

IN THE LABOUR APPEAL COURT

JOHANNESBURG

CASE NO: JA25/09

DATE: 2010-05-06

In the matter between

SOUTH AFRICAN TRANSPORT AND

First Appellant

10 **ALLIED WORKERS UNION**

PERSONS APPEARING ON ANNEXURE

Second Appellant

“A” HERETO

And

KHULANI FIDELITY SECURITY SERVICES (PTY) LTD Respondent

J U D G M E N T

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DAVIS JA: In August 2006, the first appellant acting on behalf of the second appellants referred a dispute to the CCMA, which pertained to the retrenchment of the second appellants on 16 August 2006. The dispute was referred by the CCMA to the court *a quo*, given the inability of the parties to resolve the dispute by way of conciliation. The first appellant

then proceeded to institute proceedings against the respondent on behalf of the second appellants in the court *a quo*.

In this case, the first appellant claimed payment to compensation on behalf of the second appellants arising out of their retrenchment, the case being that the retrenchment of these appellants was both substantively and procedurally unfair. The court *a quo* dismissed the claim. By way of petition the appellant has proceeded to this court on appeal.

Briefly the facts can be summarised as follows. The respondent
10 concluded a security agreement with its client, Aviation Coordination Services (Pty) Limited, (ACS), in terms of which agreement, the respondent undertook to provide security services to ACS Airport throughout South Africa. Clause 6.10 of the security agreement is a particular relevance. It reads;

“6.10: The Contractor shall, on a quarterly basis, conduct polygraph testing on each member of its security personnel who perform the Service at the Sites and shall forward the results of such polygraph testing to the
20 Contractor within 14 days of such testing having been performed.

6.10.2: Such polygraph testing shall be performed by an independent third party and shall analyse the integrity, honesty and suitability of each member of the security personnel in

carrying out their functions in accordance with the terms of this Agreement.

6.10.3: Should any member of the security personnel fail such mandatory polygraph testing, the Contractor shall immediately inform ACS in writing and ACS may, in its sole discretion, direct the Contractor to remove, at the Contractor's cost, such individual from the relevant Site and replace him with a suitably qualified individual."

10 Prior to the conclusion of this agreement, the respondent consulted with the first appellant, which agreed that its members could be tested by way of a polygraph and indeed could be removed from their positions, should they fail their respective polygraph tests.

Mr Ysel, the general manager of the respondent, gave evidence, which was uncontested, namely that there had been consultation with the first appellant, insofar as the polygraph testing of baggage handlers was concerned.

The appellant could, if it so wished, have called its office bearers to gainsay this particular averment of Mr Ysel, but no evidence was
20 forthcoming. Thus Mr Ysel's evidence therefore stands as being common cause.

On 25 July 2003, the respondent and first appellant concluded a collective agreement, in terms of which the first appellant appeared to consent to its members undergoing polygraph tests.

No specific agreement of a written nature was produced, but the

evidence of both witnesses who testified on behalf of the appellant, Mr Ysel and the shop steward, Mr Kepasi, was that an agreement did so exist.

Indeed, in Mr Kepasi's evidence, he testified about a meeting which had taken place between employees, such as the second appellants and first appellant as follows;

10 "You remember yesterday, you said that you
 were consulted as SATAWU and you went to the
 extent of meeting at Pomona? Yes. What was
 the meeting about? The meeting was about the
 dissatisfaction of us as workers; to say the
 company is sending us to polygraph test. Then
 Jackson and Rendell came and clarified the
 position of saying; why SATAWU agreed with the
 company because they will be leaving. For your
 only information or for the court's information;
 the problem we were experiencing at the airport
 was a vastly theft that was taking place around
 the airport and we were responsible for
20 screening the bags that were going to the flight.
 So they wanted to prove and for all companies,
 not for Fidelity only; ACSA people to prove
 whether their employees are honest or
 dishonest. So that was the reason they had to

come to Pomona to clarify that position.

