IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Not Reportable **Case No: C592/2007**

In the matter between:

NATIONAL UNION OF MINEWORKERS	First Applicant
THUNDEZA ELIZABETH MDEBUKA	Second Applicant
TSAKANI METILENI	Third Applicant

and

COIN SECURITY GROUP (PTY) LTD t/a PROTEA COIN GROUP	Respondent

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RULING ON COSTS

STEENKAMP J:

1. This matter was set down for trial on 14 July 2010. Before the matter was called, the parties informed me that they had agreed to settle the merits and requested me to make the settlement an order of court. The parties had further agreed to argue the question of costs and to ask the court to determine that issue in light of the settlement.

2. As agreed by the parties, I made the following order:

2.1 The respondent shall pay to the second and third applicants one year's salary at the rate they were paid when dismissed during May 2007. Such payments shall be subject to tax and net amount shall be paid into the account of the applicants' attorneys, Cheadle Thompson & Haysom, by no later than 31 July 2010. The applicants' attorneys shall furnish the respondent's attorneys with the details of their account in writing.

2.2 The respondent shall re-employ the third applicant from 1 August 2010 as a security officer, Grade A, at the rate applicable to such officers at one of the following venues: Pretoria, Bedfordview or Midrand. It is recorded that, if at all possible, she shall be re-employed in the magisterial district of Pretoria.

2.3 Such re-employment shall-

2.3.1 not encompass any obligation on the part of the third applicant to be subjected to a pre or post-employment polygraph test;

2.3.2 carry the seniority of her employment from 1 August 2005 to 25 May 2007.

2.4 The question of costs shall be decided after consideration of argument on that issue.

3. The parties proceeded to argue the issue of costs. This ruling, therefore, only addresses the issue of costs, without the benefit of any evidence.

4. The applicants submit that, having achieved substantial success in the litigation, they are entitled to their costs. The respondent submits that each party should pay its own costs.

5. The background to the dispute is that the two individual applicants were dismissed for operational requirements after undergoing polygraph tests. The two employees had allegedly failed the polygraph test. It was a term and condition of their employment that they would undergo polygraph tests at the request of either the respondent or Alexkor Limited, the entity at whose premises the respondent placed them to do security duties.

APPLICABLE LEGAL PRINCIPLES CONCERNING COSTS

Costs in Labour Court cases of unfair dismissal

6. The Labour Court has a discretion in terms of s 162 of the LRA to make an order for costs according to the requirements of the law and fairness.

7. Mr *Kahanovitz*, who appeared for the applicants together with Mr *Paschke*, submits that the recent general approach in unfair dismissal disputes in this court

is to award costs to the substantially successful party unless considerations of fairness dictate otherwise. This is illustrated, for example, in the following matters:

7.1. In *Manhattan Motors Trust v Abdulla,*[1] the LAC said the following in relation to the costs award in Labour Court:

> 'Maleka AJ furnished no reasons for not awarding them. From the recorded argument it appears that Mr Boda's predecessor submitted that costs should not be awarded either way. In response to a contrary submission by Mr Koekomoer, the learned judge observed: "No, this court does [not] want to discourage litigants to advance their case or their defence simply because of the aspect of costs. I mean it is quite clear that I can only order costs when there is some element of vexatious or [bad faith?] on the part of the litigant."
>
> If that reflected the learned judge's eventual reasoning, he was in error. The discretion regarding costs is far wider than that, and includes fairness among other considerations. See Landman & Van Niekerk Practice in the Labour Courts at A-61. In my view the outcome of the trial and the dictates of fairness indicate that the respondent should have been awarded his trial costs.[2]

7.2. *In Hospersa & Another v MEC for Health, Gauteng Provincial Government*[3] the court rejected an argument that costs should not be awarded to an applicant who had succeeded in her application: 'I can see no reason why the respondent should not be ordered to pay the costs in circumstances where an employee had to resort to bringing an application to put a stop to the highhanded and unilateral conduct of her employer.'[4]

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[1] (2002) 23 *ILJ* 1544 (LAC)
[2] At para 15.
[3] (2008) 29 *ILJ* 2769 (LC).
[4] At para 27.

7.3. In *Wallis v Thorpe & another*[5] Van Niekerk J ordered an individual who unsuccessfully instituted proceedings for unfair dismissal to pay the party and party costs of the respondent.

