IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR 1570/15

In the matter between:

ENRC MANAGEMENT (SA) (PTY) LTD	Applicant
and	
CCMA	First Respondent
COMMISSIONER DIALWA ALPHEUS MATHALA N.O.	Second Respondent
TEBOGO KHASAKE	Third Respondent

Heard: **30 November 2017**

Delivered: **3 October 2018**

JUDGMENT

WHITCHER J

[1] This is an application in terms of section 145(1) of the Labour Relations Act 66 of 1995 ("**the Act**") to review and set aside the second respondent's award that the applicant had failed to prove that the third respondent ("Khasake") was guilty of the misconduct charges preferred against him.

[2] The applicant submitted meticulous pleadings of all the evidence led at the arbitration. I shall only record summaries thereof in my analysis of the award.

[3] The applicant manages mining companies and deals with Compliance in Procurement, HR and Finance. Mr Khasake was employed in 2011 by the applicant as an Expeditor in the Procurement Department. He was dismissed on 17 September 2014, after having been found guilty at a disciplinary enquiry of the following charges:

`Charge One – Being found in unauthorised possession of property of the Company, another employee, client, or any other person(s) associated with the Company, regardless of the value of such property;

Thereby contravening a level 3 offence categorised as gross misconduct;

In that on 6 August 2014 the employee was found in possession of private and confidential documents of employees and/or the Company of which the documents fell outside the scope of the employees normal duties as Expeditor in the Procurement Department of the employer, namely:

(a) Carlo Paxton's confirmation of acting position 2014; and/or
(b) The 2013 annual salary review and performance bonus process of Marius Krige; and/or
(c) The 2013 annual performance record of Marius Krige; and/or
(d) The 2013 annual performance record of Johan Jacobs; and/or
(e) Natasha du Swart's acknowledgment of debt.

Charge Two – Failing to exercise care with the confidential information;

Thereby contravening item 8 of the ENRC Global Code of Conduct;

In that on 15 July 2014 the employee, using his official computer and credentials, copied confidential information which he was not authorised to possess, from an internal *network drive to an unsafe and unsecured non-ENRC external drive (serial number na473v3z) that was connected to the employee's computer alternatively failing to use the ENRC's information technology system sensibly, for work purposes, and in accordance with local laws and workplace customs;*

Thereby contravening item 14 of the ENRC Global Code of Conduct.

In that on 15 July 2014 the employee, using his official computer and credentials, copied confidential information that he was not authorised to possess, from an internal network drive to an unsafe and unsecured non-ENRC external hard-drive (serial number na473v3z), that was connected to the employee's computer while the possession and/or copying of the confidential data was not or could not reasonably had been for work purposes.

Charge Three – Conflict of interest in improperly using ENRC confidential information for personal benefit and placing personal interest ahead of the employee's duty of loyalty and confidentiality;

Thereby contravening item 4 of the ENRC Global Code of Conduct;

In that on 15 July 2015 the employee accessed and/or read a document on his official computer, which document contained the names, salaries and bonuses for January 2012, which document was also included in an email message distributed to the Company employees on 5 August 2015, from a gmail account named"sizwem.mayaba@googlemail.com".

Charge Four – Attaching non-ENRC hardware to ENRC's systems without permission;

Thereby contravening item 14 of the ENRC global Code of Conduct;

In that on during or about 14 February 2014 to 15 July 2014 the employee connected a removable Seagate external device *with serial number na473v3z without obtaining prior permission from his manager and/or information Technology officer.'*

[4] At the arbitration the applicant led the following testimony by Morne Crouse ("**Crouse**").

[5] On 5 August 2014 an email was distributed to company employees from a Gmail account named *sizwem.mayaba@googlemail.com*. The email contained an attachment comprising sensitive information pertaining to salary increases and bonuses of the applicant's employees.

[6] Crouse was mandated to investigate the leakage of confidential information.

[7] When the I.T department ran network reports, Mr Khasake, based on the logon details used to gain access to the system and documents, was identified as an employee who had transferred such information.

[8] A query was run for the period of 1 June 2014 to the end of July 2014 on Mr Khasake's computer. The query request was put into the system by the head of IT Clint Adonis. The generated report revealed that Mr Khasake, based on logon details used to access the system, had copied files on 6 June, 1, 3, 7, 15 and 29 July 2014. On 15 July 2014, Mr Khasake copied 144 files from his computer to a Seagate removable device. The files that were copied on 15 July 2014 were confidential documents which Mr Khasake was not authorised to access. The serial number of the removable device used was recorded on the system as na473v3z.

[9] Crouse explained that the *"Seagate expansion USB device"* was a hard drive. A USB cable connects that drive to the computer. It has to be plugged into the USB port of the computer itself. Crouse also explained that the term *"expansion"* was a term that the manufacturer used to describe the drive. The word *"removable"* means that it is a removable drive. It is not a fixed drive which is part and parcel of the computer itself.

[10] The report also revealed that on 15 July 2014 at 16:34 Mr Khasake accessed a document on his official computer containing the names, salaries and

bonuses for 2012. This document was subsequently included in an anonymous email that was distributed to company employees (see Charge 3).

[11] Crouse testified that the report had to be reprinted on 18 August 2014 because he had made notes on the copy that he had been given during his visit to Mr Khasake on 6 August 2014.

]12] On 6 August 2014, Crouse, Basil the security manager and C. Paxton, Mr Khasake's manager, paid an unannounced visit to Mr Khasake's office. Crouse wanted to take a forensic image of Mr Khasake's work computer. Mr Khasake gave him permission to do so and whilst busy with the task, Basil asked Mr Khasake if they could search his bag. He consented thereto and a folder was removed from his bag. Whilst Basil was paging through it, he came across confidential documents (cited in charge 1) which Khasake was not permitted to be in possession of.

