Not reportable

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case No: C530/2021

In the matter between:

ROCHE DIA	**First Applicant**
and	
MOSA ALFRIEDA LEBAEA	**First Respondent**
NATIONAL BARGAINING COUNCIL FOR THE CHEMICAL INDUSTRY	**Second Respondent**
ANDISWA MAKASI (*N.O.*)	**Third Respondent**

Date of Hearing: 12 April 2023

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 10h00 on 17 April 2023.

Summary: (Review – Award one which no reasonable arbitrator could have arrived at – *inter alia* no basis on which arbitrator could have decided to admit hearsay in the proper exercise of his discretion)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an opposed application to review and set aside an arbitration award in which the arbitrator found that the dismissal of the first respondent, Ms M Lebaea ('Lebaea') was substantively and procedurally unfair.

Brief factual background

[2] The applicant ('Roche') is a multinational pharmaceutical company. Amongst other things, it provides DNA and rDNA testing kits. The applicant was a logistics planner at the time of the events which gave rise to the charges for which she was dismissed. At the time there were two teams responsible for assembling the test kits. Lebaea was the most senior member of one team. The detailed standard operating procedure for assembling the kits required each component item of a kits to be scanned and once the kit was complete the kit itself would be scanned separately. Lebaea knew the standard operating procedure.

[3] It came to management's attention that there was a marked discrepancy between the number of kits assembled by the two teams, which was difficult to explain. It was only when video footage of the activity of Lebaea's team was scrutinised that it became evident that the standard operating procedure was not being followed. More specifically, component items were being scanned without being packed into a kit at the same time. Management, could not be sure how many kits might have been incomplete as a result of the deviation, but the risk of deviation extended

to approximately 28,000 test kits which had been issued, even though the number of complaints from customers at the time of the disciplinary enquiry was insignificant by comparison. There was uncontested evidence that employees engaged in performing the same function at one of Roche's facilities in Germany had been dismissed for a similar failure to follow the procedures.

[4] After the problem was detected, members of the team including Lebaea were required to confirm, amongst other things, whether they had been following the SOP, or whether there had been a deviation in the way they had assembled the kits. All members of the team claimed to have been following the standard procedure. The other four members of Lebaea's team were dismissed for the same misconduct she was charged with, after admitting they were guilty as charged.

[5] At the end of the enquiry, Lebaea submitted affidavits from other members of her team in which they claimed that they had started packing the kits without scanning them at a time when she was on leave and that she was not aware that the assembled kits should be scanned when packed. Although these affidavits had not been canvassed with the employer's witness, and amounted to hearsay evidence, the arbitrator decided to admit them as part of the record.

The award

[6] The arbitrator dealt with the two charges simultaneously as they stemmed from the same facts. The charges were:

(a) Charge I - Gross negligence and/or derivative misconduct and/or serious non-compliance to comply with the SOP.

(b) Charge 2- Gross dishonesty.

[7] The arbitrator accepted it was common cause that the SOP for packing DNA and rDNA kits performed by the team the Lebaea was part of, was not adhered to as video footage showed. The arbitrator concluded that:

> "54. In deciding if Applicant breached a rule she was aware of, …based on the evidence before me, I am not persuaded that the Respondent has proven on a balance of probabilities that the Applicant committed gross

> negligence in this regard noting the position she held as the link between her team and management. Tilting the scale are the affidavits, though carrying minimal value, which support the Applicant's version in this regard."

(Emphasis added)

[8] The arbitrator did not refer to any of the principles governing the admission of hearsay evidence[1], as informing his decision to admit the affidavits. It is apparent he admitted the evidence without obviously considering them.

[9] In relation to the charge of dishonesty, the arbitrator reasoned:

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[1] 3(1) of the Law of Evidence Amendment Act, 45 of 1988, provides for the general rule that hearsay evidence is inadmissible and also for the exceptions to that general rule, as follows:

'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;

(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.'

In *Exxaro Coal (Pty) Ltd & another v Chipana & others* (2019) 40 *ILJ* 2485 (LAC), the LAC held:

> "[21] The provisions of s 138 of the LRA that give a commissioner a discretion to conduct an arbitration in a manner that she, or he, considers appropriate to determine a dispute fairly and quickly, and to do so with a minimum of legal formalities, do not imply that the commissioner may arbitrarily receive or exclude hearsay evidence, or for that matter any other kind of evidence. In the case of hearsay evidence, even though s 3 of the LEAA, by providing a set of rules or principles for the admission or exclusion of hearsay evidence, assumes some legal formality, it is invaluable. While a commissioner is notionally not obliged to apply it because of the discretion bestowed on him or her by s 138 of the LRA, the prudent commissioner does not err by applying it when dealing with hearsay evidence, rather than conceive of an alternative norm that will ensure not only fairness in the process, but also in the outcome of the arbitration."

[51]…, I am guided by the evidence that the Respondent conducted an audit review questioning whether there was a new way of packing kits. Based on the above, I am not convinced that the Applicant demonstrated deceit in that she answered the questionnaire to the best of her knowledge, although later proven to be incorrect. Had the opposite been true, the Respondent's version would be persuasive.

