**IN THE LABOUR COURT OF SOUTH AFRICA**

**(HELD AT JOHANNESBURG)**

**CASE NO JR 1655/07**

In the matter between

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| **NKELE DOLO** | **Applicant** |
| and | |
| **COMMISSION FOR CONCILLIATION, MEDIATION AND ARBITRATION** | **1st Respondent** |
| **COMMISSIONER S MTHETHWA N.O.** | **2nd Respondent** |
| **GOLD REEF CITY CASINO** | **third respondent[d] Respondent** |

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**JUDGMENT**

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**LAGRANGE, J**

**Introduction**

1. This matter concerns an application to review a commissioner's award in terms of section 145 of the Labour Relations Act, 66 of 1995 ('the LRA') and an application to dismiss the review in terms of rule 11 of the rules of the Labour Court.

**Background to the review application and the application for dismissal**

2. The applicant was employed as a table inspector in the third respondent's casino operation. In her personal life she became romantically involved with a married man ('the boyfriend') who was accused of defrauding the mining company for which he worked. The applicant made a statement under oath in terms of section 204 of the Criminal Procedure Act 51 of 1977 in terms of which she set out her role in assisting the boyfriend in his fraudulent scheme. The purpose of the statement was for the prosecution service to consider if she could be called as a state witness. The statement was made on condition that if she were called as a state witness she would be indemnified against any criminal prosecution flowing from the facts set out in the affidavit, and provided that she gave her testimony in such proceedings openly and honestly. Criminal charges against the applicant relating to the fraudulent scheme were apparently withdrawn in consequence of her statement and her agreement to be a state witness. The statement was also made on the basis that it could not be used against her in any civil prosecution.

3. The essence of the fraudulent scheme allegedly perpetrated by the applicant's boyfriend was that he was involved in a scheme of producing false invoices for goods supposedly supplied to the mining company and arranging payments to be made by the company on presentation of those invoices. The payments were made into the applicant's personal account and were usually for amounts between about R 15000 and R 25000. All in all, about twelve deposits totaling some R 200,000-00 were paid into the applicant's account between 2000 and 2003. The bulk of this money was withdrawn by the applicant and either paid over to the boyfriend or deposited into his account. Some of the money was spent jointly by them.

4. The applicant admitted she had signed the invoice which related to the first payment that was made into her account. That invoice was for the alleged sale of some promotional material. The applicant was not involved in the production of subsequent invoices, but deposits and withdrawals into and from her account continued as outlined above.

5. The applicant claimed in her statement that on the occasion of the first deposit into her account, her partner had explained that the deposit needed to be made into her account because he was having problems with his wife and did not want her to know about it. On the face of the statement, it seems the applicant never queried why all the deposits she subsequently made into his account would not create the very problems with the boyfriend's wife that he was supposedly seeking to avoid. At the arbitration hearing it seems the applicant was insistent that she believed the boyfriend was running a business which he wanted to conceal from his wife.

6. On the basis of her involvement in the fraudulent scheme as described in her statement, the applicant's employer took disciplinary action against her. It is not clear how the applicant's involvement in the fraudulent scheme or the section 204 affidavit came to the employer's attention. The applicant was charged with misconduct on account of her alleged collusion with her partner in defrauding his employer, which caused the employer to have develop serious 'financial doubt' about her, which meant the trust relationship between it and her had been broken. Secondly, she was accused of bringing its name into disrepute through her collusion in the fraudulent scheme.

7. The employer found her guilty of both charges and on 5 October 2010 she was dismissed.

8. The applicant referred the matter to arbitration. In January 2006, the applicant obtained a default award reinstating her in former position. However, this award was subsequently rescinded and another hearing took place. On the second occasion, the arbitrator found that it was patently clear that the applicant was aware her partner was involved in unlawful conduct, but that her conduct did not affect the employer directly, which was merely trying to protect its interest against any potential losses it could incur if the applicant 'allowed greed to take hold of her'.

