do not believe that

it would be just and equitable that he be made to pay the costs of the review, despite having been unsuccessful in his opposition thereof.

Order

[28] In the result, the following order is made:

- 1) The second respondent's award is reviewed and set aside;
- 2) The dismissal of the third respondent by the applicant is declared to have been substantively fair;
- 3) There is no order as to costs.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicant: Adv BZ Kela instructed by Ndumiso Voyi Inc

For the third respondent: Adv S Hayward instructed by Van Hysteens Attorneys