



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR731/24

In the matter between:

SECURIFORCE CC

Applicant

and

LETSEMA MOKOENA N.O. (As Commissioner)

First Respondent

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

Second Respondent

JOHN MOKITLANE NTHOLENG

Third Respondent

Heard: 18 March 2025

Delivered: 21 August 2025

JUDGMENT

ERASMUS, AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award issued by the First Respondent (the Commissioner) under case number FSBF4824-23, dated 22 March 2024, in terms of which the Commissioner found that the dismissal of the Third Respondent, Mr Ntholeng (Ntholeng), was procedurally fair but substantively unfair and awarded him compensation equal to two months' remuneration.

[2] The application is in terms of section 145 of the Labour Relations Act¹ (LRA) and came before this Court on an unopposed basis.

Factual background

[3] The Applicant's principal business consists of providing security services to its clients.

[4] Ntholeng was employed by the Applicant as a security officer, and at the time of his dismissal, he was placed at the site of the Applicant's client, Shoprite Checkers.

[5] Prior to his employment, Ntholeng underwent training and passed the integrity test (polygraph), qualifying him to be placed in high-risk areas. He signed a contract of employment which provided, amongst others, as follows:

'The Employee acknowledges that the Employer's business is vulnerable to numerous and various forms of dishonest and unlawful acts which, while extremely difficult to detect, are capable of prejudicing the viability of the business and the employment security of all employees, and in the light of the afore-going, the Employee expressly agrees to:

...

15.2.2 Submit him/herself to polygraph examinations to be conducted by any person designated by the Employer, wherever the Employer deems it necessary. A refusal to undertake the polygraph test would allow the

¹ Act 66 of 1995, as amended.

Employer to draw a negative inference and would amount to a material breach of this contract of employment which will result in disciplinary action, including dismissal.

15.2.3 The Employee acknowledges that the Employer's operational requirements are such that it is necessary that an Employee must be completely trustworthy in the Security Industry. Should the Employee who has been subjected to a polygraph examination not pass the examination to the satisfaction of a person properly qualified to conduct such examination, the Employee shall forthwith be deemed to be incapable of continuing to perform work at the Employer. The parties shall then enter into a consultative process where the parties shall strive to find suitable alternative employment where the employee is not required to perform work of a security nature. If this is not possible, then an incapacity process will be followed. The Employee hereby irrevocably agrees that failure of a polygraph examination is a substantively fair reason as an operational requirement to embark upon an incapacity procedure due to the impossibility of the employee to perform to the required standard set in terms of the contract of employment. Should the employee fail to pass the Polygraph examination, the employee agree that he/she will be held responsible for payment of the test on the employees account and cannot hold the company liable for same.' (*sic*)

[6] In terms of his contract of employment, Ntholeng also agreed to the terms and conditions of the Applicant and its client. He furthermore agreed to be subjected to polygraph testing every six months and to be removed from the client's site if the test results show deception.

[7] It was common cause that the client requested its own staff, Ntholeng and the other security officers to undergo polygraph testing due to the client having experienced stock shrinkages. It was further common cause that Ntholeng had failed the polygraph test and was removed from the client's premises.

[8] A facilitator was appointed by the Applicant to conduct the proceedings to determine whether there were alternatives to the termination of his employment. At

the end of the process, the facilitator recommended that Ntholeng's employment be terminated due to incapacity.

[9] The Applicant's Retail Manager testified at arbitration, and so did the polygraph examiner. The polygraph examiner found that Ntholeng was not truthful when he answered some of the questions posed to him during the examination.

[10] Ntholeng was then provided with an opportunity to make a statement, setting out the reason(s) why he thought he had failed the test. Ntholeng made a statement, and in doing so, he indicated that he had received money from customers in return for ensuring that their bicycles or their wheelbarrows with beer in them were not stolen. He further confirmed that, in receiving this money from the customers, he ensured that the manager did not see him receiving the money, as he knew he was not supposed to receive money from the customers and that he had received approximately R180 during the preceding six months. He also admitted to seeing that the damaged stock, which was on the pallets, would disappear and believed that the staff were consuming the stock.

[11] The Commissioner found that the results of the polygraph test were valid on a balance of probabilities. He also found that Ntholeng was not dismissed for failing the test, but was removed from the client's premises in terms of the contract between the Applicant and its client. The Applicant then attempted to find alternative employment for Ntholeng, which it failed to do, and he was dismissed.

