



**REPUBLIC OF SOUTH AFRICA**

**THE LABOUR COURT OF SOUTH AFRICA, DURBAN**

**JUDGMENT**

Reportable

Case no: D738/10

In the matter between:

**DHL SUPPLY CHAIN SA (PTY) LTD**

**Applicant**

and

**DE BEER, LW N.O**

**First Respondent**

**NATIONAL BARGAINING COUNCIL**

**FOR THE ROAD FREIGHT INDUSTRY**

**Second Respondent**

**SABELO DUBE AND ENOCH MASINGA**

**Third Respondents**

**Heard: 31 July 2012**

**Delivered: 16 October 2012**

**Summary: Review application- applicant relying on polygraph test results to dismiss third respondents – circumstantial factors placed by applicant at arbitration hearing applicable to all employees including those not dismissed – review application dismissed.**

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**JUDGMENT**

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BOQWANA AJ

Introduction

- [1] This is a review application in terms of sections 145(2) and 158(1) (g) of the Labour Relations Act<sup>1</sup> ('the LRA') to review and set aside the arbitration award issued by the first respondent ('the commissioner') on 17 June 2010 under case number KZNRFB 4137. The commissioner found that the dismissal of the third respondent was procedurally fair but substantively unfair and ordered the applicant to re-instate the third respondents, Sabelo Dube ('Dube') and Enoch Masinga ('Masinga') with retrospective effect on the same terms and conditions prior to their dismissal. She further ordered payment of the amounts of R112 657.50 to Masinga and R67 500 to Dube respectively as back pay.
- [2] The answering affidavit was filed almost 16 months late. The third respondents applied for condonation only a day before the matter was heard. No plausible explanation was given as to the lateness of the filing of the answering affidavit and the filing of the condonation application on the eve of the hearing of the review application. The condonation application and the opposition thereto were fully canvassed at the hearing of this matter. I was not satisfied with the explanation given by the third respondents given the excessive delay in the filing of the answering affidavit. In view of that I dismissed the condonation application and accordingly disallowed the answering affidavit as proper evidence before this Court.
- [3] I however allowed the third respondents to make submissions purely on the papers of the applicant and on the law.

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<sup>1</sup> Act No 66 of 1995.

## Facts

- [4] The applicant is involved in the warehousing and distribution of cigarettes. Cigarettes are apparently known to be a very high risk commodity because of their great street value.
- [5] The third respondents had been employees of the applicant until their dismissal on 28 August 2008. They were employed as cage loaders together with six other employees.
- [6] During the period of June 2008, the applicant noticed that it was experiencing substantial increase in stock losses. Approximately R14 500 worth of stock was lost over a period of 5 days being 3, 4, 5, 6 and 10 June 2008.
- [7] The site has a high level of security with guards inside the warehouse and at access gates. Employees are searched before leaving premises and there are cameras situated all around the warehouse and on the outside of the building as well.
- [8] Notwithstanding that, the applicant did lose a great deal of stock, particularly through hijacks and lost more than R10 million the previous year. Nobody knew how exactly the stock was removed or where it went. The video surveillance did not show any employees removing the stock and no employees were caught with stock in their possession.
- [9] All employees who were on shifts during those times (eight in total) were sent for polygraph testing, including two stock takers, the cage loaders, the dispatch clerks and the vehicle loader who took the goods out of the cage and put them in the truck. Employees have a clause in their contracts of employment obligating them to undergo polygraph testing.
- [10] Six of these employees passed the polygraph test with the exception of the third respondents who failed. Polygraph test was conducted by a qualified polygraph examiner.

[11] An investigation was then conducted culminating in the dismissal of the third respondents. The applicant relied on various circumstantial factors, which I will deal with later in the judgment and concluded that the third respondents were guilty of stock loss and subsequently dismissed them.

#### The arbitration award

[12] The commissioner found that the dismissal of the third respondents was procedurally fair but substantively unfair.

[13] Referring to case law dealing with polygraph testing, the commissioner found that the polygraph examination result is merely one evidentiary fact and cannot in itself, prove guilt.

[14] She concluded that if she had to exclude the adverse polygraph test results, the evidence against the third respondents would be as follows:

- 'They worked on the days the stock went missing.
- They were amongst a group of 8 employees who had access to the stock...
- The stock is very valuable.
- The stock loss dropped off considerably once they were suspended'.

[15] The commissioner *inter alia* found that the fact that the third respondents were on duty and had access to the stock did not allow her to draw an inference that they were involved in the removal of the stock, same as the value of the stock. She went on to state as follows:

'At best for the Respondent the final factor suggests some sort of causal link between the Applicants and the stock loss but it was Houston's evidence, corroborated by Woodhouse and Shange, that the theft had not stopped completely since their dismissal and that they had suffered R10 million worth of stock loss in 2009. Indeed Woodhouse stated that it abated for some time but where "one group left off, another picked up". It must be noted that an equally probable inference that can be drawn from this fact is that the real

culprits were scared off by the dismissals and decided to “lie low” for a while. In addition, it was Houston’s evidence that additional security measures had been put in place since June 2008 which might also account for the reduced stock losses.’

[16] The commissioner accordingly did not accept this evidence as being sufficient to draw the most probable conclusion that the third respondents were guilty of misconduct.

[17] She found that the inescapable conclusion was that the applicant relied heavily on the polygraph test, meaning if the third respondents had passed the polygraph test they would not have been dismissed.

#### Grounds for review

[18] The applicant submits that the commissioner committed a gross irregularity and acted unreasonably in the following respects:

- a) She excluded material facts, by not allowing the most probable inference that the third respondents participated or were involved in or had knowledge of the missing stock. She appears to have reasoned her award largely from the premise of the exclusion or reduced value of the polygraph examination results. According to the applicant, the commissioner was duty bound to look at the evidence holistically by applying the polygraph examination results to the list of circumstantial issues, which were not limited to the four issues listed by the commissioner.
- b) She did not correctly apply the rules of evidence in that the third respondents failