IN THE LABOUR COURT OF SOUTH AFRICA

(HELD IN BRAAMFONTEIN)

Case no: JR1347-2007

In the matter between:

NATIONAL UNION OF MINEWORKERS **1ST APPLICANT**

PETER MASHA **2ND APPLICANT**
V

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **1ST RESPONDENT**

MTUTUZELI NGQELENI **2ND RESPONDENT**
TAVISTOCK COLLIERY A DIVISION OF XSTRATA SOUTH AFRICA (PTY) LTD **3RD RESPONDENT**

JUDGMENT

AC BASSON, J

[1] On 21 October 2010, I gave an order with brief (ex-tempore) reasons dismissing the application for review with no order as to costs. Here are my written reasons for my order.

[2] This is an application to review and set aside an award in terms of which the

2nd applicant's dismissal was found to be substantively and procedurally fair. The applicant contends that his dismissal was procedurally and substantively unfair

[3] The applicant (Mr. Peter Masha) was charged and dismissed for being in unauthorized possession of company property. The incident which led to his dismissal took place on 16 October 2006 at approximately 12 am. A disciplinary hearing was held on 6 November 2006 and the applicant was found guilty and dismissed.

[4] The applicant raises 12 grounds for review. In brief it is, *inter alia,* stated that the arbitrator failed to investigate the authenticity of the allegations; he failed to take into account the applicant's version and failed to give reasons for rejecting the applicant's version. It was also submitted that the arbitrator placed the burden of proof on the applicant to explain why Mr. Ben Mohlaole would lie. The commissioner also failed to apply her mind and consequently reached conclusions that are speculative. It is also alleged that the commissioner failed to investigate the authenticity of the polygraph test and that she had failed to investigate as to whether or not the respondent did in fact lost the property.

The award

[5] The commissioner summarized the evidence and more in particular referred to the evidence of Mahloale who had testified that he had met the applicant on

the day in question and that the applicant was carrying a sample bag . The sample bag tore apart and certain items fell on the ground. Mahloale later reported the incident to his superiors.

[6] It was the applicant's case that he had in fact alerted his Head of Department of the fact that some workers were allegedly stealing bonuses. He, however, admitted that he had met Mahlaole and that he was carrying a sample bag. He, however, denied that the sample bag tore apart and that the contents fell on the floor.

[7] The commissioner duly considered whether or not the applicant was guilty as charged and in doing so the commissioner set out the two versions that were presented to the arbitration. After having evaluating the evidence of Mahloale, the commissioner came to the conclusion that, in light of the fact that the applicant could not provide a reasonable explanation as to why Mahlaole would lie, that the balance of probabilities favoured the respondent. The commissioner also pointed out that there were no evidence that the two (Mahloale and the applicant) did not get along nor of the fact that Mahloale was linked to an alleged bonus scheme fraud. The commissioner also took into account that Mahloale had undergone a polygraph and that he was found to be truthful.

Evaluation

[8] The applicant submits, *inter alia*, that the commissioner in effect placed a

burden of proof on him to explain why Mahlaole would lie about the applicant and in doing so the commissioner committed misconduct. If regard is had to the award and the reconstructed record it is clear that the commissioner did not place a burden on the applicant. The commissioner merely held that the applicant could not provide an explanation as to why Mahlaole would lie about what had happened. This is not placing a burden of proof on the applicant. Moreover, this observation is not reviewable and merely serves to indicate that the commissioner was of the view that there was no obvious reason as to why Mahlaole would implicate the applicant.

[9] In respect of the polygraph issue. It is accepted that a polygraph cannot be taken into account on its own. It is, however, accepted that it has some probative value and that the results of such a test may be taken into account in assessing

the fairness of a dismissal.[1] In my view the results may also be taken into account as one of the factors in assessing the credibility of a witness and in assessing the probabilities. the fairness of a dismissal.[2] In my view the results may also be taken into account as one of the factors in assessing the credibility of a witness and in assessing the probabilities.

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1 Truworths Ltd v Commission for Conciliation, Mediation & Arbitration & Others (2009) 30 ILJ 677 (LC): [36] It is accepted that a polygraph is a controversial method of gathering information and that opinion is divided on the probative value of the results probative value of the result. Professor Grogan in Sosibo & others v Ceramic Tile Market (2001) 22 ILJ 811 (CCMA); [2001] 5 BALR 518 (CCMA) sets out the divergent approaches in respect of polygraphs.

