



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Not Reportable

Case no: D1159/2012

In the matter between:-

BIDAIR SERVICES (PTY) LTD

Applicant

and

COMMISSIONER P M NAIDOO N.O.

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

SATAWU obo M N HADEBE

Third Respondent

SATAWU obo E S MTHEMBU

Fourth Respondent

Heard: 17 July 2014

Delivered: 20 August 2015

Summary: Application for review of arbitration award.

JUDGMENT

HASLOP AJ

- [1] The applicant has applied to this Court for the review and setting aside of an arbitration award by the first respondent who found that the dismissal by the applicant of the third and fourth respondent employees, both represented by their trade union, was procedurally and substantively unfair and directed the applicant to reinstate them 'on the same terms and conditions no less favourable to them' [sic]. He also awarded them arrear salary.
- [2] The employer provides services at King Shaka Airport in Durban and, to that end, employed the respondent employees as cleaners.
- [3] They were dismissed following a disciplinary enquiry at which they were found guilty of the following misconduct:
- 'Stealing or attempting to steal property belonging to either an employee, company or customer
 - Being in unauthorized possession of a customer, visitor, or employee, or passenger's property
 - Dishonesty: any decision or actions or conduct that results in a breakdown of the trust relationship between Company and employee
 - Bringing the Company's name into disrepute
 - Breach of contract of employment.'
- [4] It turned out that all of these complaints related to a single incident, and a single incidence of alleged misconduct. During a search of employees coming off duty a colleague was found in possession of a pack of tissues that was airline

property. Nothing untoward was found in the possession of the respondent employees, but two more packs of tissues were seen on the floor and, when she was asked whose they were, the colleague is alleged to have pointed them out. By that stage they had already left the search area.

[5] A South African Airways official alerted the applicant to the matter by email and indicated that South African Airways no longer wished the employees concerned to be 'involved with SAA operations'. However his email was misleading, or he had been misled. In it he identified the two respondent employees with having had 'Kleenex tissues in lunchbox', which was not the case.

[6] He also mentioned that 19 of the applicant's staff had been searched and only three – the two respondent employees and their aforementioned colleague – 'found in contravention'.

[7] The employees denied that they had been responsible for removing the packs of tissues that had apparently been found on the floor by a policeman during the search process.

[8] In summary, the evidence against them, as presented by the applicant, was that:

8.1 The zip of the bag of one of them was open as she approached the search area, as if she had just removed something from it.

8.2 When asked whose tissues they were, their colleague made what the applicant's counsel referred to as a 'spontaneous exclamation' that they belonged to the respondent employees, who had just left the search area. She also pointed in their direction.

8.3 This exchange was captured on video.

8.4 Both they and the colleague subsequently underwent polygraph tests in accordance with the provisions of their employment contracts, the results of which showed that all three had been deceitful in answering the questions posed during the tests.

[9] There were several problems with this 'evidence', as pointed out by the commissioner in his award.

- [10] Firstly, the colleague did not testify at the arbitration, so her statement was hearsay. In addition, the video did not have sound, so, although it could apparently be seen that she was pointing in a particular direction, what was said could not be ascertained. In this regard, however, there seems to be no reason to doubt the direct evidence of the applicant's witness who was present, heard the exchange and testified to it. However, all that proves is that the exchange took place. The content is still hearsay and the respondent employees had no opportunity to test it.
- [11] Secondly, it seems to me that one cannot rule out, on a balance of probabilities, the employee's contention that she unzipped her bag, not to take out contraband, but in preparation for the search. The fact that the bag was unzipped is no more than relatively weak circumstantial evidence, so weak in fact, that I do not consider it necessary for me to deal in any detail with the law relating to circumstantial evidence.
- [12] Thirdly, the polygraph results, whatever their worth, were not properly entered into evidence at the arbitration. The Labour Appeal Court has dealt in detail with polygraph evidence in *DHL Supply Chain (Pty) Ltd v De Beer NO & Others*¹. That court had the following to say at para [26] of its judgment:
- ‘As alluded to earlier, in this case, no expert evidence was adduced to establish the cogency of the *concept* of a polygraph nor to establish the *technical integrity* of the process. The say-so of the operator of the device is unlikely to be of such a nature to qualify properly as expert evidence of the validity of the underlying concept or to be convincing if it is tendered because of an obvious lack of independence and a lack the appropriate credentials. In *FAWU obo Kapesi & others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 ILJ 1654 (LC) and *NUM & others v Coin Security Group (Pty) Ltd t/a Protea Coin Group* (2011) 32 ILJ 137 (LC) expert evidence was admitted about the process. It seems to me to be a serious omission to consider such evidence in the absence of expert evidence. The fact that courts have, previously, on one or another footing, admitted such evidence, cannot serve as a licence to admit it in all subsequent proceedings. Indeed, a reading of the cases where benign remarks have been made about this species of evidence does not warrant the supposition that it is an “approved type of evidence”.’

