



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 2460/10

In the matter between:

IDWU obo JOSEPH MOTSWAGAE

Applicant

and

**THE NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT INDUSTRY**

First Respondent

MNCEDISI SIHLALI

Second Respondent

CAREFUL CARRIERS (PTY) LTD

Third Respondent

Heard: 07 January 2013

Delivered: 06 March 2013

Summary: Admissibility of polygraph test. Considerations when faced with mutually exclusive versions.

JUDGMENT

NAIDOO AJ

Introduction

- [1] This is an application to review and set aside an arbitration award made by the second respondent (the arbitrator) under case number GPRFBC11696/10, in terms of which the applicant's dismissal was found substantive fair. The application is opposed by the third respondent.

Background facts

- [2] The applicant commenced his employ with the third respondent on 07 September 2009 as a driver and was dismissed on 29 March 2010 having been found guilty of working, more particularly driving under the influence of alcohol. On the day of the alleged incident the applicant, while accompanied by others, drove a truck delivering fridges to certain clients of the third respondent.
- [3] The applicant referred an unfair dismissal dispute to the first respondent. His matter came before the second respondent on 01 September 2010.

Evidence led at arbitration

- [4] At arbitration the third respondent led four witnesses. The first two witnesses, S Steenkamp and W White testified primarily on the investigations they led once alerted to the applicant's alleged misconduct. The third respondent further called a one I Maliseni, an employee of the third respondent's client who accompanied the applicant on the day in question. Maliseni testified to his observations on the said day, which included witnessing the applicant consuming alcohol given to him by a customer at the latter's premises and further that the applicant appeared intoxicated while driving. Maliseni went on to state that the applicant was driving erratically, to the extent Maliseni requested the applicant drop him off before their deliveries were complete, fearing the applicant would cause an accident. A polygraphist, M Broomhead also testified on behalf of the third respondent. Broomhead testified to his experience and the instrument used in testing the applicant, the results of which indicated the applicant was deceptive when asked whether or not he consumed alcohol while on duty on the date of the alleged incident.

The applicant was the only person to testify on his behalf wherein he denied consuming alcohol or that he was intoxicated. As to why Maliseni was dropped off before their deliveries were done, the applicant stated Maliseni wanted to finish early that day. With regard to being offered alcohol by a client, the applicant denied same but alleged a client did give him a bottle of Stoney Ginger Beer, which he and the others shared.

The award

- [5] The arbitrator, in somewhat of a short analysis, accepted the third respondent's version over that of the applicant's. In his reasoning, the arbitrator relied on the fact that the applicant failed to cross examine Maliseni on crucial aspects of his testimony and further to this, the third respondent led an investigation before finding the applicant guilty of the charge put to him. On the second reason the arbitrator held the following in his award;

'The evidence of the respondent in this matter is the most probable as the respondent took steps to investigate the complaint against the applicant. Further, the respondent also relied on direct evidence of Mr. Maliseni who was present when this event took place'

Grounds of Review

- [6] Mr. Morgan, the applicant's representative appointed by the Pro Bono office was, for the first time, instructed to represent the applicant on the day this matter was heard. The applicant was initially represented by his union, IDWU, which had been deregistered by Registrar of the Department of Labour sometime in 2011. This court is grateful to Mr. Morgan for his efforts in assisting the applicant especially on such short notice.
- [7] The review application was brought on three grounds, namely the arbitrator committed a gross misconduct by;

- a) accepting the testimony of Steenkamp and White, when in fact their respective testimonies amounted to hearsay evidence and on that ground, should have been held inadmissible,
- b) accepting the evidence of the polygraphist contrary to the jurisprudence governing the admissibility of such evidence,
- c) failing to appreciate the legal principle that when faced with two mutually exclusive versions, a party on which the onus rests, must fail. Alternatively the applicant's version was more probable given the contradictions in Maliseni's testimony.

Evaluation

- [8] On the first ground, it can hardly be said that both Steenkamp and White led only hearsay evidence. It is apparent that once advised of the applicant's alleged misconduct they launched an investigation in an attempt to verify the veracity of the allegations. At arbitration it was this very investigation which both testified to, including how they became aware of the allegations. While it is correct their testimony on what clients advised them when asked whether they gave the applicant any alcohol would be construed as hearsay evidence, this was not, as I read the award, a significant part of their respective testimonies. I am therefore at odds with the argument that their entire testimony should be considered hearsay or that their testimony, as a whole should have been inadmissible on grounds of the hearsay evidence tendered. Both Steenkamp and White led direct and relevant evidence with regard to their investigation. The arbitrator cannot be faulted for relying on their respective testimonies to the extent he did.
- [9] As evident from the arbitrator's notes, the polygraphist, Broomhead, testified to his experience, including the number of tests he conducted over a specific period of time and to the instrument used. The admissibility and probative weight of a

polygraph test was discussed in *Truworths LTD v Commission for Conciliation, Mediation and Arbitration and Others*,¹ wherein the court said the following

'What appears from the foregoing is that a polygraph test on its own cannot be used to determine the guilt of an employee (see also John Grogan Workplace Law (9 ed) at 160). However, a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. At the very least, 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.'

