THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 903/23

In the matter between:

JERICHO KHOZA **Applicant**

and

SPAR NORTH RAND DISTRIBUTION **First Respondent**

COMMISSIONER BONGE MASOTE N.O. **Second Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION- BENONI **Third Respondent**

Heard: 22 April 2025

Delivered: 19 June 2025

JUDGMENT

DJAJE, AJ

<u>Introduction</u>

[1] This is an application in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award by the second respondent

[1] Act 66 of 1995, as amended.

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declaring the dismissal of the applicant substantively fair. The applicant seeks an order to have the dismissal declared unfair and an order for retrospective reinstatement and appropriate compensation. In the alternative, the applicant seeks an order remitting the matter to the third respondent for arbitration to commence *de novo* before another commissioner other than the second respondent.

[2] The applicant was dismissed by the first respondent on 18 January 2023 after he was found guilty of:

> '- Unauthorised removal of company property that he removed a roll of 5000 Master Chef Pots stickers and gave them to a colleague;
>
> - Breach of trust for having removed and given the said stickers to a colleague with the intention of the said employee to benefit unduly;
>
> - Gross Negligence by failing to carry out duties diligently in giving the colleague the stickers to benefit improperly and unlawfully and being dishonest to cover up gross misconduct.'

[3] The applicant was employed by the first respondent as Promotions Clerk and had been in the employ of the first respondent since 1 March 2016. On 8 November 2022, the first respondent was running a Master Chef Pots promotion where a customer would qualify for one sticker with the grocery purchase of R100.00. There was an anonymous tip-off received by the Human Resources Department of the first respondent that the applicant had stolen stickers used for Master Chef Pots and had given them to a colleague named Harold Cave. During investigations, Cave deposed to an affidavit admitting that the applicant did give him the 5000 stickers, but the applicant denied the allegations. As a result of the dispute between the applicant and Cave, a polygraph test was conducted on the applicant and Cave with their consent. The results showed no deception detected with Cave and deception detected with the applicant.

[4] The respondent's witnesses, Robert Williams and Joe Matlou, testified before the second respondent at the CCMA that Cave admitted during the hearing that the applicant gave him the stickers. Frank Olivier was the Polygrapher

and testified that the polygraph tests showed that the applicant showed deception and that Cave did not. Cave was subpoenaed for the arbitration but did not attend.

[5] The applicant's evidence was that he never gave Cave any stickers, and further that the stock did not indicate any shortage of stickers or any claim from the retailers that they were short of stickers. He did confirm that Cave asked him for stickers, but he did not give them to him as it was not allowed.

Findings by the commissioner

[6] The commissioner found that the evidence against the applicant was overwhelming, corroborative, and based on oral, documentary and digital recordings. In addition, as the applicant was responsible for distributing marketing materials and overseeing the promotion campaign, it made sense why Cave would approach him for stickers. As such, there was no reason for Cave to lie about the applicant giving him the stickers. The commissioner went on to reject the defences raised by the applicant of criticising the respondent for not calling an Edward, who was mentioned by Cave, and not presenting evidence of the cameras in Cave's office. The finding was also based on the results of the polygraph test that Cave was truthful, and the applicant was not.

Law and evaluation

[7] The Constitutional Court outlined the test for review *in Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] as follows:

> '… Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'

[8] Later on, the same Court in *Duncanmec (Pty) Ltd v Gaylard NO and Others*[3] expounded on the test as follows:

[2] (2007) 28 ILJ 2405 (CC) at para 110.
[3] (2018) 39 ILJ 2633 (CC) at paras 42-43.

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> '[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
>
> [43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[9] The Labour Appeal Court in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*[4] held that:

> 'The test enunciated by the Constitutional Court in Sidumo for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision maker could not, in all the circumstances, have reached.'

[10] The applicant's argument is that the commissioner, in arriving at his finding, relied on hearsay evidence which was admitted in breach of the Law of Evidence Amendment Act[5]. In that, Cave did not testify at the arbitration proceedings, and reliance on his evidence amounted to hearsay evidence. It was argued that hearsay evidence can only be admitted if agreed to by the parties or if it is in the interests of justice to do so in accordance with section 3(1)(c) of the Law of Evidence Amendment Act. The applicant's case is that at

[4] (2008) 29 ILJ 964 (LAC) at para 100.
[5] Act 45 of 1988.

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the commencement of the arbitration, there was an objection on the absence of Cave at the arbitration as they sought to cross-examine him.

[11] The other ground of review by the applicant is the reliance on the polygraph results by the commissioner to dismiss the applicant. It was submitted that the respondent failed to comply with Rule 37A of the CCMA Rules which provides that: '*A party intending to call an expert witness must give the other party seven (7) days' notice together with a summary of why the person is regarded to be an expert, the proposed evidence of the witness and the documents the expert will rely on*'. The applicant submitted that in this matter, there was no notice in terms of Rule 37A, and as such, a breach of the Rules occurred. This resulted in no expert evidence being accepted at the arbitration.

[12] In contention, the respondent argued that at the arbitration, the applicant's representative did not object to the admission of the hearsay evidence of Cave but only expressed difficulty in not being able to cross-examine him. Accordingly, the respondent's case is that failure to object to the admission of hearsay evidence is implied consent to the admission thereof. In substantiation, the respondent relied on the case of *Ithala Development Finance Corporation Ltd v Zulu and Others*[6] (*Ithala*) that '… *when a witness tenders inadmissible evidence, the party against whom the evidence is tendered must immediately object to the tendering of such testimony. Failure to object would imply that there is an agreement as to the admission of such evidence*'.

[13] Section 3 of the Law of Evidence Amendment Act provides that:

> '(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless –
>
> (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;

[6] (D615/2020) [2023] ZALCD 13 (24 July 2023) at para 10.

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(b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or

(c) the court, having regard to –

(i) the nature of the proceedings;
(ii) the nature of the evidence;
(iii) the purpose for which the evidence is tendered;
(iv) the probative value of the evidence;
(v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
(vi) any prejudice to a party which the admission of such evidence might entail; and
(vii) any other factor which should in the opinion of the court be taken into account,

is of the opinion that such evidence should be admitted in the interests of justice.

(2) The provisions of subsection (1) shall not render admissible any evidence which is inadmissible on any ground other than that such evidence is hearsay evidence.

(3) Hearsay evidence may be provisionally admitted in terms of subsection (1) (b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in terms of paragraph (a) of subsection (1) or is admitted by the court in terms of paragraph (c) of that subsection.

(4) For the purposes of this section –

'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

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'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution.'

[14] The Supreme Court of Appeal in *S v Ndhlovu and Others*[7] stated the following about hearsay evidence and the right to cross-examination:

> 'The Bill of Rights does not guarantee an entitlement to subject all evidence to cross-examination. What it contains is the right (subject to limitation in terms of s 36) to 'challenge evidence'. Where that evidence is hearsay, the right entails that the accused is entitled to resist its admission and to scrutinise its probative value, including its reliability. …'

[15] The Court in *Ndhlovu*[8] went on further to state that:

> 'Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.'

[16] In *Exxaro Coal (Pty) Ltd v Chipane*[9] (*Exxaro*), the court held that:

> 'Those safeguards and precautions, duly adapted, also apply to the application of section 3 of the LEAA in civil proceedings. Because of the similarities between civil proceedings and arbitration proceedings, the, overwhelmingly, adversarial nature of arbitration proceedings under the LRA, and the overarching requirement that such proceedings be fair, those safeguards and precautions, duly adapted, apply equally to arbitration proceedings to ensure fairness and serve as an invaluable guide for commissioners and arbitrators when confronted with hearsay evidence, and, particularly, when applying section 3 of the LEAA. Adapted they would include the following: (1) Section 3(1)(c) of the LEAA is not a licence for the wholesale admission of hearsay evidence in the proceedings; (2) in applying

[7] 2002 (6) SA 305 (SCA) at para 24.
[8] Ibid at para 18.
[9] (2019) 40 ILJ 2485 (LAC) at para 24.

