Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C 399/2019

In the matter between:

SA METAL GROUP (PTY) LTD	**First Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER C JACOBS N.O.	**Second Respondent**
NUMSA OBO Z.N. NGQANEKANE	**Third Respondent**

Date of Set Down: 7 September 2021

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 14h00 on 8 September 2021

Summary: (Review – dismissal – misconduct – intended theft – value of polygraph evidence – weakness of other evidence implicating employee – not an award no reasonable arbitrator could have arrived at)

JUDGMENT

LAGRANGE J

Introduction

[1] The third respondent, Mr Z Ngqnekane ('Ngqanekane'), was dismissed for the 'intended theft' of large bundles of copper wire that had been discovered in a locker in a security officer change house. The locker in question, number 40, had not been allocated specifically to any of the security personnel using the change house.

[2] The second respondent ('the arbitrator') found that the applicant had failed to prove that Ngqanekane was guilty of the misconduct on a balance of probabilities. The arbitrator then ordered his reinstatement.

Material aspects of the evidence

[3] It was common cause, on the evidence, that the copper wire had been discovered when the lock on locker 40 was broken open for the purposes of allocating, what was assumed to be an unused locker, to another employee.

[4] Ngqanekane was charged after a polygraph test indicated he was not honest when he had answered questions concerning his knowledge of, or involvement in, the theft of copper wire from the applicant. The questions did not specifically concern any prior knowledge he had of the copper wire being stored in the locker before it was broken open.

[5] At the internal hearing, Mr. Smit, the applicant's risk manager was the initiator of the inquiry. There was no information placed before the arbitration about any evidence led during the internal inquiry, though a few details of what was not led emerged in the arbitration.

[6] The only witness for the applicant at the arbitration hearing was Mr. G Joubert ('Joubert'), a senior security officer (known as an inspector). Joubert did not testify in the disciplinary inquiry, nor was an undated security report, signed by him, tendered as evidence in the internal inquiry. In the arbitration hearing, his statement was handed up during the course of his evidence. Joubert could not remember when the statement was made but believed that it was on 25 October 2017, when the locker had been opened. The dates when the report was completed and when it was signed were not entered on the document.

[7] In the statement, Joubert claimed that during the previous 6 to 8 months before the locker was opened, on at least four occasions when he was looking for Ngqanekane inside the change house container, he always saw him sitting next to locker 40. Joubert also testified that on one such occasion had seen Ngqanekane close and lock the locker. It is common cause that locker 40 was situated in the furthest corner from the entrance to the change house, which had been constructed in a shipping container. It was also common cause that Ngqanekane's allocated locker was number 14, which was not near locker 40.

[8] Joubert claimed to have remembered that the person he saw was Ngqanekane because he had unique facial features and a unique name. When he was asked to explain what he meant by unique he replied "personality". When he was asked how he could be so sure that it was on four occasions that he saw Ngqanekane next to the locker in question, he said it could have been 10 times but he specifically recalled the four occasions because those were times when he was on duty. Despite saying this, a little later in his testimony, he said he did not recall the dates when he observed Ngqanekane next to the locker. As a result of what he claimed he saw, he got the impression that the locker belonged to Ngqanekane. He readily conceded under cross-examination that it was rare for inspectors to visit the change house where the lockers were kept and volunteered no reason why he would have gone there on so many occassions, apart from his general assertion that he had been looking for him. Ngqanekane denied being seen next to the locker by Joubert.

[9] Apart from his own observations, Joubert claimed that he spoke to two other inspectors, whom he identified. They had made him aware that the locker belonged to Ngqanekane, but only after the incident when he had suggested to them possible names of persons who might have used the locker. At the time the locker was opened, he did not know if the locker had been allocated to anyone. When he spoke to the other two inspectors, they confirmed that they had seen Ngqanekane use the locker.

The arbitrator's reasoning

[10] The arbitrator concluded that the applicant had failed to establish on a balance of probabilities that Ngqanekane was guilty as charged and could find no reason not to reinstate him in terms of section 193(2) of the Labour Relations Act 66 of 1995 ('the LRA').

[11] The crux of the arbitrator's reasoning is set out in paragraphs 15 and 16 of his award.

[12] He drew adverse inferences from the fact that Joubert had not testified at the disciplinary inquiry, and was of the view that the employer had found Ngqanekane guilty solely on the basis of the polygraph test. Secondly, he found that the evidence Joubert tendered of the other two security officers was that they had initially confirmed that the locker was an unused one, and it was only when he mentioned various names including Ngqanekane's that they confirmed that the locker belonged to him. He also drew an adverse inference from the fact that Smit was present at the arbitration hearing but did not testify in the proceedings, even though according to one of Ngqanekane's witnesses Smit had allocated lockers and regulated the locker system of the employer. The arbitrator found that Smit had testified at the disciplinary inquiry that one of Ngqanekane's witnesses, Mr L Gwama ('Gwama'), had told him that locker 40 belonged to Ngqanekane.

Grounds of review

[13] The applicant has raised a number of grounds of review essentially contesting that the arbitrator committed various reviewable irregularities in his evaluation of the evidence, as a result of which the award was not one

which a reasonable arbitrator could have reached. These are summarised below.

[14] The arbitrator misconstrued the evidence in finding that the employer had relied exclusively on the polygraph test results in the internal inquiry. There was no evidence presented on what transpired in the disciplinary inquiry outcome, to support this finding of the arbitrator.