9. Even though the arbitrator accepted that the applicant was not guilty of misconduct vis-à-vis her employer he accepted that an employer was entitled to take pre-emptive action in such cases. Accordingly he 'reversed' the employer's decision to dismiss the applicant and ordered it to 'redeploy' the applicant in a

position that did not involve a daily interaction with cash, even if that entailed a reduction in salary. He further ordered that the employer should re-employ the applicant in such an alternative position by 5 June 2007, without any backpay and subject to a final written warning valid for a period of 12 months.

10. Pursuant to the award, the employer offered the applicant a lower paid job as a receptionist which was available at the time. The applicant declined to accept the appointment deciding instead to pursue a review of the award, even though the date for accepting the position was extended by the employer to 13 July 2007.

11. The applicant sought to set aside the award principally on the basis that the arbitrator incorrectly found that her dismissal was fair despite the fact she was not found guilty of any misconduct and that her statement in terms of section 204 of the Criminal Procedure Act could not be construed as an admission of guilty on her part. Other grounds of review raised was that witnesses did not testify under oath at the hearing and the reasoning of the commissioner in concluding the applicant could not retain her original position.

12. The review application was initiated on 6 August 2007, a period of about two weeks later than the six week period permissible in terms of section 145(1)9(a) of the LRA. Just over a month later on 14 August 2007, the CCMA made the record available to the registrar of the court. It was only on 16 September 2008, that the applicant filed a record with the registrar, which was in any event incomplete. A reconstructed record was only filed over a year later on 20 November 2009. In effect it took the applicant nearly 28 months to file a satisfactory record after the CCMA had lodged its record with the registrar.

13. Between August 2007 and November 2009 a series of interactions between the applicant's union and the employer's attorneys took place which eventually gave rise to the reconstructed record being filed. What is striking about these interactions is that the constant driving force in advancing the review process was not the applicant's union but the employer's attorneys. It is fair to say that if the third respondent had remained passive, the review application process would still be in a mire today and would not have been ripe for hearing. In practical terms it

meant that the employer took on the responsibilities of the applicant who should have been taking the initiative in the matter as the *dominus litis*.

14. In the course of this process, the employer had to threaten the union with the prospect of launching an application to compel the applicant to take the necessary steps to prosecute the review to conclusion. On no less than six occasions between June 2008 and November 2009 the employer raised the prospect of going to court in order to elicit a response from the union. The last straw came when, despite the parties having agreed by 2 September 2009 what the reconstructed record should consist of, the reconstructed record had not been filed by the union nor had a supplementary affidavit been filed by the end of that month despite undertakings by the union.

15. During this whole period there was only one delay of significance on the part of the employer when it took two months to respond to the union's request or assistance in making sense of the commissioner's handwritten notes. When it did respond, the employer provided the union with a copy of the transcript which it had amended with reference to the handwritten notes of the arbitrator and the award itself. Clearly, during this interval the employer's attorneys engaged in reconstructive efforts during this delay which yielded some productive result.

16. On 11 November 2009 the employer launched an application to compel the applicant to comply with the provisions of Rule 7A(6),(7) and (8) of the Labour Court rules within 10 days failing which it would ask for the review application to be dismissed. It should be mentioned that apart from not complying with the requirement to file the reconstructed record and supplementary affidavit, the union instead advised the employer that it had been trying to uplift the labour court file to expedite matters, but the file could not to be found. As the employer correctly observed, there was no apparent reason why the court file was needed at that stage. Eventually, on 20 November 2009, the applicant filed the reconstructed record and supplementary affidavit, within the deadline set out in the third respondent's notice of motion. Ultimately the persistence of the employer meant that the matter was now ripe for hearing.