Because us as workers were dissatisfied in it.”

The respondent and first appellant also concluded a site specific agreement which was mentioned in the record, but not produced into evidence in respect of the members of the first appellant who were employed as CTX operators at 100 Percent Whole Baggage at OR Tambo Airport.

The second appellants were employed as operators at the time of their retrenchment. They submitted to polygraph tests during August 2006
10 and failed these tests. After they failed their tests, Mr Ysel contacted Mr Kepasi, the fulltime shop steward on behalf of first appellant and advised him and the second appellants that they had failed these polygraph tests.

According to Mr Ysel’s testimony, he held consultations with the second appellants, during which consultations; he advised them that, because they had failed their polygraph tests, they could no longer continue working in this capacity. They were offered alternative positions as grade C security officers at sites situated close to their respective places of residence.

20 They were further offered an opportunity to consider being placed in alternative positions. None of the second appellants was so prepared to accept the alternative positions offered to them, as a result thereof, they were retrenched with effect from 16 August 2006.

THE COURT A QUO

In December 2008, Bhoola J, held that the dismissal of second appellants was substantively and procedurally fair and that their claim had to be dismissed with costs. Her judgment was effectively predicated on two principal findings. In the first place she found;

10 “It appears to me therefore, on a balance of
 probabilities, that the parties had reached
 agreement to the effect that CTX operators who
 failed their polygraph tests would be removed
 and placed in alternative employment outside
 the airport.”

She then went on to consider the implication of that finding and, in particular, whether there had been consultation sufficient to meet the requirements of Section 189 of the Labour Relations Act, 66 of 1996 (LRA).

She found thus;

20 “In my view, there has been substantial compliance with section
189 of the Act. The individual operators must have known that they would
be removed as CTX Operators if they failed. Ysel testified that other
employees who failed had accepted the alternative without question as
this rule was common knowledge, and the employees knew their union
had consented to the testing. Furthermore, the individual applicants were
offered reasonable alternative employment which they rejected; they were
offered an opportunity to consider the alternatives as well as to make
proposals concerning alternative. They availed themselves of none of
these options.”

The matter has now come on appeal. Mr Mphahlani, who appeared most ably on behalf of the appellant, submitted that Bhoola J had erred in that she had found that the failure of the second respondents to pass the polygraph test, constituted sufficient ground to dismiss them. Inadequate consultation had taken place between the first appellant acting on behalf of the second appellants and respondent and further respondent had failed to show with whom it had consulted from the Ranks of first appellant insofar as these dismissals were concerned.

Mr Mphahlani went on to contend that there had been inconsistent
10 compliance with the polygraph test, in that, on previous occasions, some of the second appellants had failed polygraph test for example (Mr Mphe), and had not been dismissed, notwithstanding noncompliance therewith.

Furthermore, he pressed the point that there had been no clear evidence to the effect that an agreement had been reached with first appellant regarding the consequences of such failure of the polygraph test, nor had there been specific consultation insofar as these particular appellants were concerned.

EVALUATION

There can be no doubt that the security agreement cited earlier in
20 this judgment, (see Clause 6.10 of that agreement) contemplated a process whereby polygraph testing was mandated for employees who worked as baggage handlers. That is not only clear from the wording of the clause; it is evident from the evidence of both Mr Ysel and Mr Kepasi.

Mr Mphahlani contended that the appellants had, in effect, been dismissed for theft. There are questions in the record pertaining to

stealing, but they are in essence irrelevant. The purpose of the polygraph test was manifestly not to show that theft had actually taken place; it was to test the integrity of all who worked in positions where considerable amount of theft had previously taken place.

The unchallenged evidence indicates that this problem and proposed polygraph solution had been canvassed with first appellant. The unchallenged evidence of Mr Kepasi and Mr Ysel, who was repeatedly cross examined and repeatedly gave the same answers concerning consultation, was that the union announced in effect party to the
10 arrangement. Had the first appellant objected to any of this evidence, it was entitled, as indeed it should have, to place before the court, evidence which contradicted the contentions of both Mr Ysel and Mr Kepasi and consequently respondent's core case.

