DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

08/05/2020
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case Number: J2673/16

In the matter between:

MAYE R MAKHAFOLA **Applicant**

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY **First Respondent**

N MBELENGWA N.O. **Second Respondent**

IMPERIAL DEDICATED CONTRACTS **Third Respondent**

Date Heard: 8 January 2020

Delivered: This judgement was handed down electronically by circulation to the parties' legal representatives by email on the 8 May 2020.

Summary: Review of Arbitration Award in term of Section 145(1) of the LRA – Misconduct – Failure to disclose an adverse relationship with previous employer – Finding that decision of the Arbitrator not the decision of a reasonable decision maker – Award reviewed and set aside and substituted the following- The dismissal of the Applicant is substantively unfair- Reinstatement with back pay limited to 12 month and an order for costs.

JUDGMENT

RAMDAW, AJ

Background

[1] The Applicant was employed by Aveng Trident Steel (Aveng) and applied to the Third Respondent, Imperial Dedicated Contracts (Imperial) for a job as Project Manager. She was short listed, interviewed and on 17 August 2015 received an offer of appointment to the position. However, that afternoon her then employer Aveng served her with a notice to attend a disciplinary enquiry scheduled for 19 August 2015. On 18 August 2015 she accepted the offer made by the Third Respondent and emailed her acceptance of the offer to the Third Respondent. On 19 August 2015 she attended the enquiry and was exonerated with the chairperson stating that it was "*an abuse of disciplinary procedure*". She then tendered her resignation with the previous employer Aveng. On 28 August 2015 two weeks into her notice period she was allowed to leave her employment.

[2] On 1 September 2015 she lodged a constructive dismissal dispute against her previous employer, Aveng as she was upset over the manner she was treated with regards to them taking disciplinary action against her for no proper and valid reasons. She never disclosed this fact to the Third Respondent, who won a tender to supply 100 trucks to Aveng as per a notification given to them around the 28 October 2015. The Third Respondent maintains that the Applicant was specifically employed as a Project Manager to deal with the new project awarded to them by Aveng.

[3] The Applicant commenced employment on 1 October 2015 and prior to the first introductory meeting of 5 November 2015 between Aveng and Imperial disclosed to her Managing Director details of this pending dispute with Aveng

and the previous disciplinary action taken against her. She stated that she could not be part of the team which was going to meet Aveng for the first time as she did not want to embarrass her employer in any way. Furthermore, that she wanted them to hear this directly from her rather than from another source that she lodged a dispute against them.

[4] The Third Respondent did not respond favourably to this and instituted disciplinary action against the Applicant which led to her dismissal. This dismissal was confirmed by the Second Respondent (the commissioner), acting under the auspices of the First Respondent in an arbitration award (the award). It is this award that the Applicant seeks to review and set aside requesting *inter alia* reinstatement with retrospective effect alternatively compensation.

[5] At the internal proceedings, the Applicant faced 2 acts of misconduct, namely:

> "1.3.1 Failure to disclose information relevant to your employment with Imperial in that you have known of the adverse relationship that you have with Aveng Trident Steel at the time of our appointment with Imperial and that you failed to disclose your adverse relationship with Aveng Trident Steel, the latter which prevented you to fulfil your contractual employment obligation as a Project Manager pertaining to the Aveng Trident Steel contract.
>
> 1.3.2 Adverse relationship with Aveng Trident Steel in that you have an adverse relationship with Aveng Trident Steel, the latter which prevents you to fulfil your employment obligations as a Project Manager pertaining to the Aveng Trident Steel contract."

[6] The commissioner in his arbitration award made *inter alia* the following findings:

> "5.23 I find in favour of the Respondent. I am satisfied that the Respondent discharged the onus of proving that the dismissal of the Applicant was for a valid and fair reason. The failure by the Applicant to disclose an adverse relationship that she had with the Client (Trident Steel)

damaged the trust component that is corollary to an employment relationship.

5.6 The Applicant resigned from the client immediately after being acquitted in a disciplinary enquiry and she referred a constructive dispute to the MEIBC against the client. In her referral the Applicant alleged that the client made continued employment intolerable by subjecting her to a disciplinary process that described by the Chairperson as an "abuse of the disciplinary procedure". The primary remedy for that kind of a dispute is compensation. The Applicant expected to be paid some money if an award was made in her favour. She had no intention of returning to the client. I therefore find that the Applicant had an adverse relationship with her previous employer.

5.11 I accept that the Applicant was well within her rights to refer a dispute to the Council in terms of the constructive dismissal against the client. The referral of the dispute is, however, not an issue here as the Respondent did not dismiss the Applicant as a result of that. The Applicant was dismissed for failing to disclose an adverse relationship that she had with the client."

He also found that the position of a Project Manager was created specifically for the client's contract with Aveng.'

[7] The commissioner also found that the position of a Project Manager was specifically created for the third respondent's tender with Aveng.

Background

[8] Ms Mamcy Letuka, the HR Director for the Third Respondent testified that the Third Respondent tendered for the Aveng Trident Steel contract. A decision was then taken to create a new position of a Project Manager. The position was advertised and it took almost 7 months to find a suitable candidate as an Affirmative Action female candidate was preferred. An employment agency found and recommended the applicant for the post as she was working in a similar position at Aveng.

[9] During the interview it was made clear to the Applicant that she would be appointed as a Project Manager primarily for the Aveng contract. It was also highlighted to the Applicant that the contract was important in that it was the first contract of that magnitude being awarded to the Third Respondent within the last three years.

[10] She then testified about the Applicant's reasons as given for her leaving her current job and said that the Applicant confirmed that she would be in a position to service the contract as she had a good relationship with her current employer. Mr DJ Fourie, the Managing Director of the Third Respondent, also testified and the commissioner captured his evidence as follows.

> "4.1.12 Mr DJ Fourie, the Managing Director of the Third Respondent, testified that a position of a Project Manager was specifically created for the client's contract. The Applicant worked for the client, the same company that the respondent was about to service a contract. He then told the Applicant that the Third Respondent has already secured the contract from the client and that she would be an ideal candidate to be appointed as Project Manager.

[11] The Third Respondent led the evidence of Ms M Letuka and the commissioner recorded the crux her evidence in his award. She testified that prior to the Applicant accepting employment with the Third Respondent she had failed to disclose her *adverse relationship* with Aveng and this prevented the Third Respondent from making an informed decision when offering her employment.

[12] She further submitted that the Applicant had an obligation and/or an opportunity at either the interview stage or when the offer was made or when she accepted the offer to inform the Third Respondent of this adverse relationship with Aveng. Had the Third Respondent been aware of the true relationship between herself and Aveng they would not have employed her. Further, that in the event the contract with Aveng not coming into effect the Third respondent would have retained Applicant within its employ.

[13] Mr DJ Fourie, the Managing Director testified that the Applicant was dismissed for not disclosing her adverse relationship with Aveng which as a consequence thereof broke the trust relationship between the Applicant and the Third Respondent. Had the contract between Aveng and the Third Respondent not been concluded he would have nevertheless retained the Applicant in their employ.

[14] The Applicant testified in her own defence and relied primarily on two arguments. Firstly, that she did not have an adverse relationship with Aveng Trident Steel at the time she accepted the Third Respondent's offer of employment. Secondly, that she did not have a duty to disclose to the Third Respondent her disciplinary history with Aveng Trident Steel prior to accepting Aveng's offer.

[15] She read into the record a prepared statement which forms part of the indexed record. She was cross examined extensively by the Third Respondent's counsel.

[16] The applicant's review is based on the factual finding that the Applicant had an adverse relationship with Aveng and the legal finding that the Second Respondent committed an error in law when finding that the Applicant had a duty to disclose this relationship to the Third Respondent which she failed to do.

[17] She further submits that the two charges are nothing but a splitting of charges as they relate to the same allegation being "*failure to disclose an adverse relationship*". The word in-between the 2 charges are "*and/or*" in other words charge 2 is an alternative to charge 1. Charge 2 contains a finding that the applicant has an adverse relationship whilst Charge 1 deals with the failure to disclose this adverse relationship at the time of her employment.

[18] On 1 September 2015 the Applicant referred a constructive dismissal dispute against Aveng to get some redress for the manner in which she was treated.

She was perfectly entitled in law to do so. If at all an "*adverse relationship*" is created it could only be as a result of referring the dispute be it constructive or an ordinary dispute to the Metal Engineering Industries Bargaining Council (MEIBC). She was no longer an employee having resigned and could not refer an unfair labour practice dispute. The time of her employment would have been when she accepted the offer made to her in writing and not when she reported for duty on the 1 October 2015.

[19] The Applicant did not provide a copy of this referral to the MEIBC and the Second Respondent made a finding that this did constitute the "*adverse relationship*" as a constructive dismissal dispute was referred to the MEIBC.

