



REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1010/11

In the matter between:

**AIRPORTS COMPANY SOUTH
AFRICA**

Applicant

AND

KHUMALO, PATRICK

First Respondent

THE CCMA

Second Respondent

GUNGUBELE, REBECCA

Third Respondent

Heard: 26 October and 10 December 2012

Delivered: 25 January 2013

JUDGMENT

BHOOLA J:

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act 66 of 1995 (“the Act”), to review and set aside the arbitration award made by the third respondent (“the commissioner”) dated 30 March 2011 under case number GAEKV724-10.

Background to the dispute

- [2] The applicant is a state owned entity and is responsible for managing airports in South Africa including the Oliver Reginald Tambo International Airport (“ORT”), which is a national keypoint where security is accordingly of paramount concern.
- [3] One of the security measures the applicant takes for international flights is the disposal of liquids, aerosols and gas, referred to as “LAGS”. The applicant has a LAGS policy in place which provides that its objective is to “prevent the carriage of liquid explosives and possibly offensive or harmful articles into the restricted areas and on-board an aircraft.” The policy requires that LAGS found in a passenger’s possession must be removed and disposed of by employees. This may be done by handing the item to a family member who is not travelling or discarding it in a prescribed disposal container. The policy makes it clear that LAGS may not be consumed or appropriated by employees. The LAGS policy has been communicated to all employees.
- [4] The first respondent (“Khumalo”) was employed as a security officer at the airport. On 18 August 2010 he was observed by surveillance cameras breaching the LAGS policy and “facilitating” a passenger. He was observed together with a co-employee, Ben Shilubane, assisting or “facilitating” a passenger in contravention of policy stipulating that only specific employees, for instance those at information desks, may assist passengers. It is common cause that Shilubane was working at the baggage search area and Khumalo was the security guard on duty.
- [5] On 8 November 2010 Khumalo was charged with the following misconduct: “(1) facilitating a passenger at international departures; (2) breaching LAGS procedure by not following security procedures and (3)

colluding with Ben Shilubane to facilitate a passenger". Following a disciplinary enquiry he was dismissed, and Shilubane was similarly dismissed in separate proceedings. Khumalo referred an unfair dismissal dispute to the CCMA which was arbitrated on 15 March 2011.

The evidence led at the arbitration

[6] The applicant led one witness, Leon Jackson, Head of Department for Security Operations. He testified that the video evidence showed that:

6.1 A passenger put his bag through the Automatic Metal Detector ("AMD") machine during baggage screening and it beeped indicating that it contained a prohibited or suspicious item.

6.2 Shilubane opened the bag, looked inside but did not remove anything. A conversation ensued between him and the passenger and the passenger took some paper slips out of his pocket and handed it to him. Khumalo can be seen on the camera footage observing this exchange.

6.3 A few minutes later Khumalo and Shilubane walk away together while the passenger went through passport control. A little while later the passenger joins them and they walk towards a restaurant, the News Café, and despite tables being available they walk behind the restaurant and out of sight of the surveillance cameras.

6.4 On the same day the cameras capture Khumalo confiscating a bottle of water and juice from a passenger. He is shown drinking the water and keeping the juice instead of disposing of these items in the bins in the baggage search area in terms of the LAGS policy.

[7] Jackson testified that the LAGS policy was introduced in 2007 and a workshop was held with security staff to introduce it. The search procedure occurred at the search point where a security guard had to advise a passenger to check an item in or to confiscate and dispose of it in the LAGS bins. He confirmed that three employees had been dismissed for committing the same offence because of the seriousness thereof and the need to ensure consistency in discipline.

