IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 2220/08

In the matter between:

NOKWANDA PATIENCE FIPAZA **Applicant**

and

ESKOM HOLDING LTD **1st Respondent**

COMMISSIONER LOYD MAPONYA N.O. **2nd Respondent**

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **3rd Respondent**

JUDGMENT

(AS VARIED ON 17/11/2010)

LAGRANGE, AJ

Introduction

1. The applicant seeks to set aside an arbitration award by the second respondent ('the commissioner') in which the commissioner confirmed the fairness of her dismissal by the first respondent ('Eskom' or 'the respondent') on the grounds that she had failed to disclose either in her job application or interview that when she was previously employed by Eskom she had been dismissed for misconduct.

2. The commissioner found that her failure to disclose this fact was a wilful and a material misrepresentation on her part, amounting to an act of fraudulent non-disclosure.

3. The parties agreed in a pre-arbitration minute that the applicant's dismissal was procedurally unfair, so the arbitrator only had to consider the substantive unfairness of her dismissal. The arbitrator found the applicant's dismissal to be substantively fair and awarded her the equivalent of three months' salary as compensation for the procedural unfairness.

Background

4. The applicant's prior employment with the respondent started in 1994. In July 2003 the respondent and the applicant concluded a three year leave of absence agreement in terms of which the applicant was released from duty until 5 July 2006. During this period the applicant was studying in the United Kingdom where she obtained a post-graduate diploma in management and a Masters degree in international banking and finance.

5. The 5 July deadline for the applicant's return to work was subsequently extended to 5 September 2006 by Eskom. Eskom sent the applicant a registered letter advising her that her failure to return and resume her services on that date would lead to the termination of her services. A disciplinary enquiry was held in the applicant's absence on 29 September 2006, and Eskom subsequently sent the applicant an email confirming the decision to terminate her services arising from her failure to report for work.

6. In the disciplinary enquiry that led to the termination of her services on this occasion, the applicant's "failure to engage" was held by the chairperson of the disciplinary enquiry to have "destroyed the trust relationship".

7. The notice of dismissal sent by Eskom to the applicant on 2 October 2006, stated:

> "*You are advised, after considering the material facts, that your contract of employment with ESKOM has been terminated with effect from 29 September 2006*."

The dismissal notice made no mention of the trust relationship having been destroyed by the applicant's failure to engage with Eskom.

8. On 16 November 2006, Eskom sent the applicant a further email in reply to an email in which she had queried the termination of her contract and the failure to provide detailed reasons for her termination. Eskom's reply goes into more detail about the reasons for termination the applicant's services, focussing on her failure to return to work even after her leave of absence was extended by a further 60 days to 5 September 2006, and her failure to communicate with Eskom. In the email Eskom characterised the applicant's conduct as wilful or negligent.

9. Eskom's reply ends in these terms:

> "*3.13 We are strongly of the opinion that the procedure we followed leading up to the termination of your services is in compliance with the policies and procedures set forth in Eskom's disciplinary code and procedure.*
>
> *3.14. In the circumstances, you are advised that should a vacancy exist within Eskom for which your skills are required, kindly follow the normal recruitment process.*
>
> *4. Kindly note that all Eskom vacancies are advertised on www. Eskom.co.za. Should you come across any vacancy which you feel that you are suitably qualified for, kindly follow the application process.*
>
> *5. We trust that you find the above in order and we would like to take this opportunity to wish you well in your future endeavours*."

10. The applicant lodged an appeal against her dismissal which was unsuccessful.

11. In 2008, the applicant applied for another job at Eskom. On 25 April 2008, after she had submitted a written application and after being interviewed by a panel, the applicant was offered a position with Eskom as a Senior Advisor: (Measurement

and Verification), which she accepted on 29 April 2008.

12. However, before the applicant commenced her employment on 2 June 2008, Eskom advised her that it intended to withdraw the offer of employment because it had become aware it had previously dismissed her for alleged misconduct.

13. It was common cause that the applicant did not mention that she had been previously dismissed in her CV or job interview. Eskom invited the applicant to make representations why it should not withdraw the offer of employment. Eskom was of the view that the applicant had a duty to disclose the reason why it had previously dismissed her and she had failed to comply with that duty.