¹ (2014) 35 ILJ 2379 (LAC)

- [13] The court then summarised the issue of polygraph evidence as follows in para [31]:

‘In summary, the respectability of polygraph evidence, at best, remains an open question, and any litigant seeking to invoke it for any legitimate purpose, must, needs be, adduce expert evidence of its conceptual cogency and the accuracy of its application in every given case.’

- [14] This the applicant singularly failed to do. The effect of that failure is that there was no polygraph evidence before the arbitrator at all.

- [15] Since the arbitration constitutes a new hearing, the fact that the results were not entered into evidence at the disciplinary hearing is of less importance, except procedurally. It seems as if the chairperson was handed the results outside of the hearing itself, and not in the presence of the employees. Although it was not the specific procedural defect complained of by the employees, that seems to me to be procedurally unfair.

- [16] Consequently, the only evidence before the arbitrator connecting the respondent employees to the apparent attempted theft of the tissues was the weak circumstantial evidence of the unzipped bag and the hearsay exclamation from the colleague. This, the arbitrator found, was not sufficient to discharge the onus on the employer to prove the misconduct on a balance of probabilities. That finding is not one that no reasonable decision-maker could have reached, which is the well-established test for setting aside an award on review.

- [17] One of the applicant’s grounds of review was that the arbitrator did not advise the applicant’s representative that it would be wise to call expert polygraph evidence as well as the colleague who made the statement implicating the respondent employees.

- [18] In *Bafokeng Rasimone Platinum Mine v Commission for Conciliation, Mediation & Arbitration & Others*² this court commented at para [17] that:

‘In conclusion, it needs to be stated that whereas there is a duty on arbitrators to provide guidance and assistance to lay litigants, the question of whether such duty arose and whether failure to carry it out is an irregularity rendering

²

(2006) 27 ILJ 1499 (LC)

an award reviewable is a matter to be decided with reference to the particular circumstances of each case. Care should be taken not to straddle the fine line between legitimate intervention by an arbitrator and assistance amounting to advancing one party's case at the expense of the other. Otherwise we would be opening the floodgates allowing every lay representative who has bungled his/her case to seek its reopening by shifting the blame to the arbitrator.'...

[19] In addition, LaGrange J dealt with this issue at para [18] of his judgment in *Anglo Operations Ltd (Kriel Colliery) v Commission for Conciliation, Mediation & Arbitration & Others*³. Applying his reasoning, with which I associate myself, to this case, I come to the following conclusions:

19.1 The employer's representative never complained that he was not familiar with the arbitration process. Nothing in the record suggests that to have been the case. The person identified by the transcriber as 'Mr Nxubu' turns out to have been Mr Ncube, the employer's Industrial Relations Manager. He states in his founding affidavit that he is 'not a trained legal representative'. He does not suggest that he is unfamiliar with the requirements of proving his case.

19.2 The arbitrator was entitled to believe that a company in the position of the applicant would have the resources to ensure that it sent adequately trained representatives to arbitration proceedings.

