

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO. ☒ YES
- (2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES
- (3) REVISED.

12/05/2020
DATE

[Signature]
SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 1335/14

In the matter between:

**CROSSROADS DISTRIBUTION (PTY) LTD T/A
SKYNET WORLDWIDE EXPRESS**

Applicant

and

**NATIONAL BARGAINING COUNCIL FOR THE ROAD
FREIGHT AND LOGISTICS INDUSTRY**

First Respondent

MATLATSI PHALA

Second Respondent

**SATAWU OBO CHARLES MAZIBUKO &
ABRAHAM MAKUBELA**

Third Respondent

Heard: 16 January 2020

Delivered: 12 May 2020

"By Email"

Summary: Review application in terms of Sections 145 and 158(1)(g) of the Labour Relations Act 66 of 1995 as amended to review and set aside the arbitration award issued by the Second Respondent acting under auspices of the First Respondent handed down on the 18th June 2014 under Case Number GPRFBC28155. Application opposed – no opposing affidavit filed by the Third

Respondent who also failed to appear. Application for review granted – no order as to costs.

JUDGMENT

RAMDAW, AJ

Background as per Applicant's Heads of Argument

- [1] The Applicant is Crossroads Distribution (Pty) Ltd trading as Skynet Worldwide Express, a courier company that primarily deals with the import and export of low and high value goods.
- [2] The individual Third Respondents' ('Mazibuko and Makubela') are ex-employees of the Applicant who both worked at the Applicant's bond store. Mazibuko was employed from November 2001 as an imports clerk and was dismissed on 21 September 2013. Makubela began his employment with the Applicant on 1 March 2005 as a general worker and was dismissed on 18 September 2013.
- [3] On commencement of employment with the Applicant, Mazibuko and Makubela, like all employees were required to enter into contracts of employment with the Applicant. All of these contracts contained the following clause, or a clause similar thereto:

"Polygraph Testing

You hereby agree to submit to polygraph testing. The decision as to whether or not to conduct these tests rests solely with the employer, provided that testing will be conducted by competent, qualified persons and only tests recognised as reliable will be used.

Refusal to submit to polygraph tests in the circumstances set out above will be regarded as a serious breach of this contract, which may lead to disciplinary action and possible termination of the contract."

or

"You hereby acknowledge that you are aware that polygraph tests have been made compulsory in all insurance claims involving hijacks, theft, losses and fraud. You hereby agree to submit to any polygraph test should such test be required for insurance claims or other purposes deemed to be reasonable....you accept that refusal to submit to a polygraph test could render you liable for appropriate disciplinary action, which may include dismissal."

- [4] During the course of Mazibuko and Makubela's employment a situation arose whereby high value goods were changed to low value goods which resulted in no tax being payable by the particular client to the detriment of the South African Revenue Services.
- [5] A subsequent investigation into the matter ensued whereby all of the employees at the bond store were requested to undergo a polygraph test as per their employment contracts. All of the bond stores employees consented to undergoing the polygraph test except for four employees, who refused to undergo the test.
- [6] Meetings were then held with the bond store employees in order to explain the purpose of undergoing the polygraph test in order to aid the investigation. Four meetings were held as well as meetings with the individual employees who refused to undergo the polygraph tests.
- [7] The Applicant held individual meetings with both Mazibuko and Makhubela on 27 August 2013 in an attempt to convince the employees to undergo the polygraph tests, as per their employment contracts, and alluded to the consequences of failure to do so.

- [8] Brent Walker, the Applicant's National Manager, explained to both Mazibuko and Makubela that the purpose of using the polygraph test was to narrow the scope of the investigation and reiterated that the results of such tests would not be considered by itself in determining whether or not the employees who failed the polygraph test were to be dismissed. Furthermore, it was explained that Mazibuko and Makubela were contractually obligated to take such a polygraph test when requested to do so. Despite these attempts Mazibuko and Makubela refused to take the polygraph tests resulting in the following charges being levelled against them:

"The Charges

You explicitly or implicitly contributed to or supported or associated with the dishonesty whereby import documentation and manifests as indicated below reflected false values and/or items pertaining to imports during the period 26/01/2013 to 28/05/2013 in that you failed to assist and/or co-operate with the company in its investigation by refusing to participate in taking a polygraph.

Alternatively

Failing to assist and/or co-operate with the company in its investigation into unauthorised amendments to import documentation during the period 26/01/2013 to 28/05/2013 in that you refused to take a polygraph test."

- [9] The Applicant then held disciplinary enquiries for all four Employees, including Mazibuko and Makubela, who refused to undergo the requested polygraph tests. All of the employees were found guilty and dismissed on the alternative charge due to their failure to co-operate with the company in conducting its investigation. Mazibuko and Makubela referred an unfair dismissal dispute to the First Respondent in term of section 191(1) of the Labour Relations Act¹ (LRA) whilst the other two did not contest their dismissal.

¹ No. 66 of 1995, as amended.

- [10] The referrals of Mazibuko and Makubela were referred to the First Respondent separately, however, the parties later agreed that the matters would be consolidated and heard as one matter.

Arbitration Proceedings

- [11] The Arbitration was held under the auspices of the First Respondent on 8 May 2014 and 04 June 2014 when it was finalised. The award was handed down on 8 June 2014 and was received by the Applicant on 18 June 2014.
- [12] During the proceedings Mazibuko testified that as a shop steward he refused to undergo the polygraph test because he became aware that the company was using polygraph tests to dismiss employees.
- [13] Mazibuko further confirmed that he was in attendance at the meeting held on 27 August 2013 where he was informed that he was under a contractual obligation to undergo the polygraph test. Mazibuko demanded to be shown the contract which stated this and an unsigned copy of the contract was given. Mazibuko stated that he, as a result of it being unsigned, was not bound to such an agreement. It was common cause that the legal duty to undergo a polygraph test was a standard clause in all of the Applicant's contracts of employment.
- [14] Mazibuko also stated that he could overhear any conversation which took place in the office but did not pick up on any related to criminal activities. Mazibuko further stated that the ambit of his occupation primarily concerned low value goods and he had no business in accessing information concerning high value goods on the systems. Mazibuko reaffirmed that despite the statement of Mr Walker that he will still be able to conduct himself as an employee of the Applicant and the trust has not broken down due to this incident.
- [15] Makubela also contended that he was not contractually obligated to undergo the polygraph test. Makubela informed the Applicant that the polygraph test made him ill in the past and was likely to do so again if he undergoes the test.

- [16] Makubela, as a general worker, dealt with the picking up and delivering of freights from the airlines to the bond store and from the bond store to the head office in Isando. He did not deal with high or low value goods and did not have access to any of the systems.
- [17] In the arbitration proceedings Mr Walker testified on behalf of the Applicant and stated that the use of the polygraph test was merely an investigative tool and will not be the only consideration in determining whether to dismiss an employee. The employees were warned repeatedly in meetings that the failure to undergo a polygraph test may lead to a disciplinary hearing and possibly dismissal.
- [18] Walker stated that Mazibuko, in particular, could assist with the investigation as he worked in close proximity of the other workers and may have overheard something.
- [19] Walker contended that the sanction of dismissal was warranted because of the seriousness of the incident which may have led to SARS, as the main taxing authority, revoking the Applicant's licence. If this would have occurred numerous employees would have lost their jobs. The conduct of the employees had a negative impact on both the business and the employment relationship.
- [20] The Applicant then called upon Kuhn, the imports manager, to testify. Kuhn assured that other people had failed the test and were not dismissed but only moved to another department. Furthermore, that the employment contracts were not signed by Mazibuko and Makubela, however, both of them signed an addendum on 8 February 2007.
- [21] The Second respondent, in making his award, made the following findings:
- 21.1 That Clause 10.2 of Mazibuko and Makubela's contracts of employment, which provided that the refusal to undergo a polygraph test is a serious breach of the contract which may in turn lead to disciplinary action or

termination of the employment contract, was 'opaque'.² This is because the first part of the clause suggested that such failure to take the polygraph test will amount to a material breach of the employment contract and thus a repudiation, entitling the Applicant to terminate the contract.

21.2 It was held that the second part of the clause seems to suggest refusal as a form of misconduct and suggests the procedure as envisaged in the LRA to determine the fairness, or otherwise of the termination.³

[22] The applicant's ground of review is that "*the facts amount to misconduct or gross irregularity or impropriety under Section 145(2)(a)(i) to (ii) and Section 145(2)(b) of the LRA, or (2), that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under Section 145(2)(a)(ii) of the Act.*"⁴

Test for review

[23] This test for review has been cemented in the case of *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commissioner for Conciliation, Mediation and Arbitration and Others*⁵, wherein it was held that there must be a ground listed in section 145(2) of the LRA present, and the presence of such ground must render the award unreasonable. It is therefore a two pronged test.

[24] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁶, the Constitutional Court held that Section 145 of the LRA is "suffused" by the constitutional standard of reasonableness and that the test for unreasonableness is: "*is the decision reached by a commissioner one that a reasonable decision-maker could not reach?*"

² Award paragraph 6.11.

³ Award paragraph 6.12.

⁴ Paragraph 53 of the pleadings.

⁵ [2014] 1 BLLR 20 (LAC).

⁶ [2007] 12 BLLR 1097 (CC) at paragraphs 88, 104, 105 and 110.

- [25] Furthermore in reaching such a decision, the Labour Court in *Sasko (Pty) Ltd v Buthelezi and Others*⁷, provided that a commissioner cannot ignore material evidence in a review, as such ignorance will amount to misconduct justifying the setting aside of a previous award.
- [26] In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*⁸, the Court reaffirmed the *Sidumo* test as a stringent test allowing the setting aside of the award where the outcome is entirely disconnected from the evidence or is unsupported by evidence or involves speculation by the commissioner.

Applicant's contention

- [27] The Second Respondent committed a serious misconduct in relation to his duties as an arbitrator by ignoring the fact that Mazibuko, even though he only dealt with low value goods, had access to the same systems where high value goods were also dealt with. There was also no reason why Makubela could not have gained access to the system and thereby could have assisted in establishing the identity of the perpetrators. Both Mazibuko and Makubela had the ability and means to gain access to the system or collaborate with someone who could access the system.
- [28] The Second Respondent also misconstrued the evidence as to the size of the bond store in reaching his conclusion. The Second respondent stated that the bond office was 160 square meters in area. The bond office is in reality only 20 square meters.⁹ This was a material piece of evidence that was misconstrued by the Second Respondent. It would therefore be reasonable to assume that employees working in a 20 square meter open plan office, would be able to hear activities or conversations of other employees within the office. The information which some employees may have heard in the office would be pivotal in investigating the perpetrators in this incident. The polygraph tests

⁷ [1997] 12 BLLR 1639 (LC) at 1639.

⁸ [2013] 11 BLLR 1074 (SCA) at para 13.

⁹ Award paragraph 6.7

would be the investigative tool to be used to determine which employees to question. This was a material piece of evidence which was not considered by the commissioner.

- [29] Furthermore, the contractual undertaking by Mazibuko and Makubela to undergo a polygraph test when requested to do so was a material issue which was not adequately considered by the commissioner.¹⁰
- [30] The materiality of the term was confirmed in *Nyathi v Special Investigating Unit*¹¹, where the Court held that it was a material term of the contract to submit to a polygraph test and that the employee, by refusing to do so, had repudiated a material term of the contract entitling the employer to terminate the contract.
- [31] Accordingly, the term requiring them to undergo a polygraph test was a material term of both Mazibuko and Makubela's contracts which placed an obligation on them to undergo such a test when requested to do so. The failure to adequately consider the importance of this, displays the Commissioner's oversight while considering the facts.
- [32] The Commissioner committed misconduct in respect of his duties as a Commissioner as he failed to reach a logical decision related to the evidence presented before him. The Commissioner failed to give recognition to Mr Walker's testimony that the polygraph test itself would be used as an investigative tool to assist in determining who the perpetrators were. The Commissioner regarded this as a 'fishing exercise' requiring the Applicant to provide evidence proving a suspicion that Mazibuko and Makubela could possibly be the perpetrators.¹²
- [33] The polygraph test was one of the first steps in such an investigation and was necessary, but not conclusive, in determining who the possible perpetrators may be. This investigation was not given the opportunity to proceed due to four

¹⁰ Award paragraphs 6.3 – 6.9.