17. Although the third respondent only sought the dismissal of the review application as an alternative remedy in its application, at the hearing it argued that it was in any event entitled to the application been dismissed on account of the delays of the applicant in prosecuting the matter and its failure to seek condonation for them. At the hearing of the matter, the union sought to hand up an affidavit addressing the delays, but the third respondent rightly objected that this should have been provided timeously, and it was not admitted. No reason was tendered why such an affidavit was not filed earlier, in sufficient time to have permitted the third respondent to answer. It appears it was only faxed to the court on 22 September 2010. It must be mentioned that the applicant ought to have been well aware that the failure to provide an explanation for the otherwise inexplicable delays would be a matter that would be raised at the hearing as it was a point raised in the third respondents heads of argument which were provided at the end of July 2010, nearly two months before the matter was enrolled for hearing. In any event, a party seeking an indulgence in terms of the rules of the court should provide an explanation timeously and allow adequate time for any reply.

18. Although there is considerable merit in the employer's application to dismiss the review application based on the dilatoriness of the applicant in pursuing it, in view of the fact that this relief was only sought in the alternative if the applicant did not comply with the final steps in the review process, which she did, dismissing the review on this basis seems inappropriate. However, the applicant's conduct merits further consideration when it comes to the matters of costs.

**Merits of the review**

19. The applicant contends she committed no wrong against her employer. This is correct: her involvement in the fraudulent scheme did not concern any non-performance of her duties or other act of misconduct in the workplace. However, being a party to such a scheme held implications for her suitability to occupy a position in which she was entrusted to deal with the employer's cash when her job required it. The first principle a person who is determining whether or not a dismissal for misconduct is unfair must consider in terms of Item 7(a) of the Code

of Good Practice: Dismissal is "*whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace*" (emphasis added). What the emphasized portion makes clear, is that misconduct outside the workplace and outside of working hours may have a bearing on an employee's continued suitability for employment. In each instance, a multiplicity of factual considerations can determine whether the employee's conduct outside the workplace holds implications for their continued suitability for employment or some form of corrective discipline. In ***Hoechst (PTY) Ltd v Chemical Workers Industrial Union & Another*** **(1993) 14 *ILJ* 1449 (LAC)**, Joffe JA (as he then was), held:

19.1.1. "*Where misconduct does not fall within the express terms of a disciplinary code, the misconduct may still be of such a nature that the employer may none the less be entitled to discipline the employee. Likewise the fact that the misconduct complained of occurred away from the work-place would not necessarily preclude the employer from disciplining the employee in respect thereof... In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work-force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work-force as a whole, as well as on the relationship between employer and employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying, or of seriously damaging, the relationship of employer and employee between the parties'.*"[1]

[1] At 1459B-I/J

20. In that case, the LAC found that the unauthorized possession by one employee of another employee's tape deck was not sufficient reason for the employer to take disciplinary action against the first employee and, *inter alia*, that it did not affect his capacity to perform his work.[2] The court stressed that this was a case in which there was no suggestion that the employee who was charged had come into possession of the sound equipment in a dishonest way.[3]

21. In this instance, what the arbitrator rightly believed was relevant was that the applicant's integrity had been tarnished by her involvement in the fraudulent transactions and consequently her trustworthiness had been placed in doubt. It does not seem an unreasonable conclusion to come to that an employee who is prepared to assist a third party to defraud that other party's own employer of substantial sums over a period of more than two years, is someone an employer would be justifiably reluctant to employ in the first place, or to retain in a position requiring the incumbent to be sufficiently trustworthy to handle money and supervise others handling money. In the light of this analysis, it seems the applicant's first and central ground of review must fail.

22. The second ground concerns whether the contents of the applicant's statement could be construed as an admission of guilt. Strictly speaking this ground of review was expressed more as a ground of appeal. Only if it is narrowly interpreted as a claim that no reasonable arbitrator could construe the contents of the applicant's statement as an admission, can it be considered as a ground of review and will be dealt with on this basis.