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the section the commissioner must be careful to ensure that fairness is not compromised; (3) a commissioner is to be alert to the introduction of hearsay evidence and ought not to remain passive in that regard; (4) a party must as early as possible in the proceedings make known its intention to rely on hearsay evidence so that the other party is able to reasonably appreciate the evidentiary ambit, or challenge, that he/she or it is facing. To ensure compliance, a commissioner should at the outset require parties to indicate such an intention; (5) the commissioner must explain to the parties the significance of the provisions of section 3 of the LEAA, or of the alternative, fair standard and procedure adopted by the commissioner to consider the admission of the evidence; (6) the commissioner must timeously rule on the admission of the hearsay evidence and the ruling on admissibility should not be made for the first time at the end of the arbitration, or in the closing argument, or in the award. The point at which a ruling on the admissibility of evidence is made is crucial to ensure fairness in a criminal trial. The same ought to be true for an arbitration conducted in an adversarial fashion because fairness to both parties is paramount.'

[17] In this matter, Cave was subpoenaed as a witness, and he did not attend the proceedings to testify. At the commencement of the proceedings, the applicant raised a concern about the absence of Cave at the arbitration as he would not have the opportunity to cross-examine him. The respondent was allowed to present a recording of what transpired during the investigations. The recording was allowed by the commissioner, but it was not transcribed, and as such, it is not clear from the record what was said in the recording and by whom. The respondent further submitted into evidence the statement by Cave made during the investigations, where he implicates the applicant as the person who gave him the 5000 stickers.

[18] The witnesses for the respondent, Ms Mokoma, Mr Matlou and Mr Williams, testified about what they were told by Cave that it was the applicant who gave him the stickers. They also testified that they acted as a result of the anonymous tip-off received about the applicant and Cave.

[19] The general rule is that hearsay evidence is inadmissible unless consented to by the parties or provisionally accepted if it will be confirmed or it's in the

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interest of justice to have it admitted. In this matter, there is no express consent for the hearsay evidence by Cave to be admitted, nor was there any submission made that he would testify at a later stage in the arbitration proceedings. In his findings, the commissioner relied on the anonymous tip-off and the version of Cave which was contained in the statement he made at the disciplinary hearing. The commissioner went on to find that Cave had no reason to lie about the applicant. This was not evidence at the arbitration; it was contained in the statement made during the disciplinary hearing. Arbitration proceedings are *de novo* proceedings, and the commissioner's finding must account for the evidence led at those proceedings.

[20] The commissioner did not make any ruling as to the admissibility of the hearsay evidence led, and the basis for such a ruling does not appear in the record of the proceedings. This hearsay evidence was the basis of the award by the commissioner to conclude that the applicant's dismissal was substantively fair.

[21] It is also important to examine whether the commissioner had relied entirely on the hearsay evidence.

[22] A commissioner is expected to be of assistance to the litigants where it is clear that hearsay evidence is to be led during arbitration proceedings. The statement made by the applicant about the difficulty to cross-examine Cave was an indication of an objection to the leading of such evidence. The commissioner was obliged to deal with the hearsay evidence with or without an objection, as the general rule is that hearsay evidence is inadmissible, subject to the provisions of section 3 of the Law of Evidence Amendment Act. Failure to state the basis of relying on hearsay evidence during the proceedings was prejudicial to the applicant. This Court is in no better position to deal with such hearsay evidence as well.

[23] The applicant argued that the reliance on the polygraph results was flawed as there was no notice served in terms of Rule 37A of the CCMA Rules. The purpose of an expert notice is for the other party to know of the expert evidence and be able to counter it if necessary. In this matter, the record of

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proceedings indicates that the representative of the applicant and the applicant were aware of the evidence of Mr Olivier in relation to the polygraph results. There was no objection thereto or a request for a postponement to deal with the evidence. The applicant has not stated if any prejudice was suffered because of the failure to serve a notice to call the expert.

