



IS THERE AN OBLIGATION ON AN EMPLOYEE TO DISCLOSE PREVIOUS CONVICTIONS WHEN APPOINTED?

The issue that had to be decided in *Bhembe / Independent Development Trust (IDT) (2015) 24 CCMA 7.17.1* was whether the dismissal of the applicant, Mrs. Busisiwe Bhembe (hereinafter referred to as “Bhembe” or “the applicant”), was conducted in a fair procedure; and whether there was a valid and legitimate reason for the dismissal.

In deciding the aforementioned, the Commission for Conciliation, Mediation and Arbitration (“the CCMA”) had to establish whether or not the dismissal of Bhembe, which was consequent to her failing to disclose that she had criminal charges against her in Swaziland and that her previous employer dismissed her for fraud, was fair.

BACKGROUND

Bhembe was employed as a regional manager. Her fixed-term contracts were renewed on several times until the employer, Independent Development Trust (hereinafter referred to as “IDT” or “the respondent”) heard that she had failed to disclose, at her pre-employment interview, that she had a pending criminal case against her in Swaziland; and that she had allegedly been dismissed by her former employer. It was further alleged that she had made several misrepresentations during her employment which had caused the employer financial losses. She was found guilty of, *inter alia*, fraud and dismissed.¹

Bhembe was charged among other with the following charges:

1. fraud and/or misrepresentation and/or gross misconduct involving dishonesty and/or conduct unbecoming of an IDT employee in that:
 - 1.1 On or about September 2010, the employee failed to disclose to the IDT during the interview for employment that she had been criminally charged and/or there were pending criminal charges against her by Swaziland Police and/or authorities emanating from her employment with PORECO;
 - 1.2 Her failure to disclose constituted material misrepresentation on her part.

¹ [2015] 11 BALR 1149 (CCMA).

2. fraud and/or misrepresentation and/or gross misconduct involving dishonesty and/or conduct unbecoming of an IDT employee in that: On or about September 2010, she failed to disclose to the IDT during her interview of employment the circumstances leading to the termination of her employment with PORECO;

2.1 Her failure on her part constituted material misrepresentation;

2.2 Her conduct above constitutes fraud and/or misrepresentation and/or gross misconduct involving dishonesty and/or conduct of unbecoming of IDT employee.

The question that arises from these charges is whether or not there is a duty to disclose previous convictions or pending criminal charges? If such duty does exist; can an employee be dismissed for failing to disclose same?

PRINCIPLES APPLIED

Upon analysing the evidence, the CCMA held that “there is no obligation on an employee to disclose anything in his or her past which might prejudice him or her. However, it was held that in certain circumstances there may well be a duty on the applicant to disclose previous misconduct, especially when it is of such a nature that it disqualifies him or her from his or her new appointment.”

The CCMA went further and illustrated examples and cited cases under which an employee may be obligated to make disclosures; mainly:

- In *Dialks v Postmus Diamond Ltd* wherein a manager of the mine failed to inform the employer that he was an alcoholic. It was held that this failure constituted a breach of contract and justified a summary dismissal;
- In *Hoffman v Monis Wineries Ltd* wherein a salesman for a liquor wholesaler neglected to disclose that twelve years previously he had been convicted for contravening various provisions of the Insolvency Act; the court held that there was no obligation to disclose this fact; and
- In *Grobler / Anglo Platinum Fran Shafts* the employee failed to disclose during an interview when asked by the employer that he had been dismissed for gross negligence during the performance of his duties. The arbitrator accepted that this was a fair reason for the dismissal.

The CCMA took note that in the present matter there were no prior misconduct or at least no evidence of any, and the applicant was never convicted of a criminal offence nor was she dismissed from her previous employer. Further, she was never asked in the interview process about any criminal charges being levelled against her and/or criminal convictions for that matter. In addition, the CCMA made reference to the principle that all persons are presumed

innocent until proven guilty – the present circumstances do not create an obligation upon the applicant to disclose the fact that criminal charges had been levied against her.

Owing to the aforementioned, it is trite that employers, during interviews, ask all the necessary questions and not assume any obligations to disclose on the part of the employee. As evident in the *Bhembe's* case, it is not always guaranteed that a labour forum would find that an employee had(s) the obligation to make a disclosure. Don't assume; ask!

This matter can also be specifically regulated in the proposed employment contract of an applicant.

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