



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not reportable

Case no: JA 54/14

In the matter between:

GEMALTO SOUTH AFRICA (PTY) LTD

Appellant

(Applicant in the Court *a quo*)

And

CEPPWAWU obo LOUW, JAMES & 20 OTHERS

First Respondent

MOAHLOLI NYAMA N.O

Second Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Third Respondent

First to Third Respondents in the Court *a quo*)

Heard: 27 May 2015

Delivered: 27 August 2015

Summary: Review of arbitration award - dismissed employees singled out among a group of employees for refusing to subject themselves to polygraph

testing – reasons for which employees dismissed not serving the real purpose of the polygraph test – no rational link between the dismissal and the alleged misconduct - selective dismissal unfair – dismissal substantively unfair – commissioner’s award falling within the band of reasonableness – Labour Court’s judgment upheld – Appeal dismissed with costs.

Coram: Tlaletsi DJP; Landman *et* Sutherland JJA

JUDGMENT

TLALETISI DJP

- [1] This is an appeal with leave of the court below against the judgment and order of that court (Cele J) in which it dismissed the appellant’s application to have an arbitration award issued by the second respondent (the commissioner) under the auspices of the third respondent (the CCMA) reviewed and set aside.
- [2] The award concerned a dismissal dispute referred to the CCMA by the first respondent (the union) on behalf of its members (the employees) who were at all relevant times employed by the appellant. The union contended that its members were unfairly dismissed for insubordination by the appellant. The commissioner in essence found the employees to have been guilty of the misconduct but that the sanction of dismissal was procedurally fair but substantively unfair and awarded the employees compensation equal to five months of their remuneration calculated at the rate as at the time of their dismissal. The collective amount of compensation was determined by the commissioner to be R1 026, 970-00 which was payable within 14 days of receipt of the award. No award was made as to costs.
- [3] It is the above award which was the subject of the review application brought by the appellant in the Labour Court. The Labour Court found, in essence that the decision reached by the commissioner fell within a range of reasonableness and dismissed the application for review and made no order as to costs.

- [4] The crisp issue to be determined in this appeal is whether the Labour Court was wrong to have concluded that the award of the commissioner is not one that a reasonable commissioner could not make in the circumstances.
- [5] The factual background leading to the dispute consists of facts which are largely common cause. The appellant is involved in the manufacturing and personalizing of secure operating devices such as smart cards and sim cards. The appellant sells these products to most of the banks in the country. In order for the appellant to produce these products, customers would necessarily entrust the appellant with their clients/users details. Due to the nature of the appellant's business and the high security risks, it operates in high security environment that deals with financial information and secure transaction tools.
- [6] On or about 31 December 2010, Standard Bank, one of the appellant's biggest clients, sent a letter to the appellant apparently alleging that some cards and data pertaining to Standard Bank had been removed from the appellant's premises and as a result of which a loss amounting to R50 000 000 was suffered by Standard Bank. The bank demanded payment of the said amount from the appellant. Due to the significance of the claim, the possible damage to the appellant's reputation and relationship with Standard Bank, the appellant decided to conduct an investigation into the Standard Banks's claim. As part of the investigation, the appellant requested all its employees including senior management, who had access to sensitive data, to undergo polygraph tests.
- [7] On 31 March 2011, Graham Adams, the appellant's Risk Manager addressed a letter to the union and all employees wherein the following was stated:

'It is a well-known fact that Gemalto operates in a secure environment and in keeping abreast with VISA and MASTERCARD security requirements and maintaining our trusted relationship with clients, Gemalto is required to authenticate employees' integrity by means of a polygraph examination.

As such Gemalto endeavours to conduct polygraph examination for all employees who have access to its secure plant facilities.

The examination will start from 4 April 2011. All affected employees will be notified accordingly of their examination in due course by the designated Risk Manager Graham Adams.

As this initiative is an inherent business requirement your co-operation in this regard is required.'