[20] The Applicant was made an offer of employment which she accepted and that constituted the employment relationship as at 18 August 2015. The Aveng contract was only awarded around 28 October 2015 and effectively commenced in February 2016.

[21] The Applicant enjoys a constitutional right to fair labour practice and not to be dismissed unfairly. Section 5 of the Labour Relations Act[1] (LRA) reads as follows:

> **"5. Protection of employees and persons seeking employment**
>
> (1) no person may discriminate against an employee for exercising any right conferred by this Act,
>
> (2) Without limiting the general protection conferred by subsection (1) no person may do, or threaten to do, any of the following:
>
> (a) ...
>
> (b) prevent an employee or a person seeking employment from exercising any right conferred by this Act or from participating in any proceedings in terms of this act or
>
> (c) prejudice an employee or a person seeking employment because of past, present or anticipated – ...
>
> (v) disclosure of information that the employee is lawfully entitled or required to give to another person;

[1] No. 66 of 1995, as amended.

(vi) exercise of any right covered by the Act, or

(vii) participation in any proceedings in terms of this Act.

[22] The Applicant exercised her rights in terms of the LRA in making this referral to the First Respondent and as such could not be prejudiced in any way for having done so. The next question to be answered is whether the Applicant was lawfully entitled or required to give this information relating to her adverse relationship to the Third Respondent. If so whether she was prejudiced in any way for not giving past, present or anticipated disclosure of information to the Third Respondent.

[23] If there was a legal duty on her to give this information about the adverse relationship to the Third Respondent then she could not be prejudiced for having done so. If prejudiced then this will be in direct contravention of section 5 of the LRA as she was a job seeker and/or an employee. If the Applicant was asked directly whether she was aware of any pending disciplinary action against her or whether any action was taken against her or whether she was involved in or had any dispute or litigation against her previous employer and she lied about this then this will constitute misrepresentation.

[24] The Applicant kept to what she said in her CV, that she was seeking a better opportunity with career growth. If she hid a dismissal or criminal misconduct then this will constitute serious misrepresentation. A set of five questions were put to her at the interview which she answered. As at the date of the interview she was only aware of the possible investigation into the incident of 15 June 2015 and on 18 August 2015 when accepting the offer of employment was served with a disciplinary charge sheet

[25] The applicant viewed the charges preferred against her with the contempt it deserved, more so in light of the findings of the Aveng Chairperson that it being an "*abuse of disciplinary procedure*". She attended the disciplinary hearing on 19 August 2015 where the charges against her were squashed for not having substance or relevance. It does appear that the Applicant downplayed her new post and attributed her resignation to both the

disciplinary steps taken and her unfair treatment which may have made continued employment intolerable for her.

[26] On 28 August 2015 she was advised of her acquittal in writing. Something must have transpired leading her to take drastic measures which she was entitled to take in law. This created the estranged relationship or rather the adverse relationship in that on 1 September 2015 she referred a constructive dismissal dispute to the MEIBC against Aveng. I accept that the relationship became adverse on the termination of the Applicant's employment relationship with Aveng.

[27] These events prompted the Applicant to approach the employment agency to request that she commence on 1 September 2015 as per her letter of appointment. She did not deem it necessary to disclose to the Third Respondent the lodging of the MEIBC referral or the so-called investigation about the incident of 15 June 2015 which she calls a safety and security issue. She failed to report the incident prior to going to hospital after she fainted at the workplace.

[28] On 7 October 2015 and for the first time she must have learnt of the company's Code of Conduct as she signed acceptance of same. She said that she could not find anything there which obliged her to make any disclosures to the Third Respondent. Had she been dismissed for any gross misconduct and did not disclose this then the position would have been different. She was never dismissed but resigned and the allegations of any misconduct arose out of an "*abuse of disciplinary procedure*" as coined by Aveng's own Chairperson.

[29] As at 17 July 2015 being the date of her interview no disciplinary action was pending against her, save some ongoing investigation which she did not pay much attention to. As at the evening of 17 August 2015, when she received the letter of offer for the post, she became aware of the pending disciplinary action but accepted the appointment to the post.

[30] She attended the enquiry on 19 August 2015 and only after her acquittal did she resign from her post at Aveng. She still had time to tender her resignation to take up her new post on 1 October 2015 making the early resignation premature. It could only be attributed to the treatment meted out to her by Aveng giving her grounds to allege a constructive dismissal and entitling her to damages if she could prove same. She cannot be prejudiced for doing so and both the Third Respondent as well as the First Respondent conceded to this. The only problem is her failure to disclose this and the catch phrase being *"at the time of her employment"*.

[31] Had she disclosed this at the interview of 17 July 2015 and was not appointed to the post, despite being acquitted at a later stage, she would have been severely prejudiced. By lodging a dispute with the MEIBC she anticipated that she could possibly get compensation from her previous employers for the way she was treated and therefore exercised her rights in terms of the LRA.

[32] It was argued at the hearing that the applicant is struggling to find a post given the stigma of a dismissal. Furthermore, that her initial attorneys of record refused to act for her and withdrew presumably as a result of lack of funds. She stated that she approached the *pro bono* office at this Court being SASLAW for assistance but that their offices were currently closed for recess. She initially came to Court on 7 January 2020 with no representation and the hearing was adjourned by consent to enable her to obtain legal representation. After the Court's intervention she was advised to contact SASLAW Secretariat directly who arranged representation for her. The Court is indeed pleased that she had the benefit of counsel who acted on a *pro bono* basis to represent her at the hearing of this matter.

[33] The Third Respondent has to show that the dismissal was for a fair reason after having followed a fair procedure. The applicant maintained her position from the outset that she did not fail to disclose any adverse relationship as nothing existed at the time of the interview nor at the time of her being offered employment. It only arose after she resigned and lodged a dispute with the

MEIBC. No evidence was led at the arbitration about the eventual outcome of this dispute.

[34] The Third Respondent failed to lead any evidence about how the adverse relationship the applicant had with Aveng would have impacted on her working relationship with Aveng who awarded the Third Respondent the contract around 28 October 2015. Furthermore whether this non-disclosure was so serious a misconduct that it destroyed the relationship of trust, being the core of the employment relationship, even if she was assigned to deal with other clients save Aveng.

Analysis

[35] The question to be answered is "*when did the relationship become adverse*"? The Second Respondent found that after the Applicant decided that she has no intention of returning to Aveng an adverse relationship came into play. This could have only happened after she resigned on 19 August 2015 which is a date after she was appointed to the post of Project Manager by the Third Respondent. The Third Respondent's witnesses stated that they had no problem with the MEIBC referral which was her right but the problem was the fact that she did not tell them about it so that they could make an informed decision. If this is indeed the position and the adverse relationship arose at the time of her resignation then the misconduct she was charged with has not been proven rendering her dismissal substantively unfair.

[36] The Third Respondent had a copy of the Applicant's CV containing the reasons why the Applicant applied for the post. There was an employment agent involved who was paid almost R100,000.00 for finding a suitable candidate. After 17 July 2015, when the interview was conducted the Third Respondent had almost one month to do its verification. Ms Letuka's evidence was that:

> "The interviews were conducted in July, the first time we met her was 17 July and thereafter she went for assessments. We conducted our reference

checks that she gave us ...." The Third Respondent did not find anything adverse that would have prevented them from making an informed decision in appointing the Applicant.[2]

She went on further to state that:

"It is not in dispute that she took the company to the bargaining council. She exercised her rights. The issue here is in terms of the fact that she did not disclose and give us an opportunity to make an informed decision. Had she disclosed this we would not have appointed her." [3]

[37] As at the date of the interview and date of the issuing of the offer as well as the date of acceptance thereof, there was no adverse relationship as alluded to above. The applicant in her founding affidavit stated:

"I categorically stated that I did not have an adverse relationship with Aveng Trident Steel any time before accepting the Third Respondent's offer."[4]

[38] The Applicant concedes that the adverse part of the relationship if any could have only arose after the referral to the MEIBC which was on 1 September 2015.

[39] The Applicant approached the Managing Director via HR and made the disclosure of the pending MEIBC action against Aveng Trident Steel. This in effect set the cat amongst the pigeons which led to disciplinary action being taken against the Applicant. The Applicant was no doubt the preferred candidate for the post as she worked for Aveng in a similar role. She would have been beneficial to the Third Respondent given the continuation of the relationship in servicing its' new contract with Aveng.

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[2] See: p. 39 of the transcript.
[3] See: p.44 of the transcript.
[4] See: paras 7.5.1 and 7.5.2 of the founding affidavit.

[40] The Applicant was open at the arbitration and stated that there was an incident which occurred on 15 June 2015 at the Aveng site. She fainted and was taken away by ambulance to hospital and spent 2 weeks in hospital. When she came back to work she heard some "*rumbling*" about a sexual encounter she may have had at work and there was some non-compliance with safety and security issues of reporting the incident given her fainting and the ambulance coming to site. Obviously a record could be made of this and it was not expected of her to report the incident on June 2015 whilst being unconscious when taken from the site. She could only do so two weeks later when she reported back to work. At the time of the interview she was not charged for any misconduct and she did not "*have an adverse relationship*" nor was she formally approached to give a statement to any investigation team nor suspended from employment.

[41] The Third Respondent maintained that the dismissal was fair and that the award issued was that of a reasonable decision maker given the breakdown of the relationship of trust, the core of the employment relationship. An "*adverse relationship*" was described by the Third Respondent's witness as being no good. Adverse as an adjective is described as a factor that seems to "*work against or actively harm*" something or somebody.

[42] The key issue is whether an obligation rested on the Applicant to disclose that there may be disciplinary action that might be taken against her arising from the incident of 15 June 2015 which she termed as nothing but a safety and security issue. The disciplinary process was still incomplete and as such never advised the Third Respondent prior to accepting the offer made in writing that there was a pending disciplinary case. Furthermore, the disciplinary process did not result in a dismissal but rather an acquittal of all charges.

[43] The Third Respondent argued that the issue was not that she had taken Aveng to the bargaining council as it was within her rights to do so. The issue was that she had not been honest and failed to disclose to the Third

Respondent at the interview that she was under investigation by Aveng regardless of whether she was formally charged at that time or not.

[44] The Third Respondent further argued that the Applicant gave conflicting versions as to what exactly led to her being charged by Aveng. It is important to note that even through the contract with Aveng was only signed after the offer was made to the Applicant. The signature of the contract was a mere formality. The Third Respondent knew that it would be awarded the contract.

[45] The Applicant sent an e-mail to Mr Dawie Fourie, The Managing Director in which she apologised and acknowledging that she placed them in a difficult position. It was decided that the Applicant could not be expected to work on the project when she has a constructive dismissal claim against Aveng as she would be required to work with the very same people she had a claim against.

[46] After an investigation into the matter by the Third Respondent the Applicant was subjected to a disciplinary enquiry and dismissed. The dismissal was justified as the trust relationship between the Third Respondent and the Applicant was damaged because she deliberately withheld important information from the Third Respondent knowing that after disclosing that information they would not have appointed her.

[47] The duty to disclose the relationship with Aveng arose at the time of her attending the interview or even at the time when the offer was made to the Applicant that she was to be appointed as project manager primarily and mainly responsible for the Aveng contract.

[48] During the interview the Applicant was asked why she wanted to leave Aveng and she advised that the steel industry was under severe economic pressure, she feared she might be retrenched by Aveng and that she was seeking opportunities for continued growth. The offer was made on 17 August 2015. The applicant accepted the offer on 18 August 2015 and commenced employment on 1 October 2015.

[49] The Applicant's counsel argued that the manner in which charge 2 is phrased does not describes a misconduct but rather sets out grounds for a dismissal based on the Third Respondent's operational requirements. He also listed out certain factual errors as contained the arbitration award[5] which makes the award absurd and reviewable. These appear to be typo errors and will have no adverse effect on the adjudication of this matter.

[50] The Applicant stated from the outset that she*did not have a duty to disclose my disciplinary hearing with the Third Respondent any time prior to accepting the Third Respondent's offer."*

[51] The Applicant argued that if she did indeed have an adverse relationship with Aveng Trident Steel is became subsequent to accepting the Third Respondent's job offer. She argued further that:

> "it is not grounds for a misconduct against which the Third Respondent dismissed her. What is noteworthy is the fact that my employment contract does not endure a clause which stipulates that I must have a good working relationship with Aveng Trident Steel nor could this have been a term of the contract under circumstances where the Third Respondent in their own version had no guarantee it would be awarded the Aveng Trident Steel tender prior to appointing me".

Legal principles

[52] In a very recent case of *Intercape Ferreira Mainliner (Pty) Ltd v McWade and others*[6], the employee, Rory McWade, (McWade), was employed by Intercape Ferreira Mainliner (Intercape) as a general manager in May 2015. At the time of his employment, it was anticipated that he would be groomed for and in due course be appointed as Intercape's Chief Executive Officer.

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[5] See: paras 5.4 and 5.5.
[6] (2020) 41 ILJ 208 (LC).

