

**THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: JA46/2023

In the matter between:

**NUMSA OBO LUNGILE MOKASE**

**Appellant**

and

**NISSAN SOUTH AFRICA LTD**

**First Respondent**

**NTHENGEDZENI MONYAI N.O.**

**Second Respondent**

**COMMISSION FOR CONCILIATION MEDIATION  
AND ARBITRATION**

**Third Respondent**

**Heard: 13 February 2024**

**Delivered: 23 April 2024**

**Coram: Savage ADJP, Mlambo JA, and Jolwana AJA**

**JUDGMENT**

**SAVAGE, ADJP**

Introduction

[1] This appeal, with the leave of the Labour Court, is against the judgment and orders of that Court (per Phehane J) in which the first respondent's review application succeeded, with the arbitration award of the second respondent (commissioner) set aside and substituted with a finding that the dismissal of the appellant, Mr Lungile Mokase, was procedurally and substantively fair. No order of costs was made.

[2] The appellant was employed from April 2010 as an operator by the first respondent, Nissan South Africa Ltd (company). On 25 April 2017, the appellant was involved in an altercation with Mr Kagiso Letsholo from the company's human resources department, who had recommended that the appellant be given meaningful work in the company's body shop or stay at home until his hand, which had been injured, had healed. During the course of this altercation, the appellant pointed his index finger at his supervisor, Mr Hope Sithole, and told him "*you undermine me*" and that Nissan was not Mr Sithole's company.

[3] The following day, at a meeting with Mr Letsholo, Mr Sithole and senior supervisor, Mr Sammy Nkanyane, the appellant was seen to have scissors in his pocket. When asked why he had the scissors with him he stated that he had been gardening at home and had forgotten them in his pocket. Mr Nkanyane asked the appellant to hand over the scissors for safekeeping. The appellant refused to do so, finally complying only when Mr Letsholo requested that he do so. After handing them over, he collected the scissors from Mr Letsholo later the same day.

[4] Some months later, on 6 October 2017, the appellant was notified to attend a disciplinary hearing regarding a complaint of serious misconduct relating to poor workmanship. On 11 October 2017, Mr Nkanyane received a phone call from a person named "Oupa", who was employed at a hair salon owned by Mr Nkanyane. Oupa indicated that he wanted to discuss a serious issue with him. The following day, the two met and Oupa told Mr Nkanyane that he had been told by someone at the salon that a hit had been placed on Mr Nkanyane by a fellow employee at the company because he had refused to allow the employee to visit his sick mother and was making life difficult at work for this employee. Oupa also told Mr Nkanyane that it was said to him that the employee had brought scissors to work in order to assault Mr Sithole.

[5] Mr Nkanyane took the view that the employee of whom Oupa spoke was the appellant as there was no other employee in the department whose mother was sick, who had been disciplined around the time in question and who had brought scissors to work. On 13 October 2017, Mr Nkanyane reported the matter to the company's

human resources department and to security due to what he regarded as an imminent risk to both him and his colleague, Mr Sithole. He was offered security by the company and was advised to report the matter to the police.

[6] Thereafter, Mr Nkanyane received anonymous telephone calls from an undisclosed number in which he was told to stop harassing “*my brother*” whose mother was sick, and to stop giving his brother trouble or “*o tlo flopa*”, which loosely translated from Setswana means that he would suffer the consequences or live to regret it. The caller indicated that he knew where Mr Nkanyane and Mr Sithole lived, where Mr Nkanyane’s children went to school and how his daughter travelled to and from school. Both men feared for their safety and that of their families. Mr Nkanyane relocated his children from his home and downloaded a cellphone application which allowed him to record telephone calls. Both Mr Nkanyane and Mr Sithole approached the Tshwane North Magistrate’s Court to obtain protection orders against the appellant which were granted on 31 October 2017.

[7] In order to establish whether the appellant was behind the threats made, the company requested both Mr Nkanyane and the appellant to undergo polygraph tests. The results of the appellant’s test showed significant indications of deception when questioned about the person who had called to threaten Mr Nkanyane and about whether a hit had been placed on Mr Nkanyane. In contrast, the results of Mr Nkanyane’s test showed no indication of deception on either issue.

[8] On 14 November 2017, the appellant was given notice to attend a disciplinary hearing to answer allegations of gross misconduct in that he had intimidated or threatened Mr Sithole or Mr Nkanyane. Following a disciplinary hearing, he was found to have committed the misconduct alleged and was dismissed from his employment with the company.