¹¹ (2011) 32 ILJ 2991 (LC) at para 39.

¹² Award paragraph 6.16.

employees refusing to undergo a polygraph test. This was not reasonably considered by the Commissioner. Furthermore there was evidence lead in the arbitration that Mazibuko and Makubela were both able to access the systems necessary to perpetrate the offence. This coupled with the reluctance of Mazibuko and Makubela to undergo the polygraph test is in itself suspicious. This would in itself disprove the Commissioner's own conclusion, further proving that the Commissioner's decision was not a reasonable one based on the evidence presented before him. Gross irregularity is regarded as being a process standard.¹³

- [34] In *Herholdt* as stated above the Court held that for a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by Section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result.¹⁴
- [35] Commissioners commit latent gross irregularities where they misconceive the nature of the inquiry or arrive at an unreasonable result.¹⁵ Errors of fact will give rise to a gross irregularity if such errors cause the Commissioner to misconceive the nature of the inquiry or produces an unreasonable outcome.
- [36] Failure to consider relevant facts constitutes in itself a gross irregularity, where the applicant is able to prove that it resulted in an unreasonable outcome.¹⁶
- [37] The Second respondent committed such a gross irregularity in the performance of his duties as an arbitrator by reaching a conclusion that is not supported by facts and evidence presented by the parties. There was no evidence presented to support the conclusion that Mazibuko and Makubela's dismissals were substantively unfair.

¹³ *Telcordia Technologies Inc. v Telkom SA Ltd* 2017 SA 266 (SCA)

¹⁴ *Herholdt* (supra id fn 8). Also see: *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LAC) at paras 32-33

¹⁵ Supra Note 5

¹⁶ See also: *SA Transport and Allied Workers Union on behalf of Zimu and Group 4 Securicor Services (SA) (Pty) Ltd* (2009) 30 ILJ 1674 (CCMA).

- [38] The Second Respondent committed a gross irregularity in the performance of his duties by placing considerable weight on the CCMA decision of *Sosibo and Others v Ceramic Tile Market*¹⁷ requiring a '*reasonable suspicion that the employee was involved in the incident*' prior to requesting an employee to undergo a polygraph test. Mazibuko and Makubela were not only contractually obligated to undergo such a test, but would do so to assist the Applicant in furthering its investigation of the incident. This must be distinguished from *Sosibo* whereby there was no indication of a contractual undertaking to undergo such a polygraph test. Furthermore, these tests were actually conducted in *Sosibo* and the admissibility of this evidence was disputed.¹⁸
- [39] As alluded to earlier, there was an error of fact as to the size of the office. This placed doubt as to the importance of conducting polygraph tests. The office is clearly of a size to come to reach a reasonable inference that employees may have heard discussions relating to the incident. This led to a gross irregularity and produced an unreasonable outcome.
- [40] The Second Respondent has failed to consider Mr Walker's testimony as to the purpose of conducting the polygraph tests. The purpose, as alluded to earlier, is to narrow the investigation to assist in identifying the perpetrator. Evidence was tendered by Mr Walker to this extent. The Second Respondent failed to consider this in deciding that the polygraph tests were not used to pursue possible perpetrators. It is evident that such tests were one of the steps employed to identify and pursue possible perpetrators, which the Applicant was entitled to do in terms of the employees' contracts of employment.
- [41] The Second Respondent failed to consider how accessible the system is to the vast majority of the employees at the bond store. This further substantiating the need to conduct the polygraph tests to narrow the search. This was not considered by the Second respondent and contributed to the unreasonable decision reached by him.