[24] The applicant's case is that the polygraph results should not have been relied upon by the commissioner, as they are inconclusive. In *DHL Supply Chain (Pty) Ltd v De Beer NO and Others*[10], the Labour Appeal Court dealt with polygraph testing and held that:

> 'An example of a polygraph being used in a misconduct case is *Truworths Ltd v CCMA & others* (2009) 30 ILJ 677 (LC). In a review, the award was set aside for a myriad of irregularities, including a failure to have regard to all the evidence, amongst which was evidence of polygraph tests (at para 38). Further, in that judgment, relying on the observations of Grogan A in *Sosibo & others v Ceramic Tile Market* (2001) 22 ILJ 677 (CCMA), it was held at para 37 that a polygraph is useless on its own but may be 'taken into account' together with 'other supporting evidence'. The dictum goes on to say that a polygraph can serve as corroboration of other evidence.'

[25] In *Food and Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River*[11], the court held that:

> 'I am in agreement with the submission that while there may be a serious debate about the reliability of the outcome of the test (see the discussion hereinbelow) it has never been argued that the outcome of a polygraph test can serve as a substitute for a hearing. In fact, as is clear from the decisions, a polygraph on its own can never be conclusive proof of the guilt of an employee. At best the polygraph could be used as part of the investigation process to determine whether or not a further investigation into the conduct of a particular individual is warranted.'

[10] (2014) 35 ILJ 2379 (LAC) (*DHL Supply Chain)* at para 29.
[11] (2010) 31 ILJ 1654 (LC) at para 90. See also: *DHL Supply Chain supra.*

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[26] The court expressed doubts in the reliability of polygraph testing in *Truworths v Commission for Conciliation, Mediation and Arbitration and Others*[12] as follows:

> 'What appears from the aforegoing is that a polygraph test on its own cannot be used to determine the guilt of an employee (see also John Grogan Workplace Law (9 ed) at 160). However, a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. At the very least, the result of a properly conducted polygraph is evidence in corroboration of the employer's evidence and may be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities. The mere fact that an employee, however, refuses to undergo a polygraph is not in itself sufficient to substantiate an employee's guilt.'

[27] The commissioner herein relied on the polygraph results together with the hearsay evidence, which, as a general rule, is inadmissible.

[28] The court in *Exxaro* expanded further on fairness as follows:

> '[34] Even though this is not a criminal matter, the principles to be derived from that decision are salient and consonant with fairness in arbitration proceedings where section 3 of the LEAA is invoked. Both the employer and the employee ought to be able to appreciate the evidentiary ambit they (respectively) face, so that they are able to conduct their cases accordingly. Late rulings on admissibility of evidence are of no assistance to the parties and result in unfairness that cannot be undone on review, or on appeal.
>
> [35] While this approach appears to introduce some measure of formality one would rather have that than unfairness. Some formality is not anathema to arbitration proceedings in the CCMA. Section 138 does not ban all formality – it merely requires "minimal formality". In deciding on how much formality is permissible one must be careful not to sacrifice fairness on the altar of informality. Section 138 not only

12 (2009) 30 ILJ 677 (LC) at para 37.

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> requires minimal formality, but also requires fairness and speed. An equitable balance must be struck so that none of these pre-eminent values are sacrificed.'

[29] The failure by the commissioner to rule on the admissibility of the hearsay evidence impacted his finding at the end of the proceedings, which, as stated in *Exxaro,* is a sacrifice to fairness. This is the main reason why this matter should be remitted back to the third respondent to start *de novo* before another commissioner to be properly dealt with on the issue of the admissibility of the hearsay evidence.

[30] Consequently, I make the following order:

<u>Order</u>

1. The award is reviewed and set aside.
2. The matter is referred back to the third respondent for hearing *de novo* before a different commissioner.
3. There is no order as to costs.

J T Djaje

Acting Judge of the Labour Court of South Africa

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<u>Appearances:</u>

For the Applicant:

Instructed by:

For the Respondents:

Instructed by:

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