[9] Dissatisfied with his dismissal, the appellant referred an unfair dismissal dispute against the company to the third respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA). In his testimony at arbitration, the appellant confirmed that he knew Oupa and knew that Oupa spoke to his “*brother Uncle C*”, who was his friend and a person in whom the appellant confided “*almost*

*everything*", including that he was not treated well at work. Although no ruling was made on the admissibility of the hearsay evidence tendered, in the arbitration award the commissioner rejected the hearsay evidence and found that there could be no reasonable suspicion that the appellant was involved in the alleged threats or intimidation, which had not been proved. The appellant's dismissal was therefore found to have been substantively unfair. The dismissal was found to be procedurally unfair in that the appellant had been suspended from duty without being given the opportunity to make written representations on the issue. The appellant was therefore retrospectively reinstated into his employment with the company with effect from 10 July 2019.

[10] Aggrieved with the outcome at arbitration, the company sought the review of the arbitration award by the Labour Court. The Labour Court found that the award was unreasonable in that the commissioner had disregarded the results of the polygraph tests which had shown deception and that, on a balance of probabilities, the evidence had shown that the appellant had threatened and intimidated Mr Nkanyane and Mr Sithole. The review application therefore succeeded and the arbitration award was set aside and substituted with a finding that the appellant's dismissal was substantively fair.

#### On appeal

[11] The appellant took issue on appeal with the Labour Court's findings, contending that the arbitration award was a reasonable one in that no evidence was disclosed by the company which proved misconduct on his part. It was contended that the Labour Court had erred in finding that the commissioner ought to have relied on the results of the polygraph tests when no expert evidence regarding such tests had been led. It was contended further that the evidence of Mr Sithole should have been rejected as he had lied under oath in seeking the protection order he obtained in which he recorded falsely that the appellant had tried to stab him with the scissors, assaulted him, insulted him and gone to Mr Sithole's home after a fight.

[12] As to the admissibility of the hearsay evidence, the appellant contended that the commissioner correctly decided not to rely on this evidence and that, with

reference to *Comtech (Pty) Ltd v Molony N.O. and Others*<sup>1</sup> and *Portapa (Pty) Ltd t/a Superbets v CCMA*,<sup>2</sup> it was not open to the company to take issue with the commissioner's failure to apply section 3 of the Law of Evidence Amendment Act<sup>3</sup> (LEAA) for the first time on appeal. Once the polygraph and hearsay evidence are excluded, the appellant submitted that nothing was left to prove the company's case against him and the decision of the Labour Court cannot stand.

[13] In opposing the appeal, the company submitted that the commissioner's failure to consider the requirements of section 3 of the LEAA constituted a gross irregularity in relation to the admissibility of that evidence. While the Labour Court's reasons for setting aside the arbitration award may be incorrect, the company submitted that no issue could be taken with the order arrived at given the body of circumstantial evidence before the commissioner. The company therefore sought that the appeal be dismissed, alternatively, that the matter be remitted to CCMA for a hearing *de novo* before a different commissioner.

### Evaluation

[14] The task of a commissioner in considering a claim of unfair dismissal is to determine whether the dismissal of the employee by the employer was fair. Doing so requires account to be taken of the undisputed facts and the admissible evidence tendered at arbitration, with regard to be had to the cumulative effect of the evidence tendered.<sup>4</sup> A commissioner is entitled in terms of section 138(1) of the Labour Relations Act<sup>5</sup> (LRA) to determine the manner in which an arbitration is to be conducted so as to determine the dispute fairly and quickly, with the minimum of legal formalities; and, in terms of section 138(2), to exercise a discretion as to the form of the proceedings during which evidence may be adduced. The permission not to rely on legal formalities does not however mean that evidence may be treated by the commissioner in a manner which is unfair to the parties to such an extent that it leads to an outcome that is unreasonable.

<sup>1</sup> [2007] ZALAC 35 (21 December 2007).

<sup>2</sup> [2014] ZALCJHB 484 (8 December 2014)

<sup>3</sup> Act 45 of 1988.

<sup>4</sup> See: *S v Isaacs* [2010] 4 All SA 481 (SCA).

<sup>5</sup> Act 66 of 1995, as amended.

[15] The general rule is that hearsay not admitted in accordance with the provisions of the LEAA is not evidence at all.<sup>6</sup> While notionally a commissioner is not obliged to apply section 3 of the LEAA because of the discretion bestowed by section 138 of the LRA, this Court has recognised that it is prudent that section 3 be applied to ensure both a fair process and outcome at arbitration.<sup>7</sup> This is so in that where it is not, it may lead to a decision which a reasonable decision-maker could not reach.

[16] In the absence of agreement between the parties, the hearsay evidence tendered at arbitration by the company could not be admitted into evidence unless the commissioner had ruled that the interests of justice required as much. Although both parties failed to raise the admissibility of the hearsay evidence as it was adduced at arbitration, it was the task of the commissioner to ensure fairness in the approach to and treatment of the evidence and to make such a ruling timeously on the issue rather than adopt a passive stance and determine it for the first time in the arbitration award.

[17] The importance of a timeous ruling on the admissibility of the hearsay evidence is that it provides parties with the opportunity to make submissions on the issue and, if informed that such evidence is to be excluded, to consider whether it is possible to rely on other evidence or not. Given the nature of the evidence and the reliance placed on it in the proceedings before the commissioner, the failure to determine the issue and the decision later simply to exclude such evidence, without having regard to the provisions of section 3 or make a timeous ruling on its admissibility, constituted a material misdirection on the part of the commissioner and led to a gross irregularity in the conduct of the proceedings.<sup>8</sup>

[18] A court will not ordinarily, for the first time on appeal, rule on whether to admit hearsay evidence.<sup>9</sup> A material misdirection and gross irregularity caused by the

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<sup>6</sup> *Ndhlovu and others v S* [2002] ZASCA 70; [2002] 3 All SA 760 (SCA) (*Ndhlovu*) at para 14.

<sup>7</sup> *Exxaro Coal (Pty) Ltd and another v Chipana and others* (2019) 40 ILJ 2485 (LAC) at paras 19 and 21.

<sup>8</sup> *Matsekoleng v Shoprite Checkers (Pty) Ltd* [2013] 2 BLLR 130 (LAC) at para 41 - 42.

<sup>9</sup> *Ndhlovu supra*.

commissioner's failure to have regard to the admissibility of the hearsay evidence in the manner required may warrant a decision to set aside the award with the matter referred back to the CCMA for a new hearing. However, for the reasons that follow, such an outcome is not necessary in this matter.

[19] This is so in that the result reached by the commissioner was also unreasonable given the failure to have regard to the circumstantial evidence adduced at arbitration. Despite the recognition that legal formalities may be kept to a minimum during the course of arbitration proceedings, evidence adduced must be appropriately considered by a commissioner and cannot simply be ignored. In the approach to and treatment of the evidence adduced, the commissioner was required to take cognisance of the fact that circumstantial evidence had been advanced in respect of which:

‘...two cardinal rules of logic ... cannot be ignored:

- (1) The inference sought to be drawn must be consistent with all the proved facts. If it is not, the inference cannot be drawn.
- (2) The proved facts should be such that they exclude every reasonable inference from them save the one sought to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct.’<sup>10</sup>

[20] No direct evidence tendered at arbitration indicated that the appellant, following his earlier verbal altercation with Mr Sithole and the incident with the scissors, had himself threatened or intimidated his superiors or caused them to be threatened or intimidated. What was in issue before the commissioner was whether the inference that he committed the misconduct by causing someone to do so on his behalf could be drawn from all of the proven facts and whether these proven facts excluded every reasonable inference from them save the one sought to be drawn.

[21] Without regard to the hearsay and polygraph evidence tendered, the undisputed facts before the commissioner were that the appellant felt aggrieved with how he was treated at work. He had previously threatened Mr Sithole at work and

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<sup>10</sup> *R v Blom* 1939 AD 188 at 202 - 3.

had taken scissors to a work meeting, which he initially refused to hand over despite an instruction to do so. His own evidence was that he spoke to Uncle C about his issues relating to his treatment at work and that Oupa and Uncle C knew each other. There was no dispute that Oupa worked for Mr Nkanyane and was known to Mr Nkanyane. Mr Nkanyane's testimony that Oupa had spoken to him was not disputed in cross-examination, nor was it disputed that he had received a warning from Oupa about a potential risk relating to an aggrieved employee at the company. Mr Nkanyane's evidence was not challenged that he had thereafter received a number of threatening cellphone calls from an anonymous caller, who knew personal details about his life and his children, which calls concerned an employee at the company whose mother was sick. Mr Nkanyane testified that the only employee he knew whose mother was sick was the appellant and the appellant confirmed that Mr Nkanyane knew that his mother was sick. Mr Nkanyane downloaded a cellphone application to record the calls. Both Mr Nkanyane and Mr Sithole testified that they felt threatened and concerned for their safety and that of their families, to the extent that Mr Nkanyane relocated his children from his home to ensure their safety. The company offered both men security and both went to the police station to lay charges and obtained a protection order against the appellant.