14. In defending herself, the applicant made representations to the effect that she never misrepresented anything during her interview. The applicant maintained that when she applied for the job she had followed the respondent's own advice that she could apply for any position for which she felt suitably qualified for and she had been successful based on the information she provided.

15. On 4 June 2008, despite the applicant's representations, Eskom advised her that it was withdrawing the offer of employment. In its letter of withdrawal, Eskom stated:

> "*2. We record that your previous employment with Eskom was terminated due to misconduct. During the hearing held in your absence Eskom duly submitted to the Chairperson of your hearing that the misconduct had resulted in a breakdown in the trust relationship between yourself and Eskom and it is upon this basis that your employment was terminated.*
>
> *3. We acknowledge that you were advised in your letter of termination that you could apply for any vacancies within Eskom, however this statement did not imply you would be guaranteed employment within Eskom. Any application made to Eskom would have to be evaluated in terms of our internal recruitment process. Unfortunately, <u>these</u>*

processes were undermined by your failure to indicate a material fact relating to the termination of your employment with Eskom.

3. *Accordingly, the fact that the circumstances relating to your previous termination of employment were not disclosed prior to the offer being made, resulted in Eskom not being in a position to effectively evaluate your future employment with Eskom.*

4. *We accordingly considered the representations made as well as the reasons for your previous termination of employment and after careful evaluation, Eskom is of the view that your further employment with Eskom would not be in our best interest and would not be in line with our corporate governance policies. Accordingly the offer of employment for the position of Senior Advisor: Measurement and Verification (G15) is hereby withdrawn.*"

(emphasis added)

16. At the arbitration, the respondent called Mrs Aphane[1], a recruitment practitioner, to testify. She said that she understood paragraphs 3.14 and 4 of the email sent to the applicant in 2006 to simply mean that Eskom does not prevent anyone from applying and going through the normal recruitment process. She also stated that persons who had previously been dismissed can apply for positions in Eskom and their applications are handled through the normal recruitment process. In the course of that process, integrity assessments are done and Eskom reserves the right to withdraw offers if discrepancies are found.

17. The second paragraph of the job offer of 25 April 2008 states:

"We are entering this employment agreement you have provided relating, inter-alia, to your skills, abilities, qualifications and job-related personal details. This offer is subject to integrity assessment(s) and a pre-employment

1 Incorrectly designated as 'Hapane' in the hearing transcript.

medical (if not already concluded). Should any information prove to be materially incorrect we reserve the right to withdraw from this agreement and your services may be summarily terminated."

(emphasis added)

18. The applicant denies that anything in her application was materially incorrect and that accordingly, Eskom had not been entitled to withdraw the offer by relying on the paragraph quoted above. The applicant also contended that all the information concerning her previous dismissal was already at Telkom's disposal as it had her previous employment record.

19. In the pro-forma recruitment form completed by the applicant when she applied for employment in 2008, the section dealing with her previous employment record required the applicant to provide the names and address of the former employer, the position held, the period of employment and a brief description of duties. The table for entering these details did not make any provision for recording the reasons for terminating employment, nor was there any residual portion in the same section of the form for dealing with other aspects of the applicant's previous employment history.

20. The applicant did not complete the table, but referred instead to her CV, which she attached to the form. The portion of her CV dealing with her work history summarised her employment in previous positions with Eskom and the Department of Minerals and Energy. The summary provided by the applicant was also presented in a tabulated form and covered the same details required in Eskom's application form. Like the Eskom form no provision was made for details of the reasons for the termination of previous employment.