[12] The Commissioner found the dismissal to have been substantively unfair only due to Ntholeng having been dismissed for incapacity as opposed to the Applicant's operational requirements, which operational requirement dismissal would have entitled him to severance pay. He awarded him two months' salary as compensation.

Grounds of review

[13] The Applicant contends that the Commissioner misconstrued the nature of the enquiry in that he failed to take into account the evidence that was before him, particularly the evidence of the facilitator and in respect of the contract, which

indicated that Ntholeng was dismissed for incapacity and not for operational requirements.

[14] The Commissioner stated in his award: *'I must admit, it was the first time I heard of this concept "incapacity due to operational requirements". I nevertheless allowed myself the opportunity to listen to evidence so that I am able to determine the real nature of the dispute and resolve it'*.

[15] In analysing the evidence presented, the Commissioner accepted that Ntholeng was not dismissed for failing the polygraph test, but was removed from the client's premises after failing the polygraph, as per the agreement between the client and the Applicant, whereafter it sought alternative employment for Ntholeng, to no avail.

[16] The Commissioner then set out that he had juxtaposed the schedules of the LRA that deal with dismissals for poor work performance and ill health incapacity and found that those schedules did not apply to the facts at hand. He was then left with the concept of dismissal for operational requirements.

[17] The Commissioner continued to explain that he was intrigued and found it peculiar that the Applicant had opted for so-called *'incapacity due to operational requirements'*. This caused the Commissioner to then juxtapose the facts of the matter with the process and requirements in terms of an operational requirement dismissal. He concluded by stating that he is *'not able to reconcile incapacity and operational requirements in one process'* and that in his view *'something has to give'*.

[18] He concluded that the Applicant had conflated the issues and had failed to consider operational requirements as the appropriate route.

[19] In dealing with the dispute, the Commissioner was very much alive to the fact that the Applicant and its witness insisted that it was a dismissal for incapacity as provided for in the contract of employment. However, the Applicant seems to steer away from the same contract which also provides that the employee acknowledged that *'the Employer's operational requirements are such that it is necessary that an*

Employee must be completely trustworthy' and that the polygraph and subsequent process will be followed and potentially result in dismissal in the event of the employee failing the polygraph test.

[20] The Applicant's insistence that it was a dismissal for reasons relating to incapacity does not mean that the Commissioner misconstrued the nature of the enquiry. He clearly dealt with the Applicant's contention and the evidence before him and found that it should have been an operational requirement dismissal and not an ill health dismissal. It cannot be said that the Commissioner misconstrued the nature of the enquiry and that his conduct in this respect constitutes a reviewable irregularity.

[21] Unlike the contention of the Applicant that Ntholeng was no longer capable of performing his duties, it is clear that he was capable and that it was the Applicant's operational requirements that caused him to be removed from the client's site and his services being terminated when no alternative employment could be found for him.

[22] The Applicant's own witness, who facilitated Ntholeng's exit from the Applicant, stated in her report that Ntholeng failed to meet the *'operational requirement of passing polygraph tests'*, which had been *'put in place to protect the interests of the Company'*.

[23] The Applicant further contended that the compensation awarded was extremely excessive, considering that Ntholeng's services were terminated due to incapacity and that the Commissioner gave no justification for an award of two months' salary as compensation. These contentions hold no water.

[24] In his award, the Commissioner stated that it would not be possible to order reinstatement or re-employment of a security guard who had failed a polygraph test and where there are no alternatives available for him within the Applicant. He then stated that he took into consideration that Ntholeng was employed on a permanent basis rather than a contract basis, which he commended the Applicant for. It was also common cause that Ntholeng had been in the Applicant's employment for eight

years before being dismissed. The Commissioner then indicated that, had Ntholeng been dismissed for operational requirements, which is the reason for his dismissal, he would have been entitled to severance pay. He therefore found it just and equitable to award Ntholeng two months' remuneration.

[25] The Commissioner's award cannot be faulted. He provided justification for his award of compensation, which certainly does not fall outside the bounds of reasonableness.

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

Order

1. The application is dismissed.
2. There is no order as to costs.

L. Erasmus

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: T Moyo of Snyman Attorneys

For the Third Respondent: No appearance