



**THE LABOUR COURT OF SOUTH AFRICA,
IN JOHANNESBURG**

Not reportable

CASE NO: JR 3062/12

In the matter between:

KHULULIWE MKHABA

Applicant

Aand

**THE COMMISSION FOR
CONCILIATION, MEDIATION AND
ARBITRATION**

First Respondent

MOTLATSI PHALA (N.O.)

Second Respondent

ESKOM HOLDINGS SOC LIMITED

Third Respondent

Heard: 15 April 2015

Delivered: 21 April 2015

Summary: (Review – reasonableness – arbitrator's findings not ones that a reasonable arbitrator could not reach on the evidence – application dismissed)

JUDGMENT

LAGRANGE, J

Background

- [1] This review concerns a second arbitration award dealing with the fairness of the applicant's dismissal. In the first arbitration proceedings challenging her dismissal the applicant was successful, but that award was set aside on review and the matter was remitted back for arbitration before another Commissioner. The parties agreed that the record of the original proceedings would form part of the record of the second arbitration hearing supplemented by specific additional oral evidence. The additional oral evidence related to remedies, in particular: the trust relationship; the nature of the operations at the National control centre at Simmerpan, and whether the applicant's position still existed.
- [2] The applicant was dismissed for contravening or failing to comply with Eskom's security and safety measures, procedures, directors and applicable statutory requirements in that, as a manager who knew about the high security risk at the National control complex, she contravened Eskom's access control policy and the National Key point act by pre-signing and thereby pre-approving a blank visitor's register form for non-Eskom employees at the complex. The applicant in this matter was a Business Support Manager earning close to R 800,000 per annum at the time of her dismissal on 29 March 2009. By virtue of her position, security fell within her management portfolio. She was the chairperson of the Joint Planning Committee and was responsible for safeguarding the complex against any form or threat or potential threat, which amongst other things entailed ensuring that security threat analysis, plans and procedures were kept updated.
- [3] The essence of the charge against her was the fact that she had pre-signed a form used for visitors to the complex, which effectively granted pre-authorisation for entering the complex to a person whose details were entered on the form after it had been signed. The pre-signed form had been used to grant admission to relief cleaning workers. The essence of the applicant's defence to the charge was that she simply continued with a pre-existing practice and could not be blamed for

adopting a system that was already in place. Added to that, she pointed out that the form was just one of several measures to ensure security of access to the complex and no loss or damage had resulted from the practice

- [4] On the question of the appropriate sanction, the applicant believed that there was no evidence of an irretrievable breakdown of trust even if she was found guilty of the charge and accordingly dismissal was an inappropriate sanction.
- [5] The arbitrator was not impressed with the applicant's defence to the charge and reasoned as follows:

"6.10 It is apparent from the structure of the form that the host is expected to confirm the details of the visitor after completion of the form but not beforehand. The pre-signing of the form effectively confirms the particulars of a phantom because at the time there is no one trying to gain access.

6.10 the applicant argued that when she joined the company the practice was already in place that she was not happy with the situation. Before she cannot be punished for a practice that she inherited. Secondly the form itself did not give a visitor access because the security guard still had to identify that person.

6.11 The applicant was not happy with access control but there was no evidence to suggest that she raised the issue with her senior orders and chairperson of the committee dealing with security matters. The applicant was the custodian of the security portfolio, she had the authority to devise security measures designed to safeguard the assets of the respondent. It was incumbent upon the applicant to take steps in order to improve the situation instead of complaining that what she inherited was not ideal."

- [6] The arbitrator also found that the applicant's claim that she had inherited the pre-signing system was refuted by some of Eskom's witnesses. The arbitrator found that by advancing an argument that no loss or damage had been suffered as a result of the pre-signing practice, in circumstances where she had failed to remedy

this flaw, the applicant demonstrated a failure to appreciate the seriousness of the situation created by the = inherent risk in the practice.

- [7] Having effectively dismissed the various defences to the charge, the arbitrator considered whether or not the sanction of dismissal was appropriate. Given the seniority of her position and the nature of the complex and the misconduct she was guilty of, the arbitrator found her dismissal was appropriate. In relation to remarks by her immediate senior, Mr Rasilingwani, the fact that he said that if he had known about the issue he would have spoken to about it and that dismissal was not appropriate, the arbitrator effectively deferred to the views of the chairpersons of the disciplinary hearing and appeal proceedings, who had been tasked with deciding whether or not she should be dismissed. The arbitrator also found that there was no procedural unfairness in the process leading to her dismissal.
- [8] The applicant's grounds of review are essentially that the arbitrator failed to take account of evidence of: witnesses who could not confirm whether there was a pre-existing practice of pre-signing forms; the fact that the security system was multi-layered and had been subject to an audit by the SAPS; the report of the investigator, Mr Kok, and Rasilingwani's testimony on the appropriateness of her dismissal or what he might have done if she had come to him about the system.
- [9] Since the decisions of the SCA and LAC in ***Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others***¹ and ***Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)***² respectively, the thought process by which an arbitrator arrives at findings is not a basis for review in and of itself, but merely indicative of whether the ultimate findings are rational or not. Thus, a failure to consider material evidence will not matter unless no reasonable arbitrator could have arrived at the same ultimate findings having taken such evidence into account. This is simply another way of saying that no reasonable arbitrator could have arrived at the same