7.4. Similarly, in *National Union of Mineworkers & Others v Black Mountain Mining (Pty) Ltd*[6]*,* in an unfair dismissal dispute involving a number of employees, despite the fact that the applicants had been partly successful, the court still awarding costs in favour of the respondent as it had been substantially successful.[7]

7.5. The recent Labour Court matter of *FAWU obo Kapesi and 31 others v Premier Foods Limited t/a Blue Ribbon Salt River,*[8] like this matter, was an unfair dismissal dispute for operational requirements involving the use of polygraph testing. Mr Kahanovitz pointed out that the order in respect of costs in that case was:

> '3. The Respondent to pay the costs, including the costs of two counsel as well as the qualifying expenses of the expert witness Professor Tredoux.'

8. Mr *Beaton*, for the respondent, unsurprisingly asked me to take into account the ongoing relationship between the parties, especially in the light of the fact that the third applicant, Ms Metileni, is to resume employment with the respondent. In

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[5] (2010) 31 ILJ 1254 (LC) at para 16.
[6] (2010) 31 ILJ 387 (LC).
[7] At para 91.
[8] Unreported judgment of Basson J under case number C640/07 dated 4 May 2010.

this regard, I am mindful of the principles established in *NUM v East rand Gold and Uranium Co Ltd*[9]*.*

Determination of costs when a matter has settled

9. In a case such as this, where the merits have been settled, a court will adjudicate the question of costs on broad general lines and not on lines that would necessitate a full hearing on the merits of a case. Thus in *Jenkins v South African Boilermakers', Iron and Steel Workers' and Shipbuilders' Society,*[10] Price, J held:

> 'The concession in respect of the first claim admittedly disposes of the dispute on the merits. It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of the case in respect of which the merits have been disposed of by the acceptance of an offer in order to decide questions of costs only ... I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days or perhaps even weeks, trying dead issues to discover who would have won in order to determine the question of costs, where cases have been settled by the main claims being conceded ... When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation...
>
> In my view the costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled.'[11] (my emphasis)

10. The issue in *Roupell v Metal Art (Pty) Ltd and Another*[12] also concerned the costs that should be awarded in respect of a matter that had been settled on the merits the day before the trial was meant to commence. Margo J, following the principle in *Jenkins,* decided that 'I therefore do not propose to engage in a close scrutiny of the various issues of fact raised in the conflicting affidavits that have been

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[9] 1992 (1) SA 700 (A) at 739 A-H
[10] 1946 W.L.D. 15
[11] at pp. 17 – 18.
[12] 1972 (4) SA 300 (W)

filed, nor do I propose to conduct a full investigation into the legal arguments advanced by the parties. I intend to resolve this issue of costs on the basis of a broad general approach to the matter.'[13] The court then being of the opinion that the application would have succeeded and applying "the broad general approach" awarded costs against the defendant.

11. I intend to follow the same 'broad general approach' in this matter.

THE PLEADINGS

12. The applicants submitted that, on the pleadings in this case, it should have been apparent from the outset that the respondent ought to have settled the matter. It should not have been necessary, they say, for the applicants to litigate to obtain relief as there was no merit to the opposition from the outset.

13. After having heard argument from both sides, the recent judgment of the Labour Appeal Court in *SATAWU v Khulani Fidelity Security Services (Pty) Ltd*[14] came to my attention. I then asked the parties to make further submissions in the light of that judgment, with which I will deal hereunder.

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[13] At 302H – 303A. This approach has been approved in subsequent matters. See for instance, *Erasmus v Grundow en 'n Ander* 1980 (2) SA 793 (O) at 798H." Wanneer 'n beslissing omtrent koste afgesonderd staan van 'n beslissing omtrent die "meriete" omdat 'n bevel op die meriete nie meer gevra word nie of nie langer toelaatbaar is nie, beteken dit nog nie dat die beslissing omtrent koste bereik moet word in totale isolasie van oorwegings omtrent die meriete nie. By 'n appèl teen 'n kostebevel, is dit duidelik dat die beslissing in die afwesigheid van kompliserende faktore bereik moet word na gelang van die vraag of die appellant met betrekking tot die meriete suksesvol moes gewees het."

[14] Unreported, JA 25/09, handed down on 6 May 2010 (per Davis JA, Hendricks and Musi JJA concurring)

The employment contract

14. The respondent relied upon clause 31 in the contract of employment to justify the dismissals. That clause provides that 'should the Employee fail the polygraph test or the test should indicate deception on the Employee's part, dismissal for operational requirements shall be the immediate result if the Client should request the Employee's removal...'[15]. The "Client" (*sic*) in this case was Alexkor Limited.

15. Mr Kahanovitz referred me to a very insightful article by Craig Bosch entitled 'Contract as a Barrier to "Dismissal": The Plight of the Labour Broker's Employee'[16]. Bosch argues that it is not permissible to have a contractual term which takes away from the right to fair labour practices. In short, Mr Kahanovitz argued, the contractual term relied upon by the employer in this case for the dismissal is indefensible. I deal with this argument in the following paragraphs. It must e noted, though, that this is not a case where a Temporary Employment Service has simply terminated a contract of employment without more, based on a suspensive condition – the type of case that Bosch mainly refers to in his article. In the present case, the employer accepts that there was a dismissal, but argues that it was based on operational requirements and that it was for a fair reason and in accordance with a fair consultation procedure in terms of s 189 of the LRA.

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[15] Clause 31.2 pleadings p 34.
[16] (2008) 29 ILJ 813. See also *Molusi and Ngisiza Bonke Manpower Services CC* (2009) 30 ILJ 1657 (CCMA).

Was this a dismissal for 'operational requirements'?

16. The LRA permits only three reasons for dismissal, namely misconduct, incapacity or operational requirements. A dismissal is substantively unfair if the employer fails to prove that the dismissal is for one of those reasons (s 188(1)(a)). 'Operational requirements' is defined to mean requirements based on the economic, technological, structural or similar needs of an employer' (s 213). The courts have interpreted the words 'or similar needs of an employer' as being restricted to 'the economic viability of the enterprise' and that hence the reasons for a dismissal 'must relate or have some resemblance to the economic, technological or structural needs of the business'[17] and that 'the company's economic viability or economic stability is under threat to such an extent that dismissal on the basis of operational requirements is the measure of last resort.'[18]

17. In its notice in terms of s 189(3) dated 20 March 2007,[19] the respondent gave the following reason for the proposed dismissal of the second and third applicants in accordance with s 189(3)(a):

> 'As per your agreement of service you are required to successfully complete a polygraph examination from time-to-time in order to, render services at the specific contract site.
>
> It is with utmost regret to inform that you did not successfully complete the polygraph examination and in terms of your agreement of service your services will be terminated based on operational requirements.

[17] *Tiger Foods* para 14, 28 and 38-40; *FAWU* para 65.
[18] FAWU para 66.
[19] Bundle p 64.

> We wish to reiterate that your contract of employment makes specific provision for polygraph testing and as such constitutes a material term and condition of your contract of employment.
>
> In this instant where you have displayed indications of deception in your polygraph test, the employer has no alternative but to revert to Section 189 of the Act.'

18. The respondent's reason for dismissal is also apparent from the following explanation given by Mike Nelson, its operational Manager at a meeting on 20 March 2007: 'You must remember, the people who failed the test broke their contract with Protea is stated in the contract, if you do not follow your contract clearly that you can be dismissed due to operational requirements.'[20]

19. In the following exchange on 22 March 2007 between Nelson (MN) and the Union's L Nongqo (LN), it is clear that the second and third applicants' posts have not become redundant:

> 'LN: Can you explain what you mean with redundancy?
> MN: It means that the employees broke their contract with the employer by failing the polygraph tests. By failing the test it means that the person became redundant and can not work on the Alexkor site anymore.
> LN: But by redundancy their posts are still available, so what do you mean?
> MN: It is not the post that became redundant but the person who became redundant by failing the polygraph test.'

20. The applicants submit that it is clear from the respondent's own version that its true reason for dismissing the second and third applicants is that they 'failed to successfully complete a polygraph examination'. The respondent has not pleaded that the dismissal was for an economic, technological, structural or any similar need. Why, the applicants ask, should failing a polygraph test make an employee redundant?

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[20] Bundle p 61, penultimate paragraph.

21. A court may investigate the real reason for a dismissal. In *SA Mutual Life Assurance v IBSA*[21] the Court held that where the evidence showed that the employer was actually dissatisfied with the performance of certain members of the department and chose not to initiate proper disciplinary inquiries but rather to restructure as a means of dismissing those employees with whom it was dissatisfied,[22] that does not constitute an operational requirement as defined in s 213. The employer also did not show that their jobs were redundant.[23]

22. However, in *Khulani*[24] the Labour Appeal Court accepted that the security company in that case could fairly dismiss employees for operational requirements in circumstances where it had a security agreement with its "client", ACSA, in terms of which its employees had to undergo polygraph tests. In that case, the applicable employees had failed polygraph tests and were dismissed for operational requirements. The dismissals were held to be fair. However, the trade union in that case (SATAWU) had concluded a collective agreement agreeing to its members undergoing polygraph tests; and the relevant employees had been offered alternative positions in a consultation process in terms of s 189 of the Labour Relations Act, which they had rejected.