- [8] Khumalo was posted at the entrance search point and not at the baggage handling point. When he asked him what he was doing with a passenger he explained that the passenger was lost and was looking for gate 6. The video however shows him directing the passenger away from the gate (and towards the restaurant). Khumalo was seen on the video moving away with the LAGS instead of putting it into the bin. Jackson testified that the applicant did not believe that the two security officers were telling the truth and he was convinced that they were acting suspiciously especially when they moved outside the restaurant to an area where the cameras could not observe them.
- [9] The applicant applied its disciplinary procedure fairly and consistently in dismissing Khumalo as well as everyone else involved in breaching the security and LAGS procedures.
- [10] The arbitrator summarises Khumalo's evidence as follows :

10.1 He went on a tea break at 11:00 and Shilubane asked him to accompany him to show a passenger where gate 6 was. He told him the passenger was a Kaizer Chiefs football fan and they waited for the passenger to go through the passport control and immigration point. They escorted the passenger. They did not know him and had never seen him before. Khumalo showed him the gate and he said he wanted to get some food at News Café. They went inside but he looked at the menu and decided he would return later and they went out. Khumalo denied that they took the passenger to a place behind the restaurant where surveillance cameras could not observe them. He testified that as far as he knew there was no place in the airport where there are no cameras except the toilets. He denied that they had facilitated a passenger. He confirmed that he consumed the LAGS and said that the staff normally accepted LAGS from passengers. He explained that LAGS confiscated from passengers are put into bins, which are then periodically taken away to be emptied. However at times passengers would request them not to destroy their confiscated items but to rather use them, which they then did. Managers were aware of the practice but never

reprimanded them for consuming LAGS. He said that sometimes they took LAGS like juice to their rest area where they consumed them.

- [11] Shilubane's evidence, as recorded in the award, was that he searched the passenger's bag and during the search they were chatting and the passenger showed him a used Kaizer Chiefs match tickets and some paper slips, which he took from him. The passenger asked him where gate 6 was and he offered to escort him there when he took his tea break at 11:00. He denied that he was facilitating a passenger as he believed he was just "doing something good" for a customer. He said he was only making a passenger's life easy during his lunch break and he was not aware of any policy regulating how employees spend their free time. They were not prohibited from showing customers directions to the shop, banks or gate as long as they did not leave their posts unattended. He was aware of the policy prohibiting facilitation of passengers. His role was to search the baggage but they also assisted passengers who needed directions. He argued that although there was a customer care service at the information department, it was not always visible and some customers could not read English on the information boards and could benefit from being assisted by someone like him who cared for them. The passenger in this case happened to be friendly and they engaged in small talk about football and he gave him "a lot of used papers including an airtime slip". That was when he asked him where gate 6 was and Shilubanethen told Khumalo they would assist him. He denied that he had exchanged documents with the passenger and said that he could not throw them away immediately because the only bin available was for LAGS. He confirmed that they spent a very short time in the restaurant because the passenger changed his mind after viewing the menu and decided he would return later. He confirmed that a breach of the LAGS policy only occurred when a passenger was allowed to pass through the security gate without removing the LAGS from him or her, and that the consumption ofLAGS was not a disciplinary offence.

The award

[12] The commissioner found the following to be common cause :

- (a) That Khumalo and Shilubane interacted with a passenger and were also seen consuming LAGS;
- (b) That the applicant had security rules and procedures in place and had introduced LAGS procedures which were known by the employees; and
- (c) That the applicant had dismissed the employees who breached these rules and procedures.

[13] The commissioner proceeded to make the following finding :

“[18] I am however, not convinced by the Respondent's version that they have proven that the Applicant committed the offences as indicated in the charges against them. I am also not convinced that the Applicant party lied when they testified that it was common knowledge that they made use of the LAGS and that they sometimes took them home as they wished. I am not suggesting that they were not breaching the rules by doing so but I am certain that their behaviour was occasioned by their realization that the Respondent was not firm and consistent in meting out discipline at all times. It only happened that on that day in question the X ray operator saw something untoward in the passenger's bag and prompted the security guards to check the bag.