23. In the statement, the applicant admits that she was "…aware that the facts deposed to in this affidavit involve me in the commission of a crime…" Further, the applicant claimed she had been told by her boyfriend that he worked in the HR department of his employer. She confirmed signing an invoice at his request for key holders, T-shirts and AIDS pins supposedly supplied to his employer, in an amount of approximately R 15000-00. The applicant admits she never provided such items to the boyfriend's employer and therefore was not entitled to payment from it. Her boyfriend deposited the money into her account and she then

[2] At 1460A-B

[3] At 1458I-1459A

deposited the money into his account. Subsequent to that initial transaction she made several deposits and withdrawals as mentioned above. The applicant did not expressly admit to have being involved in a fraudulent scheme, but essentially she admits to signing an invoice seeking payment for goods purportedly supplied to the mine and receiving payment on the strength of that invoice to which she knew she was not entitled. This alone shows she was prepared to act in a manner that was fraudulent, and the arbitrator concluded in his analysis of evidence that this render her untrustworthy even though the fraud had not been perpetrated against her own employer.

24. The arbitrator also dismissed her claim that she was not have been aware that her boyfriend was involved in illegal conduct. As already mentioned, the explanation she offered for her supposed ignorance is that her boyfriend told her that he had problems with his wife and did not want her to know about it. It was eminently reasonable of the arbitrator not to accept that she could have been so naïve. This is especially so given the fact that money was in any event transferred into his own account after being received by the applicant, which would have run the same risk of being discovered by his wife. This demonstrates the illogical nature of his stated justification for her receiving the money, which ought to have been obvious to the applicant.

25. The applicant claims that the arbitrator's assessment was unbalanced because he failed to apply his mind to the fact that her employer suffered no loss as a result of her involvement in the fraudulent scheme perpetrated against Anglo Platinum. In fact the arbitrator did accept this but balanced it against the risk of loss her employer might expose itself to if she remained in her job as a table supervisor.

26. In her supplementary affidavit, the applicant took the arbitrator to task because witnesses were not specifically sworn in. As the respondent points out, the essential factual issues before the arbitrator were essentially common cause. They almost exclusively concern matters canvassed in her own statement under section 204 of the Criminal Procedure Act. Moreover, this is not a case which turns on an assessment of disputed facts requiring an assessment of credibility. Accordingly, I do not think a failure to swear witnesses in renders the arbitration proceedings reviewable on account of a material irregularity in this instance.

27. The applicant also attacked the arbitrator's conclusion that the employer might have been at risk by keeping her in her position where she handled cash and supervised others. Given that she must have been aware that her boyfriend's scheme was not lawful and her own participation in perpetrating the fraud in the first transaction, such a conclusion is hardly unreasonable.

28. In the light of this evaluation, I do not believe the applicant has raised any substantial ground of review which would warrant setting aside the award.

**Costs**

29. Because the review has been made possible mainly due to the efforts of the respondent it is appropriate that it should not bear the costs incurred and if it were not for other considerations a cost award against the applicant in respect of the failed review application would be justified. Because the Rule 11 application was essentially used as a goad to force the applicant to conclude her review application, even though I am dismissing it, I do not think it is appropriate for the third respondent to pay the applicant's costs incurred in respect of that application. However, it is appropriate that the court should express its disapproval of the applicant's conduct of review proceedings which put the employer to the unnecessary expense of filing the Rule 11 application. It was the inactivity of the union which compelled the third respondent to act and there is no suggestion the applicant was not apprised of the progress in the matter.

30. Because there is a possibility that an employment relationship might still be resumed in terms of the award, an award of costs in respect of the review itself is not appropriate in my view, and accordingly no order of costs will be made on that application. By so saying, it must be stressed that I do not mean to make any finding on whether the award is still enforceable after the applicant previously declined the position offered.

**Order**

31. Accordingly, an order is made in the following terms:

32. The third respondent's Rule 11 application is dismissed

33. The applicant's review application is dismissed.

34. The applicant is ordered to pay the third respondent's wasted costs incurred in bringing the Rule 11 application.

**ROBERT LAGRANGE**

**JUDGE OF THE LABOUR COURT**

Date of hearing : 23 September 2010

Date of judgment: 19 October 2010

**Appearances:**

**For the Applicant:**

**Mr S Morwane of Togetherness AmalgamatedWorkers Union of South Africa**

**For the Third Respondent:**

**Mr B Leech (SC) instructed by Deneys Reitz Attorneys**