[53] However, Intercape subsequently dismissed McWade in June 2016 for, among other reasons, failing to disclose the circumstances surrounding his departure from his prior employment. McWade had been employed by the Cargo Carrier Group ("CCG") in Zimbabwe. CCG levelled a number of allegations of bribery, corruption and the use of company assets without permission against McWade. McWade was suspended. Subsequent negotiations resulted in a settlement agreement being reached with McWade.

[54] During his interview for employment with Intercape, McWade was asked, on more than one occasion (in the initial interview meeting), by the CEO of Intercape and the Board, about his departure from his previous employer. He did not mention any of the circumstances surrounding his departure. He gave reasons such as "*difference of opinion*" on ethical matters and "*new owners, as well as the Zim Economy*". When asked by the Board if there was anything to be concerned about regarding his departure from his previous employment, he once again did not mention the circumstances surrounding his departure.

[55] McWade referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration ("CCMA"). The arbitrator found that his dismissal was unfair because, among others, Intercape failed to establish that it had sought specific information from McWade regarding the circumstances surrounding his departure from his previous employer and that no response given by McWade was false.

[56] Intercape subsequently approached the Labour Court to review the decision of the CCMA. Intercape argued that the arbitrator incorrectly interpreted the law and that the finding was unreasonable. The Labour Court upheld the review. The Labour Court held that the arbitrator did not seem to:

> "recognise that outside the category of deliberate false representations of fact, a prospective employee may nonetheless be required to disclose information not specifically requested, if that information is material to the decision to employ: or where (as in the present instance) a question is

asked, that a less than honest and complete answer might form the basis for a dismissal when the truth is ultimately discovered."

[57] The Labour Court in *Galesitoe v CCMA and Others*[7] held:

"Accordingly it is not unreasonable to ensure that a person applying for the senior level of post in question would have realised that the nature of his relationship with his former employer was a material consideration for his prospective new employer and could affect his employment prospects. This would give rise to an obligation to disclose..."

[58] The Labour Court held that the failure to disclose must pertain to material information, "*at least in the sense that the prospective employer would have conducted its own enquiry into the relevant facts and determined eligibility or sustainability for employment as a consequence.*"[8]

[59] In *Intercape v McWade,* McWade argued that considering he was never found guilty of misconduct he had no contractual duty to disclose. The Court rejected his line of argument and noted that although a settlement agreement had been concluded, what "*matters for present purposes are the factual circumstances that led to the signature of the agreement, not the agreement itself or its contents.*" The Court found that this was an issue of ethics and not a contractual issue. In other words, the "*lawfulness of the non-contractual non-disclosure [is] premised on what would be mutually recognised by honest men in the circumstances.*"

[60] The Court took into account the seniority of McWade's position and held that despite the settlement agreement reached between him and his previous employer, which resulted in his resignation therefore he was never found guilty of misconduct, there was still a duty to disclose the circumstances that led to his departure from his previous employment. The non-disclosure in the circumstances was material and any reasonable employer would have wanted

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[7] Galesitoe v. CCMA and others[7] [2017] 7 BLLR 690 (LC)
[8] Get quotation para

to investigate the facts before concluding the recruitment process. The Court set aside the arbitrator's award and found that the McWade's dismissal was substantively and procedurally fair.

[61] Where there is material information that may impact upon an employer's decision to appoint an employee this must be disclosed by the employee. Failure to disclose in such circumstances will constitute misconduct which may lead to dismissal. Employers should expressly mention this obligation to applicants for employment and cater for issues of non-disclosure in their contracts of employment.

In *Galesitoe v CCMA*[9], the duty to disclose litigation with a former employer was distinguishable on the facts from *Eskom Holdings (Pty) Ltd v Fipaza and others*[10] because in that matter Eskom did not have to conduct a search in the public domain to obtain details of the applicant's previous employment or dismissal with them as they had the information in house.

[62] In *ABSA Bank v Fouche*[11] 2003 (1) SA 175 SCA at Para 5 reads

> "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[12] 1961 (1) SA 778 (D) at 781H-7838). That accords with the general rule that where conduct takes the form of an omission, such conduct is prima facie lawful (BOE Ban Ltd v Ries[13] 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

[9] KG Galesitoe v CCMA[9] JR 1402/14 supra
[10] ESKOM Holdings (Pty) Ltd v Fipaza and others[10] (2013) 34 ILJ549 LAC
[11] ABSA Bank v Fouche 2003[11] (1) SA 175 SCA at Para 5
[12] (Speight v Glass and Another12 1961 (1) SA 778 (D) at 781H-7838).
[13] (BOE Bank Ltd v Ries13 2002 (2) SA 39 (SCA) at 46G-H).

circumstances" (Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)[14] 1965 (3) SA 410 (W) at 418E-F."