- [8] The said letter by Adams was followed by a letter issued by Mark Warren, the Plant Manager, dated 7 April 2011. This letter was issued in response to the union's communication of the unwillingness of its members to participate in the polygraph tests process. In the letter, Warren noted, *inter alia* the union and its members' unwillingness to participate in the polygraph test process despite management meeting all the employees on 5 April 2011 as well as a subsequent meeting with all the shop stewards wherein the importance of the tests was fully explained; that the employees' request for another meeting which had been scheduled for 13 April 2011 already, had no impact on the current operation of polygraph testing as it is the appellants' prerogative to manage its employees and to demand performance on requests which are reasonable and lawful. In conclusion, the letter urged the union officials to intervene immediately as the behaviour of its members would not be tolerated and would instead be met with strong disciplinary action resulting in possible termination of employment.
- [9] At the meeting of 13 April 2011, the appellant's representatives reported about the Standard Bank's claim which was considered to be substantial and that should Standard Bank be successful, the appellant's business viability would be adversely affected. The union representatives expressed the view that polygraph testing was voluntary and that the appellant should consider other alternative investigation "tools" as polygraph testing would not work. They contended further that its implementation would not succeed as the majority of the employees were not participating. Appellant's representatives responded that they had considered other methods and found polygraph tests to be the most effective method. They further reported that there were employees who had a clause in their contracts of employment allowing the employer to demand that they undergo polygraph tests, and that they were at

risk of disciplinary action should they persist in their refusal to undergo the tests. The minutes of the meeting concluded by recording that there was deadlock on the matter and that the union would be allowed to address its members.

[10] Another meeting was held on 5 May 2011. The minutes reflect that polygraph testing was further discussed. Appellant's representatives recorded that it would not be cost effective to consider other alternative methods to polygraph testing; that only a small and negligible number of employees have subjected themselves to the test; that employees would be allowed more time to subject themselves to tests and that information session for the employees on polygraph testing would be arranged to try and allay their fear. Management reiterated that the employees who had clauses providing for polygraph tests incorporated in their contracts of employment were acting in breach of those contracts. The union indicated that it was opposed to compulsory polygraph testing and that its members should not be intimidated to undergo the testing if they do not want to.

[11] It is common cause that information sessions were conducted by external "polygraph specialists" on 17 and 20 May 2011. Few employees attended the sessions.

[12] It is further common cause that a group of 189 employees signed a petition which was presented to the appellant. The petition stated that:

'We are not going to the polygraph tests. As nothing wrong has happened to the Company (loss of cards). The polygraph test is not accurate. Those who want to be tested can go as the polygraph test is voluntary not compulsory. You should explain to us what will happen to those who fail it.'

[13] On 27 June 2011, the appellant issued a letter to 28 individual employees noting that despite its attempts to consult them and their union on polygraph tests, they have failed to undergo the tests. The addressees were reminded that their contracts of employment allowed the employer to demand polygraph testing and were given 48 hours final extension to submit their names for polygraph testing.

- [14] The 28 employees who were served with the letters did not submit themselves to undergo the tests. The appellant charged the employees for:

'gross insubordination, in that it's alleged that you collectively and with common purpose refused to carry out a lawful and reasonable instruction to attend a polygraph, this instruction was given to you on numerous occasions since April 2011. Your continuous refusal is in breach of your contract of employment and has potentially created a serious breach of trust.'

The alternative charge was of insubordination with details similar to the one set out in the gross insubordination charge. The chairperson of the disciplinary enquiry found the employees guilty of the charge of gross insubordination and found summary dismissal as the appropriate sanction.

- [15] Aggrieved by the findings of the disciplinary enquiry, the first respondent and its members referred a dispute of unfair dismissal to the CCMA. The matter could not be settled through conciliation and proceeded to arbitration stage where it was arbitrated by the commissioner who issued his award on 21 September 2012. The referral was initially on behalf of 23 employees. However, the referral on behalf of two of the employees was dismissed on 16 July 2012 for their failure to attend hearing.

- [16] At the arbitration, the appellant presented the evidence of Mark Warren and Theo Heffer who was the chairperson of the disciplinary enquiry. The union tendered the evidence of James Louw (Louw) who was one of the dismissed employees, Gabriel Malakia Tau (Tau) and Gilbert Rose (Rose) both former shop stewards of the union.