¹⁷ (2001) 22 ILJ 811 (CCMA).

¹⁸ *Id* fn 6.

- [42] The conclusion reached by the Second respondent is not one a reasonable decision maker would have reached upon proper consideration of the material before him. The Second Respondent thus failed to properly apply his mind to the material properly put before him and took into account irrelevant evidence to come to his conclusion.

Analysis

- [43] The Applicant lodged and prosecuted this review application in accordance with the prescribed time limits. The failure by the Third Respondent to file any answering affidavit and/or heads of arguments leave the Court with one version, that of the Applicant. The Applicant's attorneys filed concise Heads of Arguments on the Third Respondent failing to attend court, despite a proper notice of set down being served. In applying the various tests with regards to review applications, in particular the *Sidumo* test where the Constitutional Court (per NAVSA J) set the test for unreasonableness as follows: "*Is the decision reached by the Commissioner that a reasonable decision-maker could not reach?*"¹⁹
- [44] The fundamentals of the *Sidumo* test has been met and so has the components of reasonableness been met showing that the arbitration award is not a decision of a reasonable decision-maker.
- [45] In *Herholdt*²⁰ the Supreme Court of Appeal explained how a reviewing court should go about deciding a review based on the *Sidumo* test and what the Applicant must establish.
- [46] Both the employees Mazibuko and Makabela represented by the Third Respondent herein were under a contractual obligation to take a polygraph test and they refused to do so despite numerous requests. Disciplinary action was taken against four employees who refused to take the polygraph test including

¹⁹ Id fn 6

²⁰ Id fn 8.

these two. All four were found guilty and were dismissed whilst only the two represented by the Third Respondent lodged a referral to the First Respondent's Bargaining Council.

[47] The Second Respondent misdirected the nature of the enquiry given the evidence that the requirement to undergo polygraph testing was part of an ongoing investigation involving fraud in the bond store. Both the employees could have contributed to this investigation and assisted the Applicant in its investigation whilst they simply refused to co-operate.

[48] In *DHL Supply Chain (Pty) Ltd v De Beer NO and Others*²¹ the Labour Appeal Court upheld an award in which the Commissioner found the dismissal of employees based on their having "failed" a polygraph test remains an important tool at the workplace to detect deception provided that it is properly administered. A point blank refusal to undergo one whilst it is part of the disciplinary code and/or conditions of employment is cause for concern.

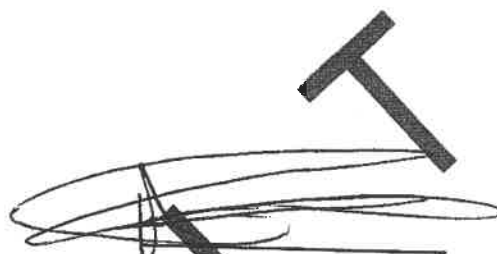
[49] I accordingly find that the conclusions of the Second Respondent is so unreasonable that no reasonable decision-maker could come to the conclusions he arrived at based on the evidence before him. This matter goes back to July 2014 and an appropriate order will be a finding that the dismissal of Mr Charles Mazibuko and Mr Abraham Makubela represented by the Third Respondent was both procedurally and substantively fair. There should be no order as to costs despite the non-filing by the Third Respondent of any answering affidavits, heads of arguments or their non-appearance at the hearing of this matter.

[50] In the premises, the following order is made:

Order:

²⁸ [2014] 9 BLLR 860 (LAC)

1. The arbitration award issued by the Second respondent acting under auspices of the First Respondent under Case Number GPR FBC 28155 dated 8 June 2014 is hereby reviewed and set aside.
2. The dismissal of Mr Charles Mazibuko and Mr Abraham Makubela represented by the Third Respondent is found to be both procedurally and substantively fair.
3. There is no order as to costs.



A. Ramdaw
Acting Judge of the Labour Court of South Africa

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Appearances:

For the Applicant: Ms M Chenia of CDH Attorneys

For the Respondent: No appearance

LABOUR COURT