¹ (2014) 35 ILJ 943 (LAC)

² 2013 (6) SA 224 (SCA)

conclusion on all the evidence that was before the arbitrator whose decision is under review.

[10] In this instance, though the arbitrator's reasoning is a useful indication of the reasonableness of the findings made. In relation to the applicant's claim that the arbitrator must have failed to consider the evidence as to whether there was a pre-existing practice of using the pre-signed forms or not, the applicant appears to have adopted the view that it was for Eskom to establish that the practice did not exist, whereas in fact the onus fell on her to establish that it did because it was part of her defence. At best for her, the evidence she cites in favour of the pre-existence of the practice, for example that of Ms Dickerson is neutral and does not support her claim that it did exist previously. Moreover, if one has regard to the evidence of Ms Masehela, her evidence of the use of the form for admitting replacement cleaners was of a very different pre-existing practice namely, that the form would only be signed to authorise access for a particular replacement worker *after* all the details of the replacement had been captured first and authorisation would only be given for two days at a time on that basis. Similarly, Kok in fact testified that he did not establish the existence of a practice of pre-signing the forms other than that done by the applicant.

[11] Further, even though the access system was subject to a variety of controls, it does not alter the fact that for a non-Eskom employee, pre-authorisation for gaining entry as provided by the signing of the form was one of the pre-requisites. It stands to reason that by using the pre-signed forms an important layer of control did not exist. In this regard it is worth mentioning that there was evidence that several copies of the pre-signed forms had been made, which illustrates the abuse that was possible by making available even one pre-signed form. The applicant herself conceded that the practice created a risk and was wrong and did not conform with the normal authorisation procedure. She further conceded that there was no pressing need to bypass the normal procedure by using the pre-signed forms.

- [12] It is true that under cross-examination, Rasilingwani appeared to concede that a warning might have been appropriate sanction, but it is important to note that this concession was made in the context of it being assumed that the applicant had inherited a pre-existing practice of using the pre-signed forms. What clearly troubled Rasilingwani, even if there was such a pre-existing practice, is that, the applicant appeared to see nothing wrong with it. Earlier on in his testimony, he made it plain that in allowing the practice to exist she could not be trusted to do what was expected of her given the level of her responsibility she was entrusted with. Similarly, merely because Rasilingwani agreed that if the applicant was reinstated she would be placed somewhere in Eskom, that did not amount to a concession that the employer had no objection to her returning to work for it: he was simply responding to a scenario in which Eskom was compelled to accept her back.
- [13] In addition to his evidence in the original proceedings, which I have just alluded to, Rasilingwani gave further evidence of the impairment of the trust relationship based on a report from the IR Department on the applicant's poor relations with the people she had supervised in her Department. It was evident that he was concerned that these problems would be revived if she returned to Eskom. Another factor concerned allegations she made against him of allegedly holding secret meetings with her staff about her which he denied doing, though he confirmed that his working relationship with her was not good because of all the complaints from her staff about her which had caused her department to be dysfunctional. This evidence was effectively not contested.
- [14] Rasilingwani also testified that the applicant's responsibilities had been absorbed under other posts since her dismissal and her post as such no longer existed. Of course, that would only be relevant if the question of the practicability of her returning to her former post was under consideration, if her dismissal was found to be unfair
- [15] In conclusion, on the evidence available, the arbitrator's findings which led him to conclude that the applicant was guilty and that the sanction of dismissal was

appropriate in the circumstances are certainly not ones that no reasonable arbitrator could reach.

[16] I am aware that the applicant was previously successful in the original arbitration and that in launching this application she did not act frivolously. Accordingly, it would not be appropriate to award costs against her in this instance.

Order

[17] In light of the above,

17.1 the review application is dismissed, and

17.2 no order is made as to costs.



R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicant: C G Grové of Smit & Grové Attorneys

For the Third Respondent: F Boda

Instructed by: Mabuza Attorneys

LABOUR COURT