



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No JR 2732/2010

In the matter between:

MUSTEK LTD

Applicant

and

JOSEPH TSABADI NO

First Respondent

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

MOLOMO SYDNEY LETSOALO

Third Respondent

Heard: 9 January 2013

Delivered: 2 March 2012

Summary: The employee was dismissed for the misappropriation of company property on a polygraph test. It was argued that the commissioner failed to consider corroborative evidence. This was found to be factually misleading. The review application was dismissed.

JUDGMENT

SEEDAT AJ

Introduction

- [1] This is an application to review and set aside the award made by the first respondent (the commissioner) under case number GATW 6875-09 dated 23 August 2010 in terms of which the commissioner found the dismissal of the third respondent (the employee) on a charge of misappropriation of company property to be without a fair reason and therefore unfair. The procedural fairness of the dismissal was not in dispute.

Background

- [2] The employee was employed as a service technician by the applicant. His duties entailed repairs to laptop computers and other electronic equipment.
- [3] There are a number of sections on the premises of the applicant one of which is the bulk store where the computers and related products are kept. The other is the production area which is the section for the building of personal computers and laptops. The employee had access to both sections.
- [4] In the period between 25 March 2009 and 30 March 2009 eight laptops went missing from the bulk store and nine laptops from the production area. The computers were not found after a full search of the premises. A review of the video footage did not reveal anything untoward or suspicious.
- [5] Management then resolved that all staff who worked in the two areas during that period should be subjected to a polygraph test. The employee was included because he had come to work on that weekend. All together sixty-seven employees were polygraphed. Of these six failed the test and a second test was done. Four of the six, including the employee, failed the test again. Charges were preferred against the four and all of them were dismissed.
- [6] Three of the employees collectively referred their dispute to the second respondent while the employee did so on his own. The dismissals of the three employees were confirmed in a separate hearing before one commissioner. In the case of the employee, another commissioner, the first respondent, found that his dismissal was substantively unfair.

The grounds of review

- [7] The applicant seeks to set aside the award on multiple grounds the most important of which are:

‘The award is not justifiable in relation to the reasons given for such award, and such award is not rational in its merit or outcome. The award is simply not a determination a reasonable decision maker could arrive at;

The [commissioner] failed to properly, justifiable and reasonable (sic) determine the evidence properly before the [commissioner] (sic).’

The other grounds simply elaborated on or supplemented these reasons.

Polygraph testing

- [8] Mr Groenewald, a director of the Polygraph Institute of South Africa, testified on behalf of the applicant. He is a member of the American Polygraph Association and has many years of experience in this discipline. He explained that a polygraph is based on the principle of fear of being caught out. A number of questions are posed to the examinee and if that examinee is threatened by a question, his body will react subconsciously. His breathing will be quicker, his heart rate will increase and his blood pressure will rise. Prior to the actual test, he discusses the questions with the examinee and a dummy test without recording anything is done. Mr Groenewald testified that in 250 studies throughout the world, ‘they [?] came to the conclusion that the accuracy [of a polygraph] is 97%. If I may just add that doesn’t mean that in 3% of the cases it’s wrong, it just means that 3% of the cases give you an inconclusive result’. But surprisingly adds that in the case of the employee ‘it wasn’t inconclusive’. Mr Groenewald gives no reasons for this confounding conclusion.

- [9] In their paper ‘Polygraph Based Testing of Deception and Truthfulness: An Evaluation and Commentary’ (2001) ILJ 819, Colin Tredoux and Susan Pooley write at pages 824-5:

‘The polygraph is merely a device that measures and records electro-physiological activity... including differential blood pressure, heart rate,

respiration rate and skin conductance (subcutaneous sweating)...However, the polygraph cannot and does not measure deception or lying, or the absence of deception or lying. It merely records physiological activity, and any attempt to use it to detect deception involves drawing an *inference* from the physiological activity that it records.’ (emphasis supplied)

- [10] Our courts have approached the use of the polygraph results with much circumspection.¹ and it is now accepted that ‘the result of a properly conducted polygraph is evidence in corroboration of the employer’s evidence and may be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities’.² In *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*,³ Basson J:

‘I am in agreement that polygraph testing, as it presently stands, can do no more than show the existence or non-existence of deception...At best the polygraph test can prove that a person lies, not that he is necessarily guilty of a crime or misconduct...A polygraph test on its own cannot be used to determine the guilt of an employee. In the context of an arbitration, the results of a polygraph can be taken into account where other supporting evidence is available...’