[15] Although the arbitrator appreciated that the arbitration hearing was a hearing *de novo*, his approach was to evaluate the correctness of the findings of the internal inquiry based on what he supposed the evidence had been on that occasion. This was a misdirection on his part.

[16] The arbitrator misunderstood Joubert's evidence when he concluded that Joubert had testified that his colleagues at first had said that locker number 40 was unused, but later identified as belonging to Ngqanekane, after he mentioned some names to him. The applicant correctly points out that the arbitrator misconstrued the evidence by collapsing the distinction between the locker being unallocated and not being used.

[17] Regarding the negative inference drawn by the failure of Smit to testify about the allocation of lockers, which was his responsibility, the arbitrator could not have drawn an inference that his evidence would have been relevant and material to the issue at hand, particularly where the arbitrator himself had concluded that the locker system was in a shambles and that lockers were used interchangeably by various security officers.

[18] The arbitrator ought to have discounted the evidence of Gwama on the basis that his credibility was questionable because he had been dismissed for theft and had disputed his dismissal. Moreover, the applicant contends that his evidence to the effect that he denied ever having told Smit that the locker belonged to Ngqanekane, was irrelevant since the applicant had not even led such evidence in the arbitration, and no evidence in rebuttal was accordingly required.

[19] The applicant contends that if the arbitrator had not misconstrued evidence as alleged, he would have concluded that Ngqanekane was probably guilty as charged, considering Joubert's evidence of having seen Ngqanekane next to the locker on four occasions and having observed him close and

lock it, coupled with the fact that his fellow inspectors had told him that they had seen Ngqanekane making use of the unallocated locker.

Evaluation

[20] I readily agree with the defects identified by the applicant concerning the manner in which the arbitrator arrived at his findings. The question remains whether no reasonable arbitrator could nonetheless have found that the applicant had failed to prove that Ngqanekane probably was guilty as charged on the evidence available.[1]

[21] Quite apart from the testimony of Ngqanekane and his own witnesses in his favour, Joubert's evidence is problematic in a number of respects, namely:

21.1 Joubert's testimony about what his colleagues told him is hearsay, even if his account of what they told him is correctly understood. There was no consideration of whether this evidence ought to have been admitted or not in order to corroborate Joubert's own observations and opinion, and it should not have been part of the record without the justification for its admission being scrutinized and evaluated.

21.2 Joubert conceded that it was rare for inspectors to go to the change room.

21.3 He claimed that he 'specifically' remembered four occasions he had seen Ngqanekane next to the locker based on when he had been working, but at the same time could not remember when those occasions were.

21.4 The basis on which he had positively identified Ngqanekane as the person he had allegedly seen next to the locker was poorly explained.

[1] See *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC) at para [31], viz: "The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the light of the issues and the evidence".

21.5 Joubert's explanation why his statement in the written report is undated makes no sense, and contrasts with all the other similar reports made at the time, which were properly dated.

21.6 If Joubert had made such a statement in October 2017, purportedly confirming he had seen Ngqanekane on a number of occasions lurking near the locker, it inexplicable why these direct observations were not led as part of the applicant's evidence at the disciplinary inquiry, particularly as the statement would have been relevant, and was heavily relied on by the applicant in the arbitration hearing.

[22] *Ms Harvey*, the applicant's counsel, rightly conceded that Joubert evidence was problematic. Nonetheless, she contended that the evidence of the polygraph testing showed that Ngqanekane was reasonably identified as a suspect in the attempted theft of the copper wire, given that the evidence showed that all the other security also been tested. By implication, Ngqanekane was the only officer identified as being deceptive about the issue of copper wire theft, and Joubert's evidence pointed to his involvement. In the circumstances, Ngqanekane's dismissal was a reasonable response by the employer to mitigate the operational risk facing it that Ngqanekane was the most likely employee to have been involved in the intended theft of the copper wire. If it could be assumed that the polygraph test results can be relied on to exclude other possible suspects, and if Joubert's evidence could not reasonably be doubted, it would not be unreasonable to infer that Ngqanekane was probably guilty.

[23] The first difficulty is that polygraph results are not accepted as evidence of in the absence of expert evidence being adduced as to its conceptual cogency and accuracy of its application in a given case.[2] There was no such evidence in this case. The second difficulty is that because of the problems with Joubert's evidence mentioned above, it cannot be confidently concluded that no reasonable arbitrator would have any difficulty in accepting the reliability of his evidence. If Joubert's evidence can plausibly be found to be unreliable, it follows that another reasonable arbitrator might

[2] See *DHL Supply Chain (Pty) Ltd v De Beer NO & others* (2014) 35 *ILJ* 2379 (LAC) at para [31] and more generally at paragraphs [25] to [31].

conclude that the applicant had failed to discharge the onus of proving the misconduct on a balance of probabilities, because without his evidence, there was no other evidence implicating Ngqanekane, apart from the shadow of suspicion cast by the polygraph test result.

[24] I appreciate that the applicant is satisfied that it is a reasonable inference to draw that Ngqanekane was guilty of the alleged misconduct. However, even if this is a plausible inference to draw, it is not decisive of a review application, if other contrary plausible conclusions could be drawn by a reasonable arbitrator on the evidence available.

[25] In this case, despite the errors made by the arbitrator, it does not follow from the evidence before him that he would necessarily have found in favour of the applicant.

Order

[1] The review application is dismissed.

[2] No order is made as to costs.

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Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	S Harvey instructed by Guy & Associates
For the Third Respondent	No appearance