23. Despite these distinguishing factors, in the light of the LAC's authority apparently accepting that employees could be dismissed for operational requirements in similar circumstances, provided a fair procedure was followed, I cannot find that

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[21] *(2001)* 9 BLLR 1045 (LAC).
[22] At para 16.
[23] Para 17.
[24] *SATAWU v Khulani Fidelity Security Services (supra)*

the dismissals were not for operational requirements and were therefore substantively unfair for that reason alone. I bear in mind that *Khulani* may be distinguished on the basis that in that case the trade union, and not only the individual employees, consented to the clause in question. Nevertheless, I make no pronouncement on the validity of the clause in the employment contract itself.

Was s 189 permitted in this case?

24. The relevant questions in the polygraph tests conducted upon the second and third applicants were:[25]

    24.1. Did you help anyone to steal diamonds from Alexkor in the past three months?

    24.2. Did you steal any diamonds from Alexkor in the past three months?

    24.3. Did you receive any benefit from any theft of diamonds from Alexkor in the past three months?

    24.4. Are you currently a member of a syndicate that steals diamonds at Alexkor?

25. The subject matter covered by these questions, namely the theft of diamonds, is clearly a matter of misconduct. It is only in rare cases that an employer would be entitled to follow the s189 route where misconduct triggered the operational rationale, namely where it is not possible to hold a disciplinary enquiry and where

[25] Bundle pp 43 and 46-47.

'continued economic survival of the business' is under threat.[26] The s189 route is not open in cases where an employer simply cannot prove the charges against the employee.[27] The respondent has not pleaded that it was unable to hold a misconduct hearing or that its continued economic survival was threatened.

26. Nevertheless, I cannot accept the applicants' argument that it follows that the respondent is never entitled to follow the process in s 189 for an operational requirements dismissal in circumstances where it is a condition of employment to undergo polygraph tests. I am bound by the LAC authority in *Khulani*. It appears to me that, in that case, the LAC accepted that it may in certain circumstances be permissible for a security company to follow a s189 process in circumstances where its customer insists on its employees undergoing polygraph tests and an employee fails that test, albeit that the trade union in that case explicitly agreed to the testing.

Did the respondent comply with s 189?

27. In the light of the LAC's decision in *Khulani*, which binds me, and in spite of my own misgivings in that regard, I have to accept that, in certain circumstances, dismissal for failure of a polygraph test may fall within the potential ambit of an operational requirements dismissal.

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[26] *FAWU* at para 66.
[27] *FAWU* at para 66.

28. The next question for consideration is then whether the dismissal in this case – having regard to the pleadings only – meets the requirements for a fair dismissal in terms of s 189. In this case, where the criteria for selecting which employees are to be dismissed for operational requirements were not agreed, s 189(7)(b) required the respondent to adopt 'criteria that are fair and objective'. Dismissal for operational requirements is a remedy of last resort.[28]

29. Professor Tredoux, the head of UCT's department of psychology has provided a detailed report on the reliability of polygraph testing.[29] He gave similar evidence in the *FAWU* matter where that court found him to be clearly an expert in the field of polygraph testing and a 'highly competent and respected expert' with 'extensive and impressive qualifications'.[30] (I pause to note that the court in *Khulani* did not have the benefit of any expert evidence on polygraph tests). Tredoux's report shows that polygraph testing has not been scientifically shown to be a reliable, accurate and valid means of detecting deception.[31] It follows that polygraph test results cannot be a 'fair and objective' basis for selecting who should be dismissed. In fact, this court held in *FAWU* that:

> 'In light of the aforegoing and in light of the controversy that surrounds the accuracy and reliability of polygraph tests, I am not persuaded that the polygraph is a reasonable or fair alternative to minimise retrenchment... In the context of a disciplinary process the polygraph can be a useful tool in the investigation process but can never substitute the need for a disciplinary hearing. A polygraph test on its own cannot be used to determine the guilt of an employee ... I am, as already pointed out, not persuaded that it constitutes a fair and objective

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[28] *South African Breweries*, per Gamble AJ.
[29] Pleadings pp 123-166.
[30] Para 91.
[31] Tredoux's report pleadings p 157-158 para 14.4.