The award

- [11] Relying on these established principles, the commissioner concluded that:

‘The only evidence at [the applicant’s] disposal that culminated in the dismissal of the [employee] was his failure to pass the polygraph test that he underwent twice. I am with the greatest of respect in agreement with the [employee’s] proposition that polygraph test results on their own are wholly insufficient to justify the dismissal of an employee. The polygraph test results could be used in conjunction with other forms of evidence to justify the dismissal of an employee. The polygraph test results on their own cannot justify the dismissal of an employee.’

¹ *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC).

² *Truworths Ltd v CCMA* (2009) 30 ILJ 677 (LC) at para 37.

³ (2010) 31 ILJ 1654 (LC) said at para 111.

[12] The applicant argues that it was not only the polygraph test results that tied the employee to the missing laptops but three vitally corroborative pieces of evidence which the commissioner had ignored:

12.1 Access to the stores and production area

The applicant argued that the employee had full access to both sections from which the laptops had disappeared. But there is nothing peculiar about the employee having unrestricted movement between the bulk store and the production area. In his evidence, Mr Carlson, the warehouse manager of the applicant, testified that access to the various sections of the warehouse is not restricted and all employees can move about freely.

12.2 Work on Saturday

It was stressed by the applicant that the employee was at work on Saturday during the relevant period when it was rare for him to come to work on a Saturday. The fact that the employee together with several others worked on that particular Saturday was nothing out of the ordinary. It was not disputed by the applicant that his presence at the workplace was at the request of his manager.

12.3 Expertise

He had expertise which was in 'great demand and it was reasonable to assume that he built up contacts for the repair and building of laptops outside his normal working environment'. While it may be generally true that the employee has specialised skills which may be useful to people outside the workplace, this statement is highly speculative. There is no evidence that the employee had cultivated a relationship with a person or persons outside work. More importantly, the applicant has not suggested how such an association would lead and did lead to the unauthorised removal of the laptops belonging to the applicant.

All these arguments are fallacious and fall to be dismissed.

[13] The second ground on which the applicant sought to assail the award was the fact that 'it appeared' that the commissioner had ignored the dismissal finding of the employee's three colleagues by another commissioner. First, there is no evidence that the award of the first commissioner was brought to the attention of the present commissioner. Secondly, even if it was so, it is fatuous to suggest that one commissioner should complaisantly endorse the findings of another commissioner where the two matters have their origins in the same incident. The rationale for the first commissioner's decision has to be analysed. There can be any number of reasons why that commissioner arrived at the conclusion he did. To argue that a commissioner is bound by the findings of another commissioner is repugnant to the rules of precedent.

[14] Of course, it is now established that the test is whether it can be said that, based on the material presented before the commissioner, his conclusion was one that a reasonable decision maker could not have made.⁴ This was confirmed by the Labour Appeal Court in *Fidelity Cash Management Service v CCMA and Others*⁵ where it held:

'Whether or not an arbitration award or decision or finding of a CCMA commissioner is reasonable must be determined objectively with due regard to all the evidence that was before the commissioner and what the issues were before him.'

In *Herholdt v Nedbank Ltd*,⁶ the court after approving its own decision in *Ellerine Holdings Ltd v CCMA and Others*⁷ and that of the Constitutional Court in *CUSA v Tao Ying Metal Industries and Others*⁸ confirmed that one of the duties of a commissioner 'is to determine the material facts and then to apply the provisions of the LRA to those facts in answering the question whether the dismissal was for a fair reason'.

[15] The only evidence adduced against the employee was the results of the polygraph test. The attempt by the applicant to overcome the requirement that

⁴ *Sidumo and Others v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC) para 110.

⁵ (2008) 29 ILJ 964 (LAC) at para (2008) 29 ILJ 964 (LAC) at para 109.

⁶ (2012) 33 ILJ 1789 (LAC) at para 39.

⁷ (2012) 33 ILJ 1789 (LAC).

⁸ (2008) 29 ILJ 2461 (CC).

there was no corroborative evidence to support the inference of guilt from a polygraph test is factually misleading. The decision of the commissioner was one that could certainly have been reached by a reasonable decision maker. Accordingly there is no basis for it to be interfered with on review.

Order

1. The application for review is dismissed with costs.

SEEDAT AJ

Acting Judge of the Labour Court

APPEARANCES

APPLICANT: Attorney AJ Posthuma

RESPONDENT: Attorney TS Magoma

LABOUR COURT