[63] Disclose means to "*make secret and new information known*". Adverse means not good or poor. At what stage did the relationship become poor or bad. It can only be after the Applicant resigned and referred a constructive dismissal dispute. This was well after she had accepted the offer of employment made. The Second Respondent, the arbitrator, states that the Applicant resigned after she was found not guilty and acquitted on the charges preferred against her at the disciplinary enquiry held on 19 August 2015. In doing so she became eligible to take up her new post and was prepared to do so from 1 September but the Third Respondent could only accommodate her as from 1 October 2015. The Applicant lodged a dispute with the MEIBC on 1 September 2015

[64] The question that now arises is whether she had a duty *ex lege* or *ex contractu* to disclose this to the Third Respondent prior to her taking up her new post on 1 October 2015. The legal principle regarding disclosure in a contractual context is captured by the learned author Christie on Contracts [15] as *"There is no general rule in law that all material facts must be disclosed and that non-disclosure therefore amounts to misrepresentation by silence ...".*

[65] The court *a quo* in *Fizapa v Eskom* stated that the only way that the non-disclosure could be characterised as a misrepresentation was if there was an obligation on the part of Fizapa to disclose the information concerned. Fizapa was dismissed by Eskom and re-applied for a post at Eskom but did not disclose that she was dismissed for misconduct from Eskom

[66] In this regard Le Grange, AJ (as he then was) stated:

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[14] (Pretorius and Another v Natal South Sea Investment Trust Ltd (under Judicial Management)14 1965 (3) SA 410 (W) at 418E-F

[15] Christie on Contracts

"54. 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 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.

55. 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.

56. 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 test 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."

[67] The Applicant did not have an adverse relationship with Aveng at the time the Third Respondent interviewed her or at the time she accepted the latter's offer

of employment. This constitutes at the time of employment as a binding agreement came into existence.

[68] Therefore, the Applicant was not obliged in law or by contract to "disclose" the ongoing investigation regarding the incident of 15 June 2015 at the time of her interview or at the time of accepting the offer of employment. As such there was no misconduct committed at the time of her appointment.

[69] Sharon Mongolo in her article "*Disclosure of Information during Job Interviews*"[16] concluded by saying:

> "In balancing the employee's right to privacy and the employer's right to make an informed decision to appoint, for example to shed light on the candidates' suitability or assessment of skills - must be disclosed."

[70] In this matter the Applicant on her own free will disclosed to the Third Respondent on 5 November 2015 prior to a scheduled meeting, that she had lodged a constructive dismissal dispute with Aveng, her previous employer and advised them of the disciplinary enquiry held which exonerated her on 2 counts of misconduct which enquiry was termed as an abuse of disciplinary procedure.

[71] The Third Respondent never had a clause in their employment contract to the effect that should they find anything adverse about the Applicant or her integrity, they are entitled to cancel the contract. She only became aware of the Code of Conduct on 7 October 2015 which was after she reported for duty when she signed for receipt of the disciplinary code.

[72] Whether the Applicant was having sex at the workplace and fainted as a result of same or fainted when she was advised that her employer learnt of this incident or simply that a health, safety and security incident was not reported timeously to Aveng falls within the employee's right to privacy and as

[16] Disclosure of Information during Job Interviews

such is afforded protection under section 5 of the LRA. It was not serious misconduct which would have shed light on her suitability for the post or affect the assessment of her skills for the post as her CV will speak to the same.

[73] It is quite clear that in light of the above, the award of the Second Respondent is not one that a reasonable decision maker could arrive at.

Conclusion

[74] The charge of misconduct for not disclosing "*an adverse relationship*" has not been proven on a balance of probabilities more so as no evidence was led on the repercussions of the applicant lodging a MEIBC dispute against Aveng, her previous employers, or how this would have prevented her from fulfilling her contractual obligations as a Project Manager dealing with the Aveng contract. Even if the allegations were proved dismissal became too harsh a sanction for the misconduct bearing in mind that the Applicant was taken away from an existing position of 5 years and dismissed two months into a new job. It took almost 4 years for the unfair dismissal dispute to be finally adjudicated through no fault of the Applicant given this Courts clogged roll. The dispute resolution system has failed the Applicant as justice delayed is justice denied.