- [10] The testimony of Broomhead satisfies the admissibility of such evidence and there is nothing in the arbitrator's award to conclude he was not alive to this test or that he accepted the third respondent's version on the sole basis of the polygraph test results.

Ms. Wessels, appearing for the third respondent suggested that the arbitrator did not take into account the evidence of Broomhead on the basis that he does not specifically mention such evidence in his analysis. While this argument seems to lend support to the applicant's argument, in that the arbitrator had before him two mutually exclusive versions, I am not convinced the arbitrator did not take into account Broomhead's evidence. The arbitrator accepts the third respondent's evidence based on its investigations and the direct testimony of Maliseni. It is well accepted that undergoing a polygraph test and the results thereof form part of an investigation. To take the view that an investigation into alleged misconduct of an employee and a polygraph test performed on the same employee are independent of each other would be irrational. Turning to the merits of this matter and in support of my view, the polygraph test was performed on 04 March 2010 while the applicant was only handed notification to attend a disciplinary enquiry on 10 March 2010

¹ (2009) 30 ILJ 677 (LC) at paragraph 37.

- [11] In accepting the evidence of Broomhead, which he was correct in doing, the arbitrator had before him the version of the applicant, weighed against the direct testimony of Maliseni and the corroborating evidence of Broomhead. The arbitrator cannot be faulted for accepting the third respondent's version on this basis.
- [12] The third ground for review is intrinsically linked to the success of the first two grounds. I say this because if the applicant is unsuccessful on the first two grounds, which I have already found him to be, it can hardly be argued that the arbitrator had two mutually exclusive versions before him and with that the third ground of review fails automatically. For the purpose of being thorough I am willing to assume the arbitrator had total disregard to Broomhead's evidence as well as that of both Steenkamp and White's testimony and only considered the applicant's version against Maliseni's version. I would nevertheless come to the same conclusion in dismissing the third argument raised. While I accept the legal principle which sees the party on whom the onus rests failing in circumstances when two mutually exclusive versions are presented, the trigger for this principle is the fact that both versions are equally plausible and probable taking into account a host of considerations.

On this point the Supreme Court of Appeal in *SFW Group Ltd and Another v Martell ET Cie and Others*,² held the following of its judgment;

'On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias,

² 2003 (1) SA 11 (SCA) at para 5.

latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the other factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it.'

Similarly the court in *National Employers General Insurance Co Ltd v Jagers*³ held:

'In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case and where there are two mutually destructive stories, he can only succeed if he satisfied the court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and forced to be rejected. In deciding whether that evidence is true or not the court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant, the plaintiff can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

- [13] The arbitrator did not accept the applicant's version for reasons that he failed to cross examine Maliseni on crucial aspects of the latter's testimony and on the basis that he failed to call the person or provide any explanation as to his failure to do so,

³ 1984 (4) SA 437 (E) at 440D-441A.

whom he alleged would confirm his version. Further to this the arbitrator found the applicant's version amounted to a bare denial of the charges put to him. There is thus clear indication that in assessing the evidence before him the arbitrator took into account certain relevant factors in accepting Maliseni's version over that of the applicant's. On the point of Maliseni contradictions, it was argued that Maliseni, at the internal hearing, said the applicant drank Reds Cider while at arbitration he said the applicant drank another type of beer. Further to this Maliseni said they delivered 6 fridges before being asked to get off, while at arbitration he said they delivered 9 fridges. I do not find these contradictions material as they do not have any direct bearing on the matter at hand nor can it be relied on to discredit Maliseni's version to the extent the applicant's version should be accepted over his.

- [14] In light of the above, the application is dismissed. On the issue of costs, it was common cause that the applicant had a cost order against him on the previous sitting of this matter. In taking into account justice and fairness, I am of the view that each party should bear their own costs.

Order

- [15] In the premises the following order is made:

- 15.1 The application to review and set aside the arbitration award under case number GPRFBC11696/10 is dismissed.
- 15.2 There is no order as to costs.

Naidoo, AJ

Acting Judge of the Labour Court

APPEARANCES

For the Applicant:

Mr Morgan

For the Third Respondent:

Ms E Wessels