IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

REPORTABLE

Case No. : JR2116/2003

In the matter between:

ORACLE CORPORATION SOUTH AFRICA (PTY) LTD Applicant

versus

COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent
NOWOSENETZ, L N.O. Second Respondent
CLARK, B Third Respondent

CORAM: H.M. MUSI, J

HEARD ON: 17 MARCH 2005

DELIVERED ON: 29 JUNE 2005

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[1] This is an application brought in terms of section 145 of the Labour Relations Act 66 of 1995 to review and set aside an arbitration award. The background to the dispute is set out hereunder.

[2] During 2002, the applicant, a duly incorporated company

specialising in the development and distribution of computer software, engaged an employment recruitment agency called Wisdom Management Search (Wisdom) to recruit a manager for its sales department. Wisdom invited Mr. Bruce Clark (the third respondent) to apply for the post, which he did and was duly appointed to the post on 1 November 2002 at a gross monthly salary of R50 000,00. Early in 2003, the managing director of the applicant, Mr. Robin Morello (Morello) discovered that the third respondent had omitted from his CV that he had submitted when applying for the post, mention of a previous employment with a company called KSI. Now KSI had been the sole distributor of the applicant's products in South Africa but had during 1995 been bought by the applicant, which took over the business and employees of KSI, so that the applicant literally became a successor in business of KSI in South Africa.

[3] Morello then called the third respondent to a meeting on 13 February 2003 wherein the issue was discussed. The minutes of this meeting were taken by the applicant's human

resource manager, Mrs. Elizabeth Morris (Morris) and are very important. Pursuant to such meeting the applicant charged the third respondent with misconduct, in that he had allegedly secured the post by fraudulently misrepresenting his CV. At the ensuing disciplinary hearing, the third respondent pleaded guilty to the charges and was duly convicted and dismissed.

[4] The third respondent was not happy with the sanction of dismissal and declared a dispute with the CCMA (the first respondent). Conciliation having failed, the dispute was referred for arbitration and Mr. L. Nowosenetz (the second respondent) was appointed to preside over the proceedings. I shall henceforth refer to the second respondent as the arbitrator and to the third respondent simply as the respondent.

[5] The arbitrator issued his award on 19 September 2003. He found that the respondent's dismissal was substantively unfair and ordered that the applicant pay him compensation in the amount of R300 000,00, being the respondent's monthly salary computed to three months. It is this award that the applicant wants reviewed and set aside. The application is being opposed only by the third respondent (the respondent).

[6] The first ground of attack as appears in the applicant's founding affidavit is that the arbitrator misconducted himself in relation to his duties as commissioner, alternatively that he exceeded his powers or committed a gross irregularity. The basic query in this regard is that the arbitrator should not have revisited the finding made by the disciplinary tribunal that the respondent was guilty of misconduct in the form of dishonesty in that he had deliberately and fraudulently misrepresented his CV in order to secure employment with the applicant. The contention was that the sole issue for consideration by the arbitrator was the appropriateness of the sanction of dismissal.

[7] The contention aforesaid arises from the fact that the respondent had pleaded guilty to the charges at the disciplinary hearing and if there was any doubt about what the charges were, the prosecutor there clarified that when he stated the following:

> "The charges against you, Mr. Clark, is that you falsified your CV in order to – you know - you fraudulently and dishonestly misrepresented your curriculum vitae at the time of your employment with ORACLE. Those are the charges that we are going to put to you. You know the question is not when was your CV falsified, it is the fact that you did dishonestly and fraudulently misrepresent your record of employment."

The respondent then pleaded guilty.

[8] In the referral of the dispute to the CCMA in the form of LRA 11 under paragraph 4(b) where the question is asked why does he say that the dismissal was unfair, the respondent specifically stated that the nature of the offence does not warrant dismissal. This clearly shows that the dispute was not about the merits but rather the appropriateness of the sanction. When the matter came for arbitration, the parties signed an Agreed Statement of Facts which defined the issues to be decided. Paragraph 15 thereof states:

> "The applicant challenges the substantive fairness of his dismissal only. The applicant argues that the sanction of

> dismissal was too harsh. The respondent alleges that the sanction of dismissal was justifiable and fair."

[9] This statement is somewhat ambiguous for the phrase "substantive fairness" of a dismissal ordinarily relates to the merits of the dispute, the question being whether the misconduct alleged had been proved or whether there were valid grounds justifying a dismissal, in contradistinction to procedural fairness. A dismissal may be substantively fair and yet procedurally unfair and *vice versa*. On the other hand, a dismissal that is both substantively and procedurally fair may be set aside on the basis that as a sanction it is too severe or not justifiable. Which is which in this case?