'Following the Mahlangu case, attitudes to polygraph test evidence have followed the several and divergent lines:

(1) Some cases have held the view that "our courts do not accept polygraph tests as reliable and admissible. Nor do they draw an adverse inference if an accused employee refuses to undergo such a test'. See Kroutz v Distillers Corporation Ltd (1999) 8 CCMA 8.8.16 case no KN25613; Malgas v Stadium Security Management (1999) 8 CCMA 10.8.1 GA21495; E Themba & R Luthuli v National Trading Company CCMA (1998) KN16887; F

(2) Polygraph test evidence is not admissible as evidence if there was no evidence on the qualifications of the polygraphist, and if he or she was not called to give evidence. See Sterns Jewellers v SACCAWU (1997) 1 CCMA 7.3.12 case no NP144; Mudley v Beacon Sweets & Chocolates (1998) 7 CCMA 8.13.3 KN10527; Spoornet - Johannesburg v G SARHWU obo J S Tshukudu (1997) 6 ARB 2.12.1 GAAR002861; Chad Boonzaaier v HICOR Ltd CCMA (1999) WE18745;

(3) Although admissible as expert evidence, polygraph results standing alone cannot prove guilt. See the arbitration Metro Rail v SATAWU obo Makhubele (2000) 9 ARB 8.8.3 GAAR003888; NUMSA obo H Masuku v Marthinusen & Coutts (1998) 7 CCMA 2.9.1 (case no MP5036); Ndlovu v Chapelat Industries (Pty) Ltd (1999) 8 ARB 8.8.19 GAAR003528; but see Govender and Chetty v Container Services CCMA (1997) KN4881 where the dismissal was upheld even though there was no direct evidence linking the applicants to the theft. The commissioner found the inference of the polygraph test to be "overwhelming'.

(4) Where there is other supporting evidence, polygraph evidence may be taken into account. See CWIU obo Frank v Druggist Distributors (Pty) Ltd t/a Heynes Mathew (1998) 7 CCMA 8.8.19 case no WE10734.'

[37] 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 J 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." See also: *Food & Allied Workers Union on behalf of Kapesi & Others v Premier Foods Ltd t/a Blue Ribbon Salt River* (2010) 31 *ILJ* 1654 (LC):

2 Truworths Ltd v Commission for Conciliation, Mediation & Arbitration & Others

The applicant also argued that Mahlaole had changed his version and argued that the commissioner should have taken this into account. There is no indication from the award that the commissioner did not take this into account. What is clear from the award is the fact that the commissioner was alive to the fact that Mahlaole did not initially report the incident as he was scared. This explanation, coupled with the fact that Mahlaole had passed the polygraph can be taken into account by the commissioner in arriving at a decision. Put differently, the fact that the commissioner took these factors into account is not unreasonable. In fact, if the award is considered it appears that the commissioner was alive to the evidence led before the arbitration and properly considered the probabilities before arriving at a decision.

The applicant also argues that the award is reviewable because the

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commissioner did not investigate whether or not the respondent did in fact lost the alleged property. There is no merit in this argument. In this regard the evidence of Ms. Busisiwe Gloria Petros was that items to the value of approximately R 14 000.00 was lost. There is no evidence on the record to gainsay this.

The applicant also criticizes the finding of the commissioner that more than one person could have been involved in the theft. The applicant also took issue with the conclusion by the commissioner that the items in the possession of the applicant were definitely stolen goods. I have considered the commissioner's reasoning. What the commissioner apparently concluded was that, in light of the demonstration that was done during the arbitration, that only a few of the items that were stolen could fit in the bag. It was probably on this basis that the commissioner then was of the view that more than one person could have been involved in the theft. What is in my view relevant here is the fact that the commissioner was confronted with two mutually destructive versions. The one version was that the applicant had these items in the sample bag and that these items are stored in the storeroom. The applicant's version was that it was his PPE (personal protective equipment). The commissioner, as was required to do, then proceeded to evaluate and consider the probabilities. She came to the conclusion that she was persuaded that the evidence of Mahloale was to be preferred. I am in agreement with the respondent's submission that this conclusion is not reviewable. It is certainly in light of the evidence not an unreasonable conclusion.

The other complaint of the applicant was the fact that there was a plot against him because he had uncovered a bonus fraud scheme. If the award is perused it is clear that the commissioner was completely alive to this allegation. The commissioner, however, found that there was no evidence before her to substantiate this allegation. I am in agreement with her conclusion. The evidence tendered by the applicant in this regard is extremely sketchy making it impossible for the commissioner to come to any meaningful conclusions.

In conclusion, if the award is read in light of the record, I am of the view that it cannot be said that the decision arrived at is unreasonable. It is clear that the commissioner properly evaluated the evidence and that she properly considered the probabilities. This is not a decision that a reasonable decision maker could not have come to. In the event the review is dismissed. I make no order as to costs.

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AC BASSON, J

Date of proceedings and order: 21 October 2010
Date of written reasons: 9 November 2010

For the applicant: Mr Makinta of ES Makinta Attorneys.
For the respondent: Adv AN Snider. Instructed by Webber Wentzel Attorneys.