> selection criteria or a fair an objective method alternative to minimise retrenchment in the context of section 189 and section 189A of the LRA.'[32]

30. The respondent has not explained in its pleadings what benefit its "client" derives from its use of polygraph testing. It has not, on the pleadings, shown that it was either a fair and objective selection criterion or, as was the case in *Khulani*, an agreed one.

Did the applicants fail the polygraph tests ?

31. Even if the respondent could fairly use the polygraph test as a selection criterion, though, it appears from the pleadings that the two individual applicants have not been shown to have failed the tests.

32. James Murphy, the former Chief of the FBI's Polygraph Unit who was responsible for the FBI's polygraph program and a highly experienced polygrapher, did an assessment of the polygraph charts produced in this case. His conclusion, based on those charts, is that in respect of some of the questions there is 'no deception indicated' and in respect of other questions 'no opinion' could be rendered. His findings contradict the respondent's case that the second and third applicants failed their tests.[33]

33. There are also a number of inconsistencies and procedurals irregularities in how the tests were conducted and the results are contradictory. For instance:

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[32] Para 112
[3333] Pleadings pp 118120

33.1. The finding that the second and third applicant were truthful in denying that they received any benefit from any theft of diamonds from Alexkor in the past three months (question 3), is inconsistent with the finding that they were deceptive in denying that they stole diamonds in the past three months (question 2) and that they are currently members of a diamond-stealing syndicate (question 4).[34]

33.2. The control questions were poorly formulated for their function and some are incomprehensible.[35]

33.3. The examiner of the third applicant reached inconsistent conclusions on the same scoring sheet and changed her method of evaluation to achieve a result which indicated deception.[36]

34. I bear in mind, tough, that the applicants only filed the expert witness statements by Murphy and Prof Tredoux on 21 June 2010. The applicants' notice of intention to amend their statement of claim, attacking the validity of the polygraph tests and based on this expert evidence, was only filed on 18 June 2010. I will come back to this aspect.

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[34] Bundle pp 43 and 46-47.
[35] Bundle p 90.
[36] Bundle p 112A.

Repeated unfair dismissals by the respondent

35. The applicants submit that another factor that I should take into account is that the respondent is a 'repeat offender' when it comes to unfair dismissals.

36. The respondent re-employed the second and third applicants on 5 November 2007, at first not realising that it had previously dismissed them for failing polygraph tests. When the respondent discovered the first dismissals and the fact that the second and third applicants were exercising their rights under the LRA in this case to challenge those dismissals, the respondent dismissed them a second time. In a separate case, the late Nel J held those second dismissals to be automatically unfair.[37]

37. I also take into account that the respondent was only willing to consider transfer to another site as an alternative to dismissal if the individual applicants underwent another polygraph test at their own expense. In the light of my previous findings with regard to the conduct of the polygraph tests, this was neither reasonable nor fair. Contrast this with the position in *Khulani*, where the employees were offered alternatives – which were not said to be unreasonable – and rejected those alternatives.

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[37] Case number C72/2008.

CONCLUSION

38. On the facts of this case, and in spite of the judgment in *Khulani*, I am persuaded that the applicants would have been substantially successful had the matter proceeded to trial.

39. As Mr Beaton pointed out, though, in the light of the judgment in *Khulani,* it cannot be said that it was clear from the outset that the respondent enjoyed no prospects of success in defending the claim. It was only after the applicants served their expert witnesses and their notice of intention to amend their pleadings on the respondent on or about 17 June 2010 that the respondent could have no doubt that it was prudent to throw in the towel.

40. I agree with the applicants that it would be fair for respondent to bear the costs of the referral, at least to some extent. Taking into account both principles of law and fairness, though, it cannot be said that the law is sufficiently clear on the principle of dismissal for operational requirements in similar circumstances. The respondent cannot be criticised for defending the matter at the outset. In the circumstances, I am in agreement with Mr Beaton's alternative argument that costs should be awarded only from 17 June 2010 to date of settlement. However, as the amendment of 17 June was premised on the reports of the expert witnesses, I deem it fair to include the costs of those witnesses.

41. I make the following order as to costs:

The respondent must pay the applicants' costs, including the costs of two counsel where two counsel were used, from 17 June 2010 up to and including the date of this ruling; as well as the qualifying expenses of the expert witnesses, Professor Colin Tredoux and Mr James Murphy.

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STEENKAMP J

Date of hearing:	**14 July 2010**
Date of order:	**19 July 2010**
For the applicants:	**Colin Kahanovitz SC**
	Ron Paschke
	Instructed by Cheadle Thompson & Haysom
For the respondent:	**RG Beaton**
	Instructed by Malan Vogel