[10] It appears that there was no dispute between the parties about what was intended to be put before the arbitrator for a decision, nor did the arbitrator raise any queries in this regard. The statement that the applicant (respondent) challenges the substantive fairness of the dismissal is followed immediately by the following:

> "The applicant argues that the sanction of dismissal was too harsh."

Read within its proper context, the statement clearly conveys

that what was being challenged was the sanction of dismissal and not the merits. If there is any doubt about that, it will be dispelled by what transpired during the arbitration as set out hereunder.

[11] Although he did give his version as to how it came about that the employment with KSI was omitted from his CV, the respondent's evidence in chief centred on the difficulty of finding alternative employment, including inability to go back to his last employer, IBM, as well as his present predicament where he had to survive on a mere R10 000,00 per month as compared to the R50 000,00 per month that he used to earn at Oracle. This was perfectly in line with his initial referral of the dispute to the CCMA, where his only complaint was the severity of the sanction. It is abundantly clear that this is how his new attorney, Mr. Simpson, who incidentally also represented the respondent in the instant application, understood the position and led him along similar lines.

[12] A somewhat confusing stance was adopted by Mr. Roskin, the attorney who represented the applicant in those

proceedings. He devoted much of his cross-examination of the respondent to the circumstances leading to the applicant employing the respondent. He inexplicably seems to have wanted to show that the respondent had deliberately misrepresented his CV in order to secure employment with the applicant; in short, to show that the respondent had been dishonest. His cross-examination on the appropriateness of the sanction covers only one page of the record.

[13] Mr. Roskin proceeded in similar vein when he led the evidence of Morris. He literally canvassed issues relating to the merits of the dismissal. He led evidence on *inter alia* how it was discovered that the respondent had omitted the employment with KSI in his CV, the meeting of 13 February 2003 when the respondent was confronted with the discovery as well as some other discrepancies in the respondent's CV.

[14] Interestingly in the cross-examination of Morris, Mr. Simpson did not delve much into the issues canvassed by Mr. Roskin.

In my view, this confirms that Mr. Simpson was aware that these issues were not relevant to what the arbitrator needed to decide. Incidentally the questions that the arbitrator put to Morris relate only to the sanction. Morris conceded that according to the company's code of conduct, imposition of the sanction of dismissal in respect of dishonesty and related infractions is discretionary and depends on the circumstances of each case.

[15] If there was any doubt that the issue before the arbitrator was the appropriateness of the sanction of dismissal, it is dispelled by the closing argument presented by the respondent's attorney. He specifically conceded that the respondent had been dishonest and that this amounted to misconduct. His main submission was that dismissal was, in the circumstances, too severe and unjustifiable. The closing argument of the applicant's attorney also focused on the sanction, he submitting that dismissal was appropriate.

[16] It is clear from the above that the arbitrator was not called

upon to decide on whether the respondent had been guilty of misconduct in the form of dishonesty. It had clearly been common cause between the parties that dishonesty had been shown and they had accepted the verdict of the disciplinary tribunal in this regard. In making a finding to the contrary, the arbitrator exceeded his powers as well as committing a gross irregularity. See **F N MARKETING DISTRIBUTION SERVICES v COMMISSIONER MATTHEE AND OTHERS** (2002) 23 ILJ 1413 (LC) at paragraph 21 and the authorities cited therein.

[17] Likewise in finding that the omission of his employment with KSI in the respondent's CV was not material, the arbitrator misdirected himself. The issue was not whether but for the omission the applicant would have employed him. The point is that the respondent deliberately concealed pertinent information from the applicant. It may well be that had the information been disclosed, the applicant may have decided not to employ him. Again the point is that the applicant was deliberately denied the opportunity of making an informed

decision either way. It follows also that the finding that the applicant had failed to discharge the onus of proving that the respondent falsified information in order to secure employment is misplaced. Besides, it is an issue falling outside the issues that the arbitrator was called upon to decide.

[18] It stands to reason that the submission that the arbitrator exceeded his powers and committed a gross irregularity is valid and the award stands to be reviewed on that ground alone. In view hereof, it is unnecessary to deal with the extensive analysis of the evidence and submissions made in this regard by Mr. Myburgh for the applicant in his heads of argument and oral argument. Those submissions relate to the ground that the arbitrator's conclusions are, objectively viewed, not rationally connected to the evidence or to put it otherwise, that the findings are not justifiable on the evidence as was enunciated in **CAREPHONE (PTY) LTD v MARCUS NO AND OTHERS** (1998) 19 ILJ 1425 (LAC) and reaffirmed in **SHOPRITE CHECKERS (PTY) LTD v RAMDAW NO AND OTHERS** (2001) 22 ILJ 1603 (LAC). Incidentally this is the ground on which Mr. Simpson focussed his argument as well. He contended that the arbitrator's findings are in fact justifiable on the evidence.