[22] From all of the proven facts, had the commissioner approached the evidence in the appropriate manner, the inference was capable of being drawn that it was the appellant to whom the anonymous caller referred. This was so in that such inference was not only consistent with all the proven facts, but the proven facts excluded every reasonable inference from them save the one sought to be drawn.

[23] In issue further is whether the inference could be drawn that it was the appellant who had caused Mr Nkanyane and Mr Sithole to be threatened and intimidated. No evidence was tendered that the appellant had instructed the anonymous and threatening calls to be made. The proven facts before the commissioner were that the appellant had previously engaged in aggressive and intimidatory behaviour at work when he took scissors to work and initially refused to hand these over. There was no dispute that the appellant was aggrieved with what he considered to be his treatment at work. He spoke to Uncle C about all his work issues and, on the appellant's own version, Oupa and Uncle C spoke to each other.



After Mr Nkanyane was given a warning by Oupa, anonymous calls were received by Mr Nkanyane. The anonymous caller spoke on behalf of an employee whose mother was sick and the appellant confirmed that Mr Nkanyane knew that the appellant's mother was sick, in circumstances in which Mr Nkanyane knew of no other such employee.

[24] Having regard to the material before the commissioner, it did not accord with the evidence and was unreasonable for the commissioner to find that the anonymous threatening phone calls had not been proved to have been made on behalf of the appellant. This is so since such a finding was one that was consistent with all of the proven facts, in circumstances in which the facts as proved excluded every other reasonable inference from them save this one drawn.

[25] It follows that, although for different reasons, the Labour Court did not err in upholding the review application and setting aside the arbitration award. In its reasoning, the Labour Court erred in disregarding the decision of this Court in *DHL Supply Chain (Pty) Ltd v De Beer NO and others*<sup>11</sup> (*DHL*) to find that the commissioner ought to have placed reliance on the polygraph tests conducted. The finding made by the Labour Court in this regard was erroneous given that no expert evidence had been put up pertaining to the manner in which such polygraph tests had been conducted or their results analysed. It followed that the commissioner cannot be faulted for disregarding the results of such tests.

[26] The appellant took issue with the credibility of Mr Sithole's evidence given the erroneous record in his application for a protection order of the events which had transpired. Mr Sithole's explanation of this recordal is that a clerk at the court completed the document and he was required to sign it. He confirmed that the events recorded had not taken place and retreated from the contents of the affidavit without any hesitation. His explanation as to how the erroneous recordal occurred is plausible and does not provide a basis for the wholesale rejection of his evidence on all other aspects.

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<sup>11</sup> [2014] ZALC 15; (2014) 35 ILJ 2379 (LAC) at para 31.

[27] From the totality of the evidence before the commissioner, properly considered, the company proved that the appellant committed the misconduct alleged and that his dismissal for such misconduct, given its gravity, was substantively fair. The Labour Court cannot therefore be faulted for setting aside the arbitration award on review and in substituting it with a finding that the dismissal was substantively fair.

[28] As to the procedural fairness of the appellant's dismissal, it is uncontested that the appellant was entitled to refer an unfair labour practice dispute to the CCMA in the event that he considered his suspension to be unfair. He failed to do so and his complaint as to the circumstances under which he was suspended does not warrant the conclusion that his dismissal was procedurally unfair. The Labour Court did not therefore err in finding that the dismissal of the appellant was procedurally fair. For all of these reasons, the appeal cannot therefore succeed.

[29] Having regard to considerations of law or fairness, a costs order against the appellant is neither appropriate nor warranted in this matter.

[30] In the result, the following order is made:

Order

1. The appeal is dismissed with no order of costs.

SAVAGE ADJP

Mlambo JA and Jolwana AJA agree.

APPEARANCES:

FOR THE APPELLANTS:

Instructed by

FOR RESPONDENT:

Mr G L van der Westhuizen

Weavind & Weavind

Ms M Edwards

Instructed by Cliffe Dekker Hofmeyr Inc.