The unchallenged evidence of Mr Ysel was that he had discussed the issue of ACS requiring quarterly polygraph testing of the first appellant's members with the first appellant, prior to the conclusion of the security agreement. It appeared that the first appellant in agreement therewith.

Ysel testified further that he had offered second appellants
20 alternative positions which they had refused. That too is evident from the letters which were generated in this regard. As is illustration thereof, on 16 August 2006, Ms Mokgopha, one of the second appellants received a letter in which she was informed that she failed her polygraph test;

“You failed your polygraph test and as it a
contract requirements by our client ACS that all

security officers deployed at 100% H.B.S. must pass a polygraph test every 3 months we can no longer use you at 100% H.B.S and we must therefore remove you from the airport.”

The letter goes on;

10 “We offered you employment at Robertville as a normal grade C security officer. You refused the alternative employment offer and told me that you will not work at Robertville and that you wanted to go. We therefore now retrench with immediate effect for operational reasons.”

There was no challenge in the court *a quo* to the reasonableness of the alternative positions offered to the second appellants by the respondent and, more importantly, they did not claim severance packages which respondent refused to pay to the second applicants due to their refusal to accept alternative positions.

20 Accordingly, as appears in evidence, this issue was not placed in contention. Mr Mphe conceded that he was offered an alternative position and refused it. Ms Mokgopha’s contention that she was not offered an alternative position, clearly can be rejected. A letter of retrenchment indicated that she was offered an alternative position, which she conceded under cross examination;

“Did he offer you an alternative position as a grade C security officer? All he told me was that I had failed and I was going to be removed, but I

did however see on the papers that there was an alternative. Oh, so you saw; a minute ago you told the court, you were told this, now you say this, now which of the two is it? What was written there is what it is. And what salary were you going to receive as a grade C security officer? I do not know. So why did you again testify a couple of minutes ago that you received less money as a grade C security officer? I

10 knew for a fact that grade C earns lesser than a CTX operator. Were you prepared to work as a grade C security officer? I was yes.”

Both Ysel and Kepasi’s unchallenged evidence was that each of these second appellants was engaged in a process of consultation to provide them with alternative employment.

The appellant’s argument is that it was not involved at this stage. But it is clear, not only was Mr Kepasi involved, but the very purpose of the agreement with the union was that, in the event that employees failed the polygraph test, they could no longer work as baggage handlers. That

20 much is clear from uncontested evidence.

Accordingly, the question arose as to the consequence of such a finding. Section 189 of the LRA provides that there must be an attempt by an employer, such as respondent, to provide alternative accommodation after a process of consultation.

The consultations, according to the evidence, included the need for second appellants' removal from their positions and a further engagement with them insofar as alternative positions were concerned. Further, they were granted an opportunity to make representations concerning alternative positions.

There is no evidential basis to conclude that there had been noncompliance with the provisions of section 189 of the LRA. To sum up therefore, there was an agreement. That agreement was designed for operational reasons, namely to ensure that only people of proven integrity
10 could be maintained in these position. That was the purpose of the agreement with respondent's client. It was the reason why consultations took place with the first appellant. The position was also known to all the workers employed therein; that is failure of the test gave rise to termination from that post for the reasons I have mentioned, being operational reasons.

Thereafter there was an obligation to engage in a process of consultation with relevant employees and to offer, if at all possible, alternative positions. Not only was that done, but an offer was made to make representations concerning further alternative positions, other than
20 that which was offered by respondent.

For these reasons, there is no basis by which this court in my view can overturn the decision of the court *a quo*. Therefore, I would dismiss the appeal, but make no award as to costs.

DAVIS

HENDRICKS & MUSI AJJA: Conkurs.