[13] The confidential documents obtained from Mr Khasake's bag were removed from his possession and a list thereof was typed up and presented to him for his signature to confirm that the documents had been found in his possession. Five items were listed and a notation was made by Basil to the following effect: *All the above was found in Tebogo's bag after he gave permission to search the bag. I found it.*

[14] A further notation was made by Crouse to the following effect: *Tebogo refused to sign confirmation of above. Explained to us that he did not put it in his bag.*

[15] During the office visit, it was also discovered that Mr Khasake was in possession of a Seagate device. Mr Khasake permitted Crouse to check what was on that hard drive, but halfway through the imaging, Mr Khasake changed his mind. He claimed that there was personal information on the device.

[16] What was of importance to Crouse was that when he connected the Seagate device it captured the same serial number of the drive which coincided with the serial number that was detected by the network. It was the same device that had been used to copy the confidential files on 15 July 2014.

[17] Furthermore the report generated from the exercise depicted the following: *C:\Users\MornayC\Desktop\Tebogo\TebogoExHHD.* It also depicted: *Tebogo external HHD.*

[18] On my analysis of the above testimony, the essence of the evidence against Mr Khasake was that an external hard drive or USB device with a particular serial number (na473v3z) and make (Seagate) was found in his possession on 16 August 2014 and that activity logs from the employer's servers revealed that a device with identical details had been mounted to the company's digital infrastructure on 15 July 2014 by someone using Mr Khasake's log-on details to transfer to the external device confidential company data.

[19] Some of the information copied to the USB device was later emailed to persons in the company from what is in all likelihood a fake email address.

[20] Mr Khasake did not dispute that he was in possession of a device with serial number na473v3z on 16 August 2014. He also admitted that he did not permit its inspection when he was found with it to verify whether, as indicated by the company's server activity logs, the files in question had been copied to the external device.

[21] All of the above was compelling enough evidence to transfer to Mr Khasake the duty to rebut the clear inference that he was indeed responsible for the irregular transfer of the confidential information from the company's computer to the USB device found in his possession.

[22] Mr Khasake attempted to meet this burden by saying that he was gifted the device by another employee, one Laeticia, after 15 July 2014, meaning that he could not have been the person copying the files. Importantly, this was ***his*** defense and yet he failed to call Laeticia to corroborate this claim without supplying any reason for his failure to provide ready confirmation of his version.

[23] Mr Khasake however did not accuse Laeticia of being the person who copied the confidential information to the USB device. Mr Khasake raised a classic and yet vague conspiracy defense. Someone framed him to secure his dismissal. This conspiracy however is technically confused. It relies on the

ability of the employer to doctor the activity logs of its own servers. It also lacks a motive. An even more important lack is the cooperation of Mr Khasake, during the investigation, the internal hearing and the CCMA arbitration, in permitting or providing the results of a proper inspection of the USB device in question which he retained after it was discovered. If indeed the activity logs provided by the company falsely showed that this USB device had been used to copy the files in question, Mr Khasake would have, between the inspection of his bags and the two hearings, have permitted the inspection of the device.

[24] If we add to this the fact that the applicant found hard copies in his bag on 16 August 2014 of some of the documents that were irregularly copied, then Mr Khasake's averment that these too were planted on him during the search becomes even more implausible.

[25] A reasonable commissioner owes litigants a rational and serious consideration of the evidence. The commissioner in this matter, in my view, failed to do so when he accepted Mr Khasake's thin conspiracy theory, boldly describing the applicant's actions during the search of Mr Khasake's bag as mafia-like. The commissioner seems to have fixated on the applicant producing an inventory of the items found in Mr Khasake's bag for him to sign during the encounter on 14 August 2014. Ignoring all the manifest improbabilities in Mr Khasake's version, the commissioner accepted that this meant that the applicant had indeed planted the hard copies in Mr Khasake's bag to have so speedily had an inventory ready for him to sign. What this ignores is that the inspection of the bag and the USB device was an obviously protracted affair with Mr Khasake at first allowing the USB device to be checked for the files in question, only withdrawing permission, on his own version, when he realized it could take several hours. A reasonable decision-maker would have preferred the more plausible explanation that the inventory was a product of investigatory efficiency rather than mafia-tendencies on the applicant's part.

[26] A reasonable decision-maker could not possibly have arrived at the same result as the commissioner in this case. The commissioner made no attempt

to carry out a proper and objective analysis of the evidence. He uncritically accepted Mr Khasake's hopelessly unreliable evidence which contained a litany of inconsistencies and material improbabilities. He also failed to consider that material parts of Mr Khasake's version were never put to Crouse for a response and failed to recognize Mr Khasake's demonstration as a meaningless and designed to confuse.

[27] I conclude that a proper case has been made out for setting aside the award of the commissioner in this case and replacing it with a finding that the dismissal of Mr Khasake was for a fair reason.

[28] There is one more matter. The record was filed late. I find no reason not to condone such in light of my findings on the merits of the review and the fact that the applicant provided a reasonable explanation for the delay.

Order

[29] I make the following order:

(1) The award issued by the second respondent on 2 August 2015 under CCMA case number GAJB 23180-14 is reviewed and set aside, and substituted with an award that the dismissal of the third respondent was substantively and procedurally fair.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv WJ Hutchinson, instructed by Fluxmans Inc

For the Third Respondent: Adv S Sebola, instructed by Nchupetsang Attorneys