

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR2601/17

In the matter between:

BIDVEST PROTEA COIN (PTY) LTD

Applicant

and

MBONGENI ERNEST NGCOBO

First Respondent

MAPUTLE MOHLALA

Second Respondent

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Third Respondent

Heard: 11 January 2019

Delivered: 22 May 2019

JUDGMENT

NTSHEBE, AJ

Introduction

[1] This is a review application in terms of Section 145 of the Labour Relations Act¹ (LRA). The applicant seeks to have the arbitration award issued by the third respondent in favour of the first respondent reviewed and set aside.

¹ Act 66 of 1995 as amended.

Background

- [2] The applicant is involved in the security services industry, rendering security services to its clients. The first respondent was employed by the applicant as an Assistant Security Officer.
- [3] In terms of the employment contract between the parties, the first respondent consented to undergo a polygraph or truth verification test as and when requested to do so by the applicant. The applicant conducts these tests randomly and on any selected employees.
- [4] In May 2017, the first respondent was randomly selected to undergo the test. On the scheduled day of testing, the first respondent was provided with the consent form to complete so that the testing could be conducted. He refused to complete the consent form in spite of being given an opportunity to consult his attorney. As a result, he was charged in a disciplinary hearing with breaching his employment contract and subsequently dismissed. He duly referred an unfair dismissal dispute to the third respondent which was arbitrated by the second respondent (arbitrator).
- [5] The arbitrator, in his award, found that the consent form provided the first respondent with a choice to refuse to undergo the polygraph test. The arbitrator found that the first respondent, by virtue of his employment contract, was being coerced by the applicant to undergo the polygraph test. Therefore, according to the arbitrator, the first respondent had not refused to undergo the test in terms of his employment contract as it compelled him to do so but only refused to sign the consent form allowing the test to be conducted.
- [6] The arbitrator held that the second respondent had not refused to undergo the polygraph test on 11 May 2017 and thus his dismissal was substantively unfair and reinstated the first respondent.

- [7] The applicant attacks the award on the basis that the decision reached by the commissioner is one that a reasonable decision-maker could not reach.² In essence, the applicant's grounds for review are that the arbitrator ignored the fact that the first respondent had consented to undergo polygraph tests in terms of his employment contract and that his refusal to sign the consent form amounted to breach of his contractual obligations.
- [8] Furthermore, the arbitrator ignored evidence before him regarding the purpose of the consent form. Evidence led was that polygraph testing cannot be conducted until a person to be tested has signed the consent form, consenting to the testing being conducted.
- [9] I agree that the arbitrator ignored the applicant's evidence and/or did not properly weigh it up. This is because the applicant's main witness had testified that the examiner could not conduct the testing without the consent form being signed as it is a prerequisite. The purpose of the consent form was to allow the examiner to amongst others, put sensors on one's body. This had been explained to the first respondent.
- [10] The arbitrator also ignored the fact that the first respondent had also in his employment contract, consented to undergo polygraph tests. I fail to understand on what basis the arbitrator found that the first respondent was coerced into being tested by the very same employment contract he had voluntarily entered into.
- [11] In *Shoprite Checkers v Commission for Conciliation, Mediation and Arbitration and others*³ Myburgh AJ held that where a Commissioner misdirects him or herself by ignoring material facts, the award will be reviewable if the distorting effect of this misdirection was to render the result of the award unreasonable.

² *Sidumo v Rustenburg Platinum Mines Ltd and Others* [2007] 12 BLLR 1097 (CC).

³ [2015] 10 BLLR 1052 (LC)

[12] The arbitrator ignored material evidence of the applicant's witnesses. As a result of the above, the second respondent reached a decision a reasonable arbitrator could not have reached on the body of evidence that was before him.

[13] In the interest of fairness, I do not believe that it will be fair to mulct the first respondent with a cost order.

[14] In the result, the following order is made:

Order

1. The arbitration award issued by the second respondent is reviewed and set aside;
2. The arbitration award is substituted with an order that the third respondent's dismissal was fair;
3. There is no order as to costs.

T. Ntshebe

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Ms S Lancaster of Lancaster Kungoane Attorneys

For the Respondent: Ms M Mitti of MM Mitti Attorneys