21. At the end of the application form the applicant signed the following declaration:

"***Read carefully before signing***[2]*: I certify that the information on this form is true and accurate to the best of my knowledge. I understand that any false or*

2 Original emphasis.

incomplete information may constitute grounds for my dismissal[3] *and an investigation may be made of my background and used relative to my employment status. I also authorize my former employers and any other persons or organisations to provide any information that they have about me*[4] *and I release all concerned from any liability in connection herewith.*"

22. Under cross-examination, the applicant conceded that termination of employment is part of a person's job history. However, the applicant believed that the invitation to apply for other positions in Eskom, which was extended to her in the final termination letter when her first dismissal was confirmed, indicated that her previous dismissal did not preclude her obtaining another position with Eskom. She assumed also that it was common knowledge between herself and Eskom that she had been dismissed, and that when the offer of employment was made to her it was made despite Eskom's knowledge of how her previous employment ended. The applicant's understanding was that her previous work history with Eskom would be considered and that the question of her prior dismissal would come up, at some stage of the application process

23. This is captured in a statement made by the applicant during the presentation of her argument in the arbitration hearing. The relevant portion of the transcript reads:

"*So for me to say that for them to think that maybe I did not disclose it intentionally, I will say this purely untrue because in someway this, I knew that this was actually going to come up. So there was not way that it is going to stay as a hidden thing forever. It would have been, you know, even at the beginning it would have actually came up.*"

24. At the arbitration hearing, Eskom led evidence that it had no trust in the applicant. The evidence was provided by the Measure Manager, Mr Mondi, though it must be mentioned some of it was adduced by leading questions. Mr Mondi had been part of the panel which had interviewed the applicant. His initial answers

3 Emphasis added.
4 Emphasis added.

indicated that if he had known of the applicant's previous dismissal she would not have been employed. He advised that on learning of the applicant's prior dismissal it was decided to terminate her services as there was no longer a relationship of trust. Later, under cross-examination, he emphasised that it was the non-disclosure of the fact of her dismissal that was the cause of Eskom's decision to withdraw the contract.

25. In Eskom's answering affidavit in the review application, the employer emphasised also that it was the fact the applicant did not disclose her previous dismissal and not the previous dismissal itself that led to the breakdown of trust. However, Mr Mondi's testimony showed that both reasons featured in Eskom's thinking. Eskom's letter of 27 May 2008 also unequivocally cites both the applicant's non-disclosure of her dismissal and the fact that she was dismissed as being reasons for withdrawing the offer of employment. Eskom's letter withdrawing the offer of employment reflects both reasons too. The commissioner found the two reasons to be linked: Eskom's perception that the applicant had been guilty of making a misrepresentation, made it believe that the applicant could not be trusted to be honest in her dealings with suppliers.

Grounds of review

26. The applicant attacks the commissioner's award on a number of grounds including his failure to mention issues such as the fact that the applicant left her prior employment to take up the job with Eskom, and that he made an award of compensation on account of the procedural unfairness of her dismissal even though she had not requested compensation even in the form of alternative relief. To the extent these grounds need to be addressed they are dealt with later.

27. Some other grounds of review raised by the applicant are so broadly or vaguely stated so that it is difficult to identify the specific errors which the applicant is attempting to identify. Given the lack of specificity of those grounds they cannot be given any serious consideration. In any event, at the hearing of the review application the applicant did not pursue any of them, but focussed on her central

cause of complaint, being the commissioner's conclusion that the applicant wilfully failed to disclose her previous dismissal by Eskom, which he viewed as a form of fraudulent non-disclosure.

28. In a related ground of review, the applicant attacked the commissioner's conclusion that she had intentionally not disclosed the reason for her previous dismissal. The applicant claimed there was no evidence that her failure to mention it was intentional. In support of her contention, the applicant argued that the commissioner appeared to ignore the evidence that Eskom had advised the applicant she could re-apply for suitable positions through the normal recruitment procedure, at the time of her previous dismissal.

29. Ancillary findings attacked by the applicant are that the commissioner simply assumed that Eskom did not know about her previous dismissal, and the commissioner found that the relationship had broken down without hearing evidence on this issue.

The commissioner's conclusion that the applicant intentionally did not disclose her previous dismissal by Eskom

30. The applicant contends that the commissioner unreasonably concluded that she had intentionally failed to mention her prior dismissal, whereas there was no evidence to support such a conclusion. The applicant argued that the commissioner failed to apply his mind to a number of factual issues, in this regard, namely:

    30.1. Eskom's invitation to the applicant to apply for vacant positions when it confirmed her previous dismissal;

    30.2. the applicant had given all the details Eskom required when she set out her employment history in the application and there was no indication that the reasons for previous employment being terminated had to be provided;

30.3. nobody asked the applicant if she had been previously dismissed;

30.4. none of the information submitted by the applicant was false:

30.5. it was reasonable of her to have believed Eskom would have been aware of her previous dismissal, and

30.6. even if a reasonable decision maker could find that the applicant should have declared her previous dismissal, the failure to do so does not constitute fraud.