[10] Accordingly, the arbitrator found she was not guilty of dishonesty. Thus, the arbitrator concluded that Lebaea was not guilty of either of the charges against her.

[11] Paradoxically, despite finding Lebaea not guilty on both charges, the arbitrator proceeded to determine if dismissal was an appropriate sanction. In this respect, the arbitrator had regard to the absence of any progressive disciplinary steps and that the applicant had resorted to dismissal as a first resort. Moreover, he found there was no evidence of reputational damage or financial loss except for the actual complaints made complaints made by certain customers. The arbitrator also noted, in her favour, that she had been managing or leading a team for a year in an acting capacity and had no prior disciplinary record. Consequently, the arbitrator found her dismissal was substantively unfair.

[12] It seems the arbitrator confused the determination of relief for a substantively unfair dismissal with the issue of whether the sanction of dismissal was appropriate, which presupposes a finding of guilt that did not apply in this case. The arbitrator continued:

"61. Having found the dismissal to be procedurally substantively unfair, I must now determine the appropriate remedy. The Applicant sought retrospective reinstatement as a remedy for her claim. The Respondent argued that the Applicant should have been more attentive especially with the reduced number of scanning beeps. I concede that she could have played a more active role and paid more attention to her team. It is for this reason that I find that reinstatement without back pay would be appropriate in these circumstances.

62. Taking into account the reason for termination of employment, that the dismissal was procedurally and substantively unfair; I order that the Respondent must reinstate the Applicant on the same

terms and conditions prior to the termination. In this manner, I intend to ensure that the employment relationship between these parties remains intact."

(emphasis added)

[13] Lebaea had raised three issues which she claimed made her dismissal procedurally unfair. Firstly, she maintains that the employer's refusal to allow her to submit herself to a polygraph test denied her the opportunity of fully ventilating her defence. Secondly, she complains that the employer's failure to provide an alternative interpreter during her disciplinary enquiry was unfair. Lastly, she claimed she was denied an opportunity to present mitigating evidence.

[14] On the question of being denied an opportunity to submit herself to a polygraph test, the arbitrator held that:

"45. Evidence was led that the Applicant volunteered submitting herself to a polygraph test as provided for in the company policy. The Chairperson rejected such offer citing that it would be a waste of time. This appears to be an infringement of the Applicant's right to tell her version in full especially when one considers that in an appeal, a higher body or person is considering a decision already made. As such, I find that this may affected her opportunity to state her version in full."

[15] In respect of the provision of an interpreter during her disciplinary enquiry, the arbitrator found:

"37. The Applicant led evidence that she was not allowed the opportunity to have an interpreter as the chosen candidate was her junior. To this, the Respondent stated that she may do it herself. While theApplicant may converse in English, which is also a business language; it is imperative that anyone in a hearing is able to express themselves in their preferred language. English is not always the language in a hearing.

38. While this was clearly a gross prejudice for the Applicant in the initial hearing, the prejudice was rectified in the appeal hearing when the hearing was postponed in order to arrange for a suitable interpreter. The Chairperson's actions were correct in this regard."

(emphasis added)

To the extent that the arbitrator nonetheless appeared to conclude that Lebaea was prejudiced in relation to the provision of an interpreter in the internal proceedings, such a conclusion is irreconcilable with his finding that any such prejudice was subsequently rectified.

[16] On the opportunity to present mitigating factors, the arbitrator held:

> "48. Regarding the aspect of mitigating factors, no evidence was led in this regard by the Applicant. As such I shall not be making any determination on this aspect."

The arbitrator's overall conclusion was that Lebaea's dismissal had been procedurally unfair.

Grounds of review

[17] Roche raises a number of grounds of review. Apart from claiming that the arbitrator misdirected himself in the application of the principles governing the admission of hearsay evidence, it claims that the arbitrator's findings are ones that no reasonable arbitrator could have arrived at on the evidence before him.

[18] The respondent attacks the findings that the dismissal was procedurally unfair on the following basis. It argues that the arbitrator misconstrued a provision in the disciplinary code which provided that an employer was entitled to request an employee to undergo a polygraph test and if they did so were entitled to the outcome of the test. It argues that this provision did not create an entitlement of an employee to request such a test as the arbitrator seen to conclude. In any event, the wording of the provision does not give the employer a right to insist on an employee undergoing such a test, but merely a right to request the same, which the employee could refuse.

[19] Further, the respondent argued that the result of the polygraph test has not been accepted as evidence of an employee's guilt or innocence. The Labour Appeal Court has not gone quite so far. In *DHL Supply Chain (Pty) Ltd v De Beer NO & others* (2014) 35 *ILJ* 2379 (LAC), the LAC seemed to accept that it was possible that a failed polygraph test might in some circumstances be useful to determine the balance of probabilities, but then only if supported

by expert evidence of the conceptual cogency and accuracy in each case[2]. Bearing the tenuous weight that might be attributable to a polygraph test result and the LAC's view that it was unlikely to be of any relevance except possibly whether the result is negative, it is difficult to see how Lebaea, could have been prejudiced by not being able to present polygraph evidence as part of her defence. In deciding whether or not she had a fair opportunity to present her case during the internal proceedings, this would not have been a material factor. There was no evidence that she was prevented from placing any other direct or indirect evidence in her defence before the internal proceedings.

14. In addressing the arbitrator's findings on substantive fairness, Roche notes that the arbitrator failed to explain his preference for Lebaea's evidence over that of it's witness, Mr Erasmus ('Erasmus'). Moreover, he ignored evidence that when Lebaea was performing scanning functions in the compilation of the test kits, it was not disputed that she did not follow the SOP process. Like the other members of her team, she claimed that there was no deviation from the SOP, but then during the course of the arbitration argued that the undisputed deviation from the SOP which did take place could probably be attributed to the other members of the team finding 'a better way' of assembling the kits.

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[2] *Viz:*

"[30] These considerations beg the question about what a failed polygraph test really produces by way of usable information. Only the inference to be drawn from the failure of the test is useful as material to determine probabilities. In the absence of expert evidence to explain what that inference is, either generically, or within the bounds of the specific instance itself, and also to justify the explanation of what that is, there is nothing usable at all that might contribute to the probabilities. In this appeal, DHL's consent form, signed by the two respondents,states that the test would indicate that the worker was either involved or not involved in the stock loss. That premise is questionable, and to belabour the point, required the kind of expert evidence mentioned above to render it worthy of consideration.

[31] In summary, the respectability of polygraph evidence, at best, remains an open question, and any litigant seeking to invoke it for any legitimate purpose, must, needs be, adduce expert evidence of its conceptual cogency and the accuracy of its application in every given case."

15. A major bone of contention in the review proceedings was whether the arbitrator was justified in concluding that she performed a supervisory role in relation to the rest of the team members. Whichever formal title was ascribed to Lebaea's role in the team, Roche correctly points out that Lebaea agreed that she had been asked to be 'the team leader', a point which the arbitrator himself noted. Further, there was evidence that she had even acted as a manager in the department for a period. Under the circumstances, the arbitrator could not on any reasonable basis have believed that she was not more senior to her colleagues in the team and that she did not perform a supervisory role in the team. His conclusion that she was merely some kind of communication link between the team and management simply cannot be justified on the evidence. The arbitrator also acknowledged that she had not been attentive in the performance of her duties. This conclusion makes it hard to understand why, at the very least, she ought not to have been treated in the same way as the other members of the team, even if she had not performed a supervisory role, given that the non-compliance with the SOP was not in dispute.

[20] While simultaneously noting what an exceptional thing he was doing, the arbitrator took account of the hearsay evidence in Lebaea's colleagues' affidavits, as follows:

> "37. While this was highly unusual noting that documentary evidence cannot be cross questioned; I used my discretion and accepted into evidence such affidavits on the basis that their relevance and admissibility would be weighed accordingly. Dealing with the merits of the arbitration with minimal formalities is essential as part of determining the dispute fairy and quickly."

It is not enough for the arbitrator simply to have said that he exercised his discretion without explaining why he felt that the test for admitting hearsay evidence favoured the admission of the affidavits. Not only was there no

clear explanation why none of the deponents had been called to testify, but the evidence was introduced after the company had concluded its case. Despite these significant problems which ought to have indicated a need to approach cautiously in dealing with the evidence, the arbitrator attributed decisive weight to them in determining whether Lebaea knew that the SOP was not been complied with. His conduct in preferring the value of this evidence over the direct evidence that Lebaea did know the correct procedure and that one of her defences was that her colleagues had adopted a better method of assembling the test kits, is incomprehensible.

[21] Likewise, her defence that her colleagues might have found a better way of doing things was an implicit acknowledgement that she knew the correct test kit assembly process and that it was not been complied with. Her response to the questionnaire the employer issued to the team members, in which she acknowledged no deviation from the prescribed process, could not be construed as an honest response in the light of the other evidence.

[22] In light of the above discussion, I am satisfied that the applicant has successfully established that the arbitrator's findings on substantive and procedural fairness not ones that can be sustained on any reasonable interpretation of the evidence before him. Noting the potential exposure of the applicant of the non-compliant process been followed over an extensive period of time, and Lebaea's reluctance to accept any accountability, it is difficult to find a reason why she ought to have been treated differently from the other members of her team or employees in Germany who were found guilty of the same misconduct.

[23] Accordingly, the award stands to be set aside.

[24] The court is indebted to *Ms Duba* of Legal Aid South Africa for assisting the First Respondent.

Order

[1] The arbitration award 25 August 2021, issued under case number WECT 1908-21 by the Third Respondent is reviewed and set aside.

[2] The Third Respondent's findings in the aforesaid award are substituted with a finding that the First Respondent's dismissal by the Applicant was substantively and procedurally fair.

[3] No order is made as to costs.

Lagrange J
Judge of the Labour Court of South Africa

Representatives

For the Applicant	V Barthus instructed by Webber Wentzel
For the First Respondent	J Duba from Legal Aid Board