[19] I have to state though that I agree with the submissions made by counsel for the applicant. To illustrate the point I briefly deal with the finding that the respondent's act in falsifying his CV did not amount to dishonesty in relation to his application for the post to which the applicant appointed

him. The respondent clearly indicated that he had deliberately decided to omit from his CV any reference to his employment with KSI because it was difficult to explain and that he did not want to jeopardise his chances of finding employment. He gave a disingenuous explanation to the effect that this referred to him not wanting to jeopardise his chances with the other companies to which he had applied but not specifically in relation to the applicant. And yet he persisted in presenting the same doctored CV even when applying to the applicant, inspite of the fact that the applicant had practically moved into the shoes of KSI in South Africa. If he had forgotten about the omission surely the fact that he was going to sell the same products that he used to sell at KSI should have rang a bell.

[20] In the event, his evidence was highly contradictory and shows that he had not forgotten about it. When taking into account what he had said to Morello at the meeting of 13 February 2003 (and the minutes of that meeting were not disputed) then the only conclusion that could reasonably be

reached was that he deliberately concealed the information in order not to jeopardise his chances of employment with the applicant. If that is not dishonesty then I don't know what else it is. In short, there was no basis for interfering with the verdict of the disciplinary tribunal in finding that the respondent had been guilty of dishonesty, in line with his plea of guilty.

[21] I now turn to consider the real and only issue that was properly before the arbitrator for a decision, the fairness of the sanction of dismissal. The arbitrator correctly remarked that as a general rule a commissioner is not at liberty to substitute his/her own sanction for that of the disciplinary tribunal. However, he felt obliged to tamper with the sanction because of his finding that the respondent was not guilty of dishonesty. I have already indicated that it was not within the arbitrator's power to re-open the inquiry into the respondent's guilt; and, at any rate, such finding was not justifiable on the evidence.

[22] Once it is accepted that dishonesty had been proved, the basis of the arbitrator's interference with the sanction falls away. It is not disputed that the applicant's code of conduct has marked out any offence involving dishonesty as a dismissable offence. Now it is also so that the respondent has expressed remorse. However, he has, in my view, perpetuated the dishonesty by attempting to disguise it with the disingenuous explanations that he had erased the omission from his memory when applying to the applicant and trying to evade its consequences by saying that what mattered was only his ability to perform.

[23] This brings to mind what was stated in **DE BEERS CONSOLIDATED MINES LTD v CCMA AND OTHERS** (2000) 21 ILJ 1051 (LAC) at paragraph 25:

> "Where as in this case an employee over and above having committed an act of dishonesty falsely denies having done so an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to himself that the risk of continuing to employ the offender is

unacceptably great."

Compare also **TOYOTA SA MOTORS (PTY) LTD v RADEBE AND OTHERS** (2000) 21 ILJ 340 (LAC) at paragraph 24.

There can be no gainsaying the fact that the post to which the respondent was appointed is a senior post, which required a high level of trust and integrity. The applicant was entitled, in the circumstances, to say that it was risky to keep the respondent in its employ as it could no longer trust him.

[24] It has to be borne in mind also that the respondent was employed on a six months probation with effect from 1 November 2002, which means that his position would have come up for reconsideration at the conclusion of the probation at the end of April 2003 and the applicant would then have been justified to release the respondent by virtue of the misdemeanour. In the event, the respondent was dismissed on 17 March 2003 on notice. I understand this to mean that the notice extended up to the end of the probation period, which means that the respondent was entitled to be paid his full salary up to the end of April 2003. This was, in my view, a most appropriate and fair course to follow in the

circumstances. However, I was informed during the hearing that the respondent has not been paid the April salary, to which he was entitled. In my view, this shortfall can best be compensated for by absolving him from liability to pay the applicant's costs, which he would normally have been obliged to do.

[25] In the result, the application succeeds and the following order is made:

(a) The arbitration award issued by the second respondent on 19 September 2003 under no. GA11527/2003 is reviewed and set aside.

b) No costs order is made.

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H.M. MUSI, J

On behalf of applicant: Adv A T Myburgh
Instructed by:
Cheadle Thompson & Haysom Inc
BRAAMFONTEIN

On behalf of first respondent:

Instructed by:

On behalf of second respondent:

On behalf of third respondent: Adv M J van As
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