[75] On this basis it cannot in my view be said that the so-called non-disclosure of the adverse relationship amounted to any form of misrepresentation on the Applicant's part, nor constituted misconduct which became a dismissible offence. The reason for the Applicant's dismissal by the Third Respondent was not for a fair or valid reason. The arbitration award issued by the Second Respondent is not a decision of a reasonable decision maker. Therefore, as per section 145 of the LRA same stands to be reviewed and set aside on the grounds as set out by the Applicant in her founding affidavit.

Relief

[76] The primary statutory remedy for a substantively unfair dismissal is reinstatement of the dismissed employee unless the Applicant does not wish to be re-instated (which is not the case herein) or if the provisions of section 193 (2)(c) of the LRA is applicable. It reads as follows:

> "The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless- ...
> (c) it is not reasonably practicable for the employer to reinstate or reemploy the employee."

[77] The Constitutional Court (CC) in the matter of SACCAWU v Woolworths (Pty) Ltd[17] stated that:

> "An employer must lead evidence as to why re-instatement is not reasonably practicable and the onus is on that employer to demonstrate to the Court that re-instatement is not reasonably practicable."

[78] The LRA does not define the term 'reasonably practicable', therefore the CC in *SACCAWU*[18] *supra* when defining the term quoted with approval the Labour Appeal Court (LAC) decision of *Xtrata South Africa (Pty) Ltd (Lydenburg) Alloy Works v National Union of Mineworkers obo Masha*, where the LAC held that:

> "The object of [section] 193(2)(c) of the LRA is to exceptionally permit the employer relief when it is not practically feasible to reinstate; for instance, where the job no longer exists, or the employer is facing liquidation or relocation or the like. The term 'not reasonably practicable' in [section] 193(2)(c) does not equate with term 'practical', as the arbitrator assumed. It refers to the concept of feasibility. Something is not feasible if it is beyond possibility. The employer must show that the possibilities of its situation make reinstatement inappropriate. Reinstatement must be shown not to be reasonably possible in the sense that it may be potentially futile."

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[17] (2019) 40 ILJ 87 (CC) at para 50.
[18] Ibid at para 48.

[79] It is almost 4 years since the Applicant's dismissal and the so-called Aveng contract has mere one year more left to run making it seem as though it would be impossible to reinstate the Applicant. However in the matter of *Lubbe v Roop NO and Others* the Court held that:

> "Obviously, an employer must be alive to the fact that reinstatement always remains a possibility if the ultimate decision goes against it and it cannot rely solely on a long delay in finalizing litigation as a reason for denying the remedy the employee was entitled to in the first place."

[80] The Third Respondent, while primarily choosing the Applicant for employment due to her unique suitability to the Aveng contract, has not shown that the lifespan her employment was tied to the contract. Had it been so, the applicant would have been employed on a fixed term contract tied to the lifespan of the Aveng contract. Since the Applicant had been employed on a permanent basis, the employer clearly had the intention to keep her as an employee post the contract. Therefore, as the primary relief to be awarded is that of re-instatement, it naturally follows that same should be awarded to the Applicant.

[81] However, this Court keeps in mind that the Applicant has also contributed towards the unfortunate predicament she found herself in. Any decision arrived at has to be just, fair and equitable and reinstatement with back pay might also be unfair to the Third Respondent. Therefore, as a competent relief, the amount of backpay to be awarded to the Applicant should be limited.

[82] The drafters of the LRA did not deem it necessary to limit the amount of backpay to 12 months' as the LRA envisioned the speedy resolution of Labour disputes within 12 months. However the reality is that same does take more time to come to finalisation for various reasons. Therefore, a just and equitable backpay that should be paid should be limited to 12 months'.

Costs

[83] The Court has in terms of section 162 of the LRA a discretion in awarding costs and the Applicant will be entitled to her costs.

[84] In the premises the following order is made:

Order

1. The arbitration award is reviewed and set aside and substituted the following:
   "The dismissal of the Applicant is substantively unfair."
2. The Third Respondent is ordered reinstate the Applicant on the same or similar terms and conditions of employment enjoyed at the time of dismissal, with payment of backpay limited to 12 months'.
3. The Third Respondent is to pay the costs of this application.

A. Ramdaw
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. L. De Haan
Instructed by:	L Mphatlalazona Attorneys
For the First Respondent:	Ms M Chenia
	Instructed by Cliffe Dekker Hoffmeyer Incorporated