- [17] Warren testified that after they received a demand from Standard bank which accused the appellant of being infiltrated by fraud syndicates, they conducted internal investigation. The investigation did not yield intended result and was widened to include polygraph testing for all employees who had access to sensitive data and access to the manufacturing plant. They hoped that the exercise would assist to maintain integrity and check if there were any potential problems to be dealt with. He mentioned that it was not the first time that polygraph testing was used as it was common practice and policy to do

so. It was also generally accepted as an investigative tool and employees participated in order to protect the appellant's interest.

- [18] Warren mentioned that some employees were contractually bound to undergo polygraph testing because their contracts had annexures obliging them to undergo such tests whenever required by the appellant to do so. However, some of the annexures could not be found and they decided to charge only those employees whose annexures to their contracts could be found.
- [19] Heffer's evidence related mainly to his appointment as chairperson and whether he conducted the enquiry fairly. Nothing turns on his evidence since the process was found to be fair.
- [20] The union's case was that its members did not subject themselves to the polygraph tests since they were not obliged to do so and that their dismissal was unfair because they were the only ones disciplined and dismissed out of the group of many other employees who also refused to subject themselves to these tests.
- [21] The commissioner, after analysing the evidence, made, among others, the following findings:
- 21.1. that since the employees did not undergo the polygraph tests, "logically it would mean guilty as charged, but however the question remains, was dismissal appropriate in the circumstances."
 - 21.2. the appellant presented no evidence to show whether the employees had a history or record of misconduct.
 - 21.3. that dismissal for misconduct as a transgression should be for instances of such gravity that makes continued employment intolerable.
 - 21.4 that according to Warren, the sanction of dismissal was fair in the circumstances of this case because the employees refused to comply with their contractual obligations and allowing that to happen would cause "anarchy" in the business.

21.5. that one Rose who was a signatory to the petition continued to work until retrenched by the appellant. Although Rose may not have had a clause to undergo polygraph test in her contract, she was equally guilty as the dismissed employees.

21.6. the appellant tendered no evidence to justify why the employees were treated differently from other employees who did not have clauses relating to polygraph testing in their contracts of employment. The fact that some of the annexures went missing is not a justification for not disciplining them for failure to obey a lawful and reasonable instruction.

21.7. Why only 23 out of 189 employees who signed the petition were charged was not justified by the appellant. Selective discipline was applied to the employees dismissed. Tau, who signed the petition was not disciplined but retrenched a month before the respondents were charged.

As pointed out already, the dismissal of the employees was found to be substantively unfair but procedurally fair and the commissioner awarded compensation.

[22] In the Labour Court, the appellant sought the review of the award on the basis that the award is defective and that the commissioner's decision is not one that a reasonable decision-maker would have made when regard is had to the evidence before him; that the commissioner committed a gross irregularity in the conduct of the proceedings by misapplying the parity principle; he failed to apply his mind to the fact that the appellant only disciplined those employees it could prove had breached their contractual obligations and were therefore guilty of gross misconduct and, that the commissioner failed to apply the correct test which was to consider whether the appellant by distinguishing between the employees acted capriciously, arbitrarily or as a result of improper motive.

[23] The Labour Court held, among others, that the appellant could easily have decided to charge all employees and treat them equally (the 189 employees including the 23 who were charged) by using the existing contracts as an

indication of the type of contract that it had with all of them; that it was improper for the appellant to assume that any of those employees whose annexures had disappeared, might dispute that they had signed those contracts; that the appellant could easily have led evidence to show that it was its practice in terms of the industry in which it operated that all employees had to sign contracts with the clause providing for polygraph testing. The Labour Court concluded thus:

‘As already pointed out in this address as to how it would proceed with the sanction if it found them guilty was open to the applicant. In my view the commissioner’s criticism of the differentiation is meritorious, it does not, in my view, amount to any defect as is defined in Section 145(2) of the Act, nor am I satisfied that the decision reached by the second respondent in this case does not fall within the range of reasonableness.’

The review application was dismissed with no order as to costs being made.

