



REPUBLIC OF SOUTH AFRICA

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

HELD AT BRAAMFONTEIN

JUDGEMENT

Case No JR2847/11

In the matter between:

CASHPAY MASTER SERVICES (PTY) LIMITED

Applicant

and

COMMISSIONER MICHAEL LATI MASHEGO N.O.

First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

VELAPI AMOS MATLAKENG

Third Respondent

JUDGMENT: APPLICATION FOR LEAVE TO APPEAL

CHAVOOS AJ:

- [1] This is an application for leave to appeal against a judgement delivered by this Court on 20 March 2014. In its judgement, the Court dismissed the Applicant's review application on the basis that the arbitration award of the Second Respondent was one that could certainly have been reached by a reasonable decision maker.

- [2] The Applicant has applied for leave to appeal on the following grounds:
- 2.1 The Court erred in failing to take into account the surrounding facts and circumstances, in addition to the fact that the Third Respondent failed a polygraph test;
 - 2.2 The deletion and removal of files had to have been deliberate and this deletion could not have taken place accidentally. It is contended that this Court erred in not considering the arguments made by the Applicant that the Third Respondent had a motive for the deletion of the documentation as the Third Respondent did not have a good relationship with the branch manager and certainly had a motive for ensuring the ultimate removal of the branch manager;
 - 2.3 The Third Respondent could not suggest any other individual who may have been implicated in the misconduct and therefore circumstantial and inferential factors should have been taken into account and afforded more weight. It is in the circumstances contended that there is a reasonable likelihood that another court may come to a different conclusion.
- [3] It is trite that the test to be applied in applications for leave to appeal is whether another court might reasonably come to a different conclusion.
- [4] It is clear from the Applicant's submissions that its main argument is that the First Respondent had failed to ask himself which of the two suspects were responsible for the sabotage that had taken place and that he ought to have found, on a balance of probabilities, that the Third Respondent was guilty of the misconduct by virtue of the fact that he had a motive to get rid of the branch manager Mr Van der Walt and, in perpetrating the misconduct, he would succeed with such motive.
- [5] In considering whether there were any corroborative or surrounding circumstances to establish guilt in addition to the Third Respondent having failed a polygraph test, this Court agreed with the findings of the First Respondent that, but for the Third Respondent failing the polygraph test, there were no corroborating factors put before the First Respondent

to establish guilt. It was categorically stated by the Chairman of the disciplinary hearing that the basis for him having dismissed the Third Respondent was as a result of there being only two individuals that could be implicated with the one having passed the polygraph test whilst the other having failed it. There were no other corroborating factors present save for an argument of motive which is dealt with further below.

[6] The Applicant contends that the Third Respondent had a motive for the deletion of the files and missing tally rolls to ensure the ultimate removal of the branch manager. The Second Respondent, in considering such an argument considered this to be speculative. His reasoning was considered and accepted by this Court when it found that it was indeed speculative to suggest that the Third Respondent could have pre-empted that the deletion/removal of files and tally rolls would have resulted in the branch manager being dismissed. Whilst the branch manager has subsequently been dismissed for failing to ensure that the store room in which the tally rolls were kept was locked at all times, another employee, one Tsietso Ntlehekoa had been dismissed for her role in the missing tally rolls. Save for the Third Respondent failing the polygraph, there was no evidence implicating him for removing the tally rolls.

[7] Save for the Third Respondent having failed the polygraph test and the speculative argument of motive, there was no corroborative evidence put before the Second Respondent or this Court. In fact, counsel for the Applicant had great difficulty addressing this court on the issue of corroborating factors with reference to the record and persisted with the argument of motive in addition to seeking to place reliance on the accuracy of the polygraph tests.

[8] The Applicant now seeks to introduce new facts by means of statistical data to contend that they are supportive of a finding that the Applicant is guilty of the misconduct complained of on a balance of probabilities. None of the statistics and argument was placed before the First Respondent when the matter was argued before him and such data was not part of the record of the proceedings. There is accordingly no duty on this Court to consider such statistical data prepared by a post-graduate student after the hearing of this matter.

[9] I have great sympathy for the Applicant. I accept that the deletion of the files was no accident considering that the tally rolls had also been removed. The Third Respondent and his colleague Tsietsie had failed the polygraphs dismally. The argument of motive is however speculative. In the absence of evidence other than the results of the polygraph, I am constrained by the law.

[10] The real issue is whether another court might arrive at a different conclusion. The law regarding the admissibility of polygraph tests is quite clear. Polygraphs may only be used as corroborative evidence to determine guilt. The chairman of the disciplinary hearing, when pushed to give an answer as to why the Third Respondent was dismissed, categorically stated that it was as a result of him having failed the polygraph test whilst his counterpart had passed it. I see no reason why the Labour Appeal Court would come to a different conclusion on any application of the law to the facts of the present case.

[11] For the above reasons, the application for leave to appeal stands to be dismissed.

[12] In the premise, I make the following Order:

12.1 Leave to appeal is refused.

12.2 There is no order as to costs.

Chavoos AJ

Acting Judge of the Labour Court of South Africa