[19] The security guard found used papers which were taken away by the guard as shown in the video and the Applicant and his colleague could have acted suspiciously by what I would call fraternizing with the passenger. I do not believe that if someone acted suspiciously that person could be found guilty based only on that suspicion”.

[14] The commissioner further, after noting that the Code of Good Practice enjoins the employer to at least practice the graduated system of issuing discipline to employees, accepted Khumalo's testimony that it was normal to use LAGS and that “this should be seen as an indictment on the part of the Respondent for having an ambiguous stance towards maintaining discipline”. In this regard she found that “the respondent did not show me any evidence of prior disciplinary records against the applicant for breaching the rules. Surely, I cannot condone their coming on the applicant like a ton of bricks the minute they woke up to the misdemeanour. The respondent had a clumsy way of maintaining discipline especially in an industry like theirs where they are exposed to

possibilities of grave atrocities. They did not discharge the onus of proving guilt against the applicant. The dismissal was substantively unfair”.

- [15] Lastly, although procedural fairness was not in issue, the commissioner found that the dismissal was procedurally unfair as the chairman “had a fixed mind” of dismissing the applicant without taking cognisance of the provisions of the Labour Relations Act. On this basis she ordered the applicant to reinstate Khumalo and pay him four months’ salary in the sum of R29 600.00.

Analysis

- [16] Mr Orr submitted on behalf of the applicant that the commissioner failed to consider virtually every single issue before her, thus denying the applicant a fair trial. This is a higher threshold than that accepted by the Labour Appeal Court in *Herholdt v Nedbank Ltd*¹ to the effect that “ [t]here is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of the enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts and issues before him, with such having potential for prejudice and the possibility that the result may have been different.” In this regard Mr Orr submitted that despite finding the existence of common cause facts i.e. that there were security and LAGS rules and procedures in place of which Khumalo and Shilubane were aware and that the applicant had dismissed other employees in similar circumstances, the commissioner failed to apply her mind to the material issue of whether the conduct was in breach of the rules and procedures, but proceeded instead to deal with credibility and found that Khumalo did not lie about the common conduct in using LAGS. However, in the next breath she appeared to accept the breach by stating that “I am not suggesting that they were not breaching the rules...”. She then contradicted this finding by concluding that she is “certain” that their behaviour was occasioned by the realisation that the applicant was not “firm and consistent in meting out discipline at all times”. In regard to

¹[2012] 9 BLLR 857 (LAC) at para [39].

the conduct involving the passenger she found that “the Applicant and his colleague could have acted suspiciously by what I would call fraternizing with the passenger” but failed to consider the explanation advanced by Khumalo for the suspicious conduct. Instead she jumped to the conclusion that she did not believe “that if someone acted suspiciously that person could be found guilty based only on that suspicion”. The commissioner correctly concluded that the conduct appearing on the video was suspicious, but failed to enquire into whether the conduct was in fact suspicious and therefore a breach of the security rules. This reflects, as Mr Orr submitted, a manifest failure to apply her mind to the issue which constitutes a gross irregularity and results in an unreasonable award.

- [17] Ms Basson submitted that if the award and video evidence were construed as whole it was apparent that the commissioner did apply her mind to the evidence and issues before her. Her conclusions are eminently justifiable in relation to the evidence before her in relation to the two charges i.e. colluding with Shilubane and facilitation of passenger and secondly LAGS consumption. In relation to the facilitation charge there was no evidence of collusion and at the baggage check Khumalo did not interact with the passenger, although Shilubane did and it was Shilubane who exchanged documents with the passenger. Khumalo can be seen on the video pointing the passenger towards the gate and they then go outside the surveillance area for approximately 2 minutes and then return. Any inference from the video as to what transpired in the area outside the surveillance area is pure speculation and insofar as the applicant submits that an inference should have been drawn that there was suspicious conduct this is purely speculative and the commissioner approached the issue in the way a reasonable commissioner would have done in rejecting this evidence. The commissioner correctly accepted that the employees took the passenger towards gate 6 and no other reasonable inference could have been drawn in the circumstances. The commissioner was in any event not satisfied that a rule prohibiting facilitation had been proven, and reasonably and justifiably concluded that in any event it would not have applied during their lunch break. There was therefore no evidence before her to justify the conclusion that Khumalo facilitated a passenger or