[24] In this Court, the appellant rehashed the grounds of review relied upon in the court *a quo* and contended, in the main that, the arbitration award issued by the commissioner was not one that a reasonable arbitrator could make in that there was no evidence that the appellant’s decision to discipline and dismiss the employees concerned was arbitrary, capricious or induced by improper motive; that there was no evidence to support the finding that the disciplinary action and sanction imposed were inconsistent; and that the court *a quo* erred in failing to find that the commissioner committed a gross irregularity by failing to appreciate the true nature of the enquiry concerning the consistent application of discipline in the workplace and applying the applicable legal principles.

[25] It is common cause that the 23 employees failed to heed the appellant’s instruction to subject themselves to polygraph testing. Their failure to comply is *per se* an act of insubordination. However, the real question to be answered is whether their dismissal was in the circumstances of this case substantively fair. The procedural fairness of their dismissal is not in issue as there is no challenge to the ultimate procedure adopted by the appellant in dismissing them. In determining the substantive fairness for the dismissal, the

surrounding circumstances as well as the events that led to the dismissal are factors that deserve consideration.

- [26] What distinguishes the 23 dismissed employees from the rest of their 166 colleagues is undoubtedly the fact that the appellant, upon perusal of the personal files or records of all the 189 employees that refused to undergo polygraph test, managed to find, attached to the 23's contracts of employment, clause 18.1 that stated that:

'All employees where circumstances in the Company's discretion require will undergo a lie detector test. This test will be paid for by the company. The company reserves the right to use any information obtained from the test to conduct further investigations.'

But for this distinction, the 23 employees' position was similar to the others in that they were part of a group of employees who collectively did not want to subject themselves to polygraph tests and signed a petition objecting to submit to polygraph testing. The only reason why they became a soft target for discipline is the fact that annexures bearing their signatures could be found.

- [27] It is significant to note that the appellants' case had always been that all the employees, without discrimination, were obliged, as management prerogative, to be subjected to polygraph test. Furthermore, that all the employees had a clause 18.1 in the annexed to their contracts of employment. However, these annexures could not be found for other employees because they were either deliberately removed or lost. It was only then decided, based on the perception that it would be a difficult task to prove, in the absence of the said documents, that the rest of the employees were obliged to undergo polygraph testing, that disciplinary proceedings were instituted only against the 23. The latter, only became victims for disciplinary action and subsequent dismissal for the sole reason that annexures to their contracts of employment were not removed or lost. Had that not been the case, they would, like their colleagues, not have lost their employment.

[28] It is therefore not unreasonable to conclude that the dismissal of these employees had nothing to do with the object and purpose of the polygraph testing exercise. What started off as an investigation of the Standard Bank claim ended up not being the reason for the employees' discipline and ultimate dismissal. It is illogical to accept that subjecting only the 23 employees to the polygraph testing out of the many would have assisted the appellant to uncover what it referred to as a "suspected syndicate" or achieve the objective of addressing the Standard Bank claim. There is therefore no rational connection between the purpose of discipline and the alleged misconduct sought to be investigated. Furthermore, there is no causal link between the reason for the dismissal and the alleged losses suffered by Standard Bank. The differentiation between the 23 out of the rest of the 166 employees on this narrow distinction is in my view unfair. It is tantamount to making an example out of the 23 employees for the others.

[29] The 23 employees may have breached a term of their contract of employment. However, in the circumstances of this case, I am not persuaded that the enforcement of the term is fair. The employer wanted to use a contractual obligation to run a blanket polygraph test without any reason to suspect the employees of any involvement in wrongdoing. Once a blanket approach was not possible, to mechanically test the few who were vulnerable to discipline is an unfair invocation of the employer's rights because it remained dysfunctional to any operational requirement.

[30] For the reasons set out above, it cannot be found that the commissioner's decision is unreasonable and could not have been made by a reasonable decision-maker. The appeal falls to be dismissed. It would be in accordance with the requirements of the law and fairness that costs should follow the result.

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

The appeal is dismissed with costs.

Tlaletsi DJP

Landman *et* Sutherland JJA concur in the judgment of Tlaletsi DJP

APPEARANCES:

FOR THE APPELLANT: K S Makapane of Bowman Gilfillan
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