31. When the above reasons are considered, it emerges that the real thrust of the applicant's attack is not so much about the alleged lack of evidence of her intentional non-disclosure of the information. Rather it is more about whether she omitted to mention her previous dismissal with fraudulent intent and whether the commissioner had properly considered if there was an obligation on the applicant in the circumstances to raise the issue.

32. The evidence shows that the applicant was aware that her previous dismissal would 'come up' at some stage and she conceded under cross-examination that the previous termination was a material part of her previous employment history. Essentially, the applicant's justification for not raising it herself, is that Eskom could have raised the subject, if it saw fit to do so. However, it is clear the applicant decided that she was not going to be the one that brought the matter up. Accordingly, it was not unreasonable for the commissioner to conclude that the applicant intentionally did not raise the issue.

33. The applicant also did not mention the circumstances of the previous termination in the interview process, even though she conceded she did not know if the persons who were interviewing her had knowledge of her previous dismissal. Of course, if they were interested in the circumstances under which her employment with Eskom was terminated, they could have asked her about this.

34. I am satisfied therefore that there was sufficient evidence before the commissioner for him to conclude that her decision not to mention her dismissal in 2006 was

intentional. It cannot be said the commissioner acted irrationally in simply drawing an inference that her non-disclosure was intentional and it is reasonable to suppose she did not do so, because she did not wish to mention something that might put her in a negative light.

The commissioner's finding that Eskom did not know about her previous dismissal when it offered her a job

35. In relation to the allegation that there was no basis for the arbitrator to conclude that Eskom was unaware of the applicant's previous dismissal, there was the evidence to the contrary of Mr Mondi who sat on the interview panel. It is not unreasonable to suppose that if he was unaware of the applicant's previous dismissal at the time she was interviewed, that the rest of the panel was also unaware of it. It was never suggested to him that he was alone in his ignorance. Moreover, as mentioned, the applicant's own evidence was that she did not know if the panel knew of her dismissal. Consequently, she was not in a position to dispute the evidence of Mr Mondi which tended to show they were not.

36. However, it is true that the applicant would have been justified in supposing that in checking her previous employment history, Eskom personnel would have come across the record of her previous dismissal, and indeed Eskom must have done so between the time it made her the offer of employment and when it issued the letter notifying her of its intention to withdraw the offer. However, it still cannot be said there was no basis for the arbitrator's conclusion that Eskom was unaware of the previous dismissal when her application was considered and the offer was made.

37. Accordingly, this ground of review cannot succeed.

The commissioner's conclusion of a breakdown of the trust relationship

38. On the evidence, even though Mr Mondi's evidence was not very coherent, there was at least some factual basis for the commissioner to conclude that Eskom would not have had sufficient trust in the applicant to hold the position she was

appointed to, once the details of her previous dismissal became known and it was realised she had failed to disclose this. Consequently, the third mentioned ground of review must also fail.

The commissioner's award of compensation

39. Before concluding it must be mentioned that the applicant also attacked the commissioner's decision to award compensation to her consequent to his finding, based on the respondent's concession, that her dismissal was procedurally unfair. The criticism levelled against him for his award of compensation is that she never requested compensation as a remedy, even in the alternative. It is clear that the LRA does not permit an arbitrator to award anything but compensation in cases of procedurally unfair dismissal, and in making an award of compensation the commissioner is acting in terms of the discretion which he must exercise under section of the Act. I cannot find any fault with his actions in this regard.

The arbitrator's finding that the applicant's non-disclosure amounted to fraudulent misrepresentation.