colluded with Shilubane to do so. The commissioner found that Shilubane found “used papers” and that he and Khumalo had interacted with a passenger. However there was no causal nexus between the conduct of Shilubane in accepting the “used papers” and the conduct of Khumalo. The commissioner correctly rejected the evidence of the applicant as unreliable and accepted the evidence of Khumalo as being more credible. On the video Khumalo is depicted performing his duties, walking away with a colleague during their lunch break and then returning to his post – the commissioner correctly concludes that there is insufficient evidence to prove any guilt and that his version is more credible. In regard to the LAGS charge the commissioner accepted Khumalo’s version that there was no breach of the policy. The commissioner is required to determine whether there is a rule prohibiting the conduct and the video depicts Khumalo picking up a bottle and drinking from it and then walking off with it. He does so in full view of the camera and it is apparent that he could not have thought his conduct was prohibited. In any event his evidence was that the policy was never applied by the applicant. Even if the policy was applicable, his evidence was that it did not prohibit consuming confiscated LAGS as the main intent of the policy was to ensure that a passenger did not take LAGS onto the plane. In his evidence he said that “[i]f you stopped and searched a passenger you have done your job”, and he denied that there was a policy prohibiting them from drinking water from the LAGS. Ms Basson concluded that the commissioner therefore drew a conclusion based on her summary of the evidence to the effect that the applicant failed to prove this charge and that dismissal for consuming LAGS was not justified as there was no consistent application of the LAGS policy. Ms Basson conceded that the finding in respect of procedural unfairness was unreasonable but submitted that the relief awarded was consistent with a determination based only on substantive unfairness. She submitted that case law was clear that any inference from video evidence had to be based on established facts, which was not the case in this instance. In conclusion she submitted that nothing in the award indicates a failure by the commissioner to apply her mind and the award does not fall within the ambit of unreasonableness as dealt with in *Herholdt (supra)*.

[18] In regard to sanction Mr Orr submitted that the commissioner conflated consistency with the appropriateness of the sanction and furthermore did not lay any basis in evidence to substantiate her finding that the applicant did not discharge the onus of proving guilt against the applicant. In regard to her finding that the applicant should have acted immediately to confirm its suspicions, the delay in so doing was not an issue before her and was irrelevant. Procedural fairness was similarly not in issue and despite this she proceeded to make a finding and order relief in this regard.

[19] I am in agreement with Mr Orr that the award cannot stand on the review test as confirmed in *Herholdt (supra)*. The commissioner correctly summarised the evidence but her analysis falls short and this is manifest from her contradictory conclusions. This resulted in the applicant being denied a fair trial and the applicant seeks remittal of the matter to the second respondent on the grounds that the lack of evidence on the record does not enable a court to re-determine the fairness of the dismissal. On viewing the video it is apparent that the commissioner was justified in concluding that the behaviour of Khumalo and Shilubane was suspicious but her failure to investigate the issue any further depicts a manifest failure to determine a material issue. In my view this conduct results in a gross irregularity which would justify the review.

Order

[20] Therefore, I make the following order :

1. The arbitration award of the third respondent is reviewed and set aside
2. The matter is remitted to the second respondent for determination *de novo* by a commissioner other than the third respondent.
3. There is no order as to costs.

Bhoola J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

C Orr

Instructed by Mkhabela Huntley Adekeye Inc.,
Johannesburg

FIRST RESPONDENT:

N Basson

Instructed by Cheadle Thompson & Haysom Inc.,
Johannesburg

Labour Court