19.3 I believe that the issue of the admissibility of polygraph evidence is sufficiently widely known, or at least, sufficiently widely discussed for the applicant's representative to have at least understood that, if he wished to rely on polygraph evidence, he would have to call a polygraph expert. It seems that polygraph testing was fairly routine in this company. There was certainly evidence that its employees were contractually obliged to submit to polygraph testing in certain circumstances. He did not even call the polygraph tester. Indeed, it seemed from the evidence that the whole issue of the failed polygraph test was something of an afterthought, even in relation to the disciplinary hearing.

19.4 It was clear at the very beginning of the case that the colleague who had implicated her two fellow employees would not be testifying for them. She had been an applicant herself but had failed to attend the proceedings. At that point a conscientious representative would have requested an adjournment and subpoenaed the colleague as a witness. In his founding affidavit, the applicant's representative claims that the applicant could not have subpoenaed the colleague because it was anticipated that she would be one of the applicants. But it must have been obvious from the outset that that position had changed.

19.5 Of course, having apparently decided not to pursue her own case, the colleague might not have testified in the applicant's favour, in which case it would have served no purpose to call her. But the applicant would have been able to establish that upfront. I do not believe that it was the arbitrator's duty to alert the applicant to this. Indeed, the applicant's representative asked in cross-examination whether the employees would be calling the colleague to testify and was met with the answer that, although they *could* call her, 'I don't know whether we are the ones who's supposed to call her or what'.

19.6 There was no reason for the arbitrator to believe that the applicant's representative did not appreciate these issues. Had he invited the applicant to bolster its evidence in this way he might well have been perceived to be partial.

[20] LaGrange J came to the following conclusion in para [19] of his judgment:

'In the circumstances, I do not think that the arbitrator ought to have assisted the applicant's representative, by pointing out to him that he might wish to lead additional evidence ... before closing the applicant's case. Consequently, the arbitrator did not commit a reviewable irregularity in the conduct of proceedings by failing to advise the applicant's representative of the need to lead (such additional) evidence.'

[21] I come to the same conclusion in this case.

[22] The effect of that conclusion is that the review application must fail on the question of substantive fairness.

- [23] As far as procedural fairness goes, the arbitrator came to the conclusion that requiring unsophisticated employees to present written argument on mitigation, and then proceeding to deliver his finding when none was forthcoming, constituted procedural unfairness. Although the employees were represented at the disciplinary hearing by a representative of their choice, I do not believe that the arbitrator's finding in that regard is one that no reasonable decision-maker could have made.
- [24] It was argued that, even if the dismissal was unfair, reinstatement was inappropriate given the response of the employer's client, South African Airways, which was not prepared to allow the employees to be 'involved with SAA operations' anymore. That response was contained in the same email that suggested that the tissues had been found in the respondent employees' lunchboxes. That was based on factually incorrect information. Section 193 of the Labour Relations Act⁴ makes reinstatement the primary remedy for a substantively unfair dismissal. Once again, the arbitrator's conclusion that that is what should happen in this case is entirely reasonable.
- [25] The applicant also brought an application for condonation in relation to its possible late filing of the record, depending upon whether the Labour Court Practice Manual applied to this record or not. The issue is of less importance given the conclusions to which I have come on the merits. Suffice it to say, therefore, that the delay was not unreasonably long in relation to the reasons given for it, those reasons were acceptable, and it cannot be said that the applicant had no prospect of success on the merits.
- [26] Applying the well-known principles set out in *Melane v Santam Insurance Co Ltd*⁵, I therefore grant condonation.
- [27] As far as the issue of costs is concerned, the reinstatement of the employees will mean that there will be an ongoing relationship between the parties. That is often considered to be a factor that militates against a costs order. I agree. I do not believe, therefore, that a costs order would be appropriate.

- [28] In the circumstances, I make the following order:

⁴ Act 66 of 1995.

⁵ 1962 (4) SA 531 (A)

1. The applicant's condonation application is granted.
2. The application for review is dismissed.
3. There is no order as to costs.

Haslop, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: W Hutchinson

Instructed by: Moodie & Robertson, Braamfontein

For the third and fourth respondents: S Mhlanga of Mhlanga Inc, Durban