40. In evaluating the culpability of the applicant's non-disclosure, the commissioner endorsed the views expressed in Grogan J's book *Dismissal* in which the learned author identifies fraudulent non-disclosure of material information which probably would have justified an employer rejecting an applicant for employment. In asserting this principle it is important to note that the learned author relied on two cases ***Auret v Eskom Pension Fund*** **(1995) 16 ILJ 462 (IC)**[5] and ***Hoch v Mustek Electronics (Pty) Ltd*** **(2000) 21 ILJ 365 (LC)**. It must also be mentioned that Grogan points out in the same discussion that "a charge of dishonesty requires proof that the person acted with dishonest intent".

41. In *Auret's* case the dismissal of the employee had been upheld because he failed to

5 Confirmed on appeal. See ***C J Auret v Eskom Pension & Provident Fund*** **(1997) 2 LLD 64 (LAC)**

reveal the true extent of fraud he was involved with while working for his previous employer. The criminal charges which he pleaded guilty to were of an extremely serious nature and involved a lack of 'utmost good faith' and obtaining 'an improper advantage'. In *Hoch's* case the employee misrepresented her qualifications and in an enquiry repeated her previous misrepresentation about her qualifications. Both these cases entailed positive misrepresentations of the true state of affairs on material issues.

42. In both these instances the prospective employee had made representations which were distortions of the truth. They did not involve situations in which a prospective employee does not mention an aspect of their previous employment history and the employer doesn't enquire about it either.

43. In this matter, the commissioner characterised the applicant's failure to mention the prior dismissal as a misrepresentation too, even though it cannot be said on any basis that she made any false representation about the circumstances of the prior termination of her services: she made no representation at all about the circumstances in which her previous service with Eskom was terminated.

44. The only way in which the applicant's omission could be characterised as a misrepresentation is if there was an obligation on her to disclose the information. In that case her failure to mention her dismissal would have been tantamount to concealing information she had a duty to reveal and would have constituted a misrepresentation because the employer would have been entitled to assume that she had not been dismissed if she did not mention it.

45. The commissioner's decision that the principle of fraudulent misrepresentation extends to this case necessarily entails finding as a matter of law that because the circumstances of a job applicant's prior termination of service the information constitute a material part of that employee's employment history, a job applicant is obliged to make it known to the employer, even when the employer does not solicit that information from the applicant. The applicant disputes the existence of such an obligation. The question this raises is when does such an obligation arise in law?

46. It is trite law that as between and employer and employee it is important to maintain a relationship of trust and both employee and employer have obligations in this regard. Thus in ***Sappi Novoboard(Pty) Ltd v Bolleurs*** **(1998) 19 ILJ (LAC)** at par [7], Myburgh, JP, held:

> "It is an implied term of the contract of employment that the employee will act with good faith towards his employer and that he will serve his employer honestly and faithfully: F Pearce v Foster & others (1886) QB 356 at 359; Robb v Green (1895) 2 QB 1 at 10; Robb v Green (1895) 2 QB 315 (CA) at 317; Gerry Bouwer Motors (Pty) Ltd v Preller 1940 TPD 130 at 133; Premier Medical & Industrial Equipment Ltd v Winkler & others 1971 (3) SA 866 (W) at 867H. The relationship between employer G and employee has been described as a confidential one (Robb v Green at 319). The duty which an employee owes his employer is a fiduciary one 'which involves an obligation not to work against his master's interests' (Premier Medical & Industrial Equipment Ltd v H Winkler at 867H; Jones v East Rand Extension Gold Mining Co Ltd 1917 TH 325 at 334). If an employee does 'anything incompatible with the due or faithful discharge of his duty to his master, the latter has a right to dismiss him': Pearce v Foster at 359. In Gerry Bouwer Motors (Pty) Ltd v Preller it was said at 133: 'I do not think it can be contended that where a servant is guilty of conduct inconsistent with good faith and fidelity and which amounts to unfaithfulness and dishonesty towards his employer the latter is not entitled to dismiss him.' The conduct of an employee in receiving a commission which arises out of the employment relationship without the knowledge of his employer constitutes a lack of good faith: Boston Deep Sea Fishing & Ice Co v Ansell (1888) 39 ChD 339 (CA) at 363-4; Levin v Levy 1917 TPD 702 at 705; Gerry Bouwer Motors (Pty) Ltd v Preller at 133."

47. Similarly, an employer's obligation in maintaining the trust relationship was succinctly expressed in the judgment in ***Imperial Group Pension Trust Ltd and Others v Imperial Tobacco Ltd and Others*** **[1991] 2 All ER 597 (Ch)** at 606a-c. Navsa , in the case of ***Lorentz v Tek Corporation Provident Fund and others*** **1998 (1) SA 192 (W)** approved the following dictum from that judgment:

> "In every contract of employment there is an implied term - that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee . . ."

48. Mr Bhoda urged me on the basis of precedents such as *Hoch*'s case (see above) and the judgment in ***Wium v Zondi & others*** **[2002] 11 BLLR 1117 LC** to accept

the correctness of the commissioner's approach. However as his own summaries reveal those cases where ones in which the job applicants had positively misrepresented facts. In *Zondi*'s case the job applicant had lied about his previous criminal convictions. In *Hoch'*s case the applicant misrepresented her qualifications. By contrast, the principle stated by the commissioner seeks to extend the duty beyond the established obligation on a job applicant not to misrepresent their employment history or qualifications.

49. In further support of the existence of such a duty the respondent cited the case of ***Colonial Industries Ltd v Provincial Insurance Co. Ltd*** **1922 (AD) 33.** That matter concerned the obligation on an applicant for insurance to disclose matters not canvassed in the insurer's proposal forms. In particular, it concerned whether or not a member of the company ought to have disclosed that a partnership in which he had been a partner had been declined fire insurance by other companies, when the proposal form had only asked if any members of the company had been declined insurance. The Appellate Division, as it was then, held that such a fact was material to the prudent insurer and in a contract of insurance which demands the 'utmost good faith' required that it should have been disclosed.

50. Since the decision in ***Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality*** **1985 1 SA 419 (A)**, the duty of disclosure in insurance contracts has been identified as one that arises ex lege and is no longer attributable to the supposed existence of a duty of utmost good faith in such contracts.[6]

51. The general legal principle regarding disclosure in a contractual context is stated by the learned author Christie thus:

> "There is no general rule in our law that all material facts must be disclosed and that non-disclosure therefore amounts to misrepresentation by silence, but in certain circumstances this is undoubtedly the rule."[7]

52. The principles governing when disclosure in a contractual context is required are summarised in by Conradie JA in ***ABSA Bank Ltd v Fouche*** **2003 1 SA 176**

6 At 432E-433F of the judgment.
7 RH Christie, The Law of Contract in South Africa, (5ed), 2006 at 276-7

(SCA) as follows:

> "The policy considerations appertaining to the unlawfulness of a failure to speak in a contractual context – a non-disclosure – have been synthesised into a general test for liability. The test takes account of the fact that it is not the norm that one contracting party need tell the other all he knows about anything that may be material (Speight v Glass and Another 1961 (1) SA 778 (D) at 781H-783B). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful (BOE Bank Ltd v Ries 2002 (2) SA 39 (SCA) at 46G-H). A party is expected to speak when the information he has to impart falls within his exclusive knowledge (so that in a practical business sense the other party has him as his only source) and the information, moreover, is such that the right to have it communicated to him 'would be mutually recognised by honest men in the circumstances' (Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management) 1965 3 SA 410 (W) at 418E-F)."[8]
>
> (emphasis added)

53. In this instance, the fact of the applicant's dismissal was not within her exclusive knowledge, even though it may have been a material issue. It may have not have been within the knowledge of the members of the interview panel, but it can hardly be said they were not in a position to ascertain the circumstances in which the applicant's previous employment with Eskom ended either by simply asking the applicant, or by consulting Eskom's own records. Moreover, in its dealings with the applicant, Eskom gave no indication that it expected more information than it specifically requested.

54. When the commissioner found that the applicant had a duty to disclose her previous dismissal to Eskom, he did not give consideration to the proper legal principles applicable to determining when such an obligation arises in contract. As a result, he gave no consideration to the principle that there is no general duty on a contracting party to tell the other all she knows about anything that may be material, nor to the fact that the applicant's dismissal was not a matter within her exclusive knowledge in this case.

55. Mr Bhoda also argued that even if the court disagrees with the commissioner, it may not interfere with the award because the commissioner was exercising his

8 At 180-181 of the judgment.

moral judgment entrusted to him by the legislature. While this proposition may well be true in relation to matters within the commissioner's exclusive jurisdiction,[9] such as the determination of the fairness of a dismissal, I do not think it applies to the question of determining contractual obligations which are clearly not the exclusive preserve of commissioners.

56. Even so, it might be argued that insofar as the commissioner erred in law, it is not for the court to interfere as a simple mistake of law does not justify setting aside an arbitrator's decision. It is well established though that where a mistake of law is such that it results in the arbitrator misconceiving the nature of the enquiry and addressing the wrong issue the arbitrator's decision may be set aside[10], provided that if the result would still have been the same had the arbitrator adopted the correct approach the arbitrator's decision will still stand.[11]

57. In this instance, the commissioner adopted the view that an obligation to disclose a previous dismissal arises where the applicant would not have been employed if that fact was known. He adopted this view without considering if it was also necessary that the information fell within the applicant's exclusive knowledge for the obligation to arise. Consequently the commissioner failed to consider Eskom's own ability to ascertain the reason for the applicant's previous termination from its records. The facts of the matter show Eskom did just that, demonstrating that it was able to ascertain the information without having to rely on the applicant. Applying the correct principle to the facts would have led to the unavoidable conclusion that the applicant in this instance was not obliged to disclose her previous dismissal to Eskom. Accordingly, the applicant's non-disclosure of her previous dismissal could not have been a fair ground for her dismissal.

58. In other words, had the commissioner applied the correct legal test for determining the obligation to disclose, the outcome would have been different.

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9 See ***Hira and Another v Booysen & Another*** **1992 (4) SA 69 (A)** at 93C-E

10 See in this regard, ***Local Road Transportation Board and Another v Durban City Council and Another*** **1965 (1) SA 586 (A)** at 597H-598C where Holmes JA endorsed the following summary statement of principle: "A mistake of law per se is not an irregularity but its consequences amount to a gross irregularity where a judicial officer, although perfectly well-intentioned and bona fide, does not direct his mind to the issue before him and so prevents the aggrieved party from having his case fully and fairly determined."

11 *Hira'*s case at 93F-I

This appears to me to be an instance in which the commissioner's failure to apply the correct legal test led him to deny the applicant a fair hearing in respect of the determination of the substantive fairness of the applicant's dismissal, which amounts to a reviewable irregularity. Accordingly, the commissioner's finding that the applicant's dismissal was substantively fair ought to be set aside.

59. Having determined that commissioner's finding of a substantively fair dismissal should be set aside, the next question which arises is whether the matter should be that of an appropriate remedy. Because the material facts are mainly common cause and the substantive fairness of the dismissal hinged on a crisp issue, the court is in as good a position as the arbitrator to decide the question of the substantive fairness of the dismissal. As stated above, the applicant was under no obligation to disclose the fact of her previous dismissal when she applied for the job. Accordingly, it was unfair of Eskom to dismiss her for this reason.

60. However, in dealing with the remedy for the applicant's unfair dismissal, the court is not in possession of all the facts which might be relevant to determining the appropriate remedy in terms of section 193 (2) of the LRA. Accordingly the matter will be remitted to the commissioner to determine this.

Order

61. Accordingly, the following order is made:

61.1. the second respondent's finding in his award of 10th September 2008 that the dismissal of the applicant was substantively fair is set aside;

61.2. the matter is remitted to the third respondent to convene a hearing before the second respondent to consider and determine an appropriate remedy for the applicant's substantively unfair dismissal;

61.3. at the hearing before the second respondent, the applicant and first respondent must be given an opportunity to lead evidence relevant to determining an appropriate remedy and to present argument on the

issue;

61.4. the first respondent is ordered to pay the applicant's costs of this application.

ROBERT LAGRANGE
ACTING JUDGE OF THE LABOUR COURT

Date of hearing : 26 February 2010
Date of judgment: 6 May 2010

Appearances:

For the applicant: Mr P H Kirstein
Van der Merwe, Du Toit Inc.

For the first respondent: Mr F Bhoda
Attorneys: Van Niekerk, Perrott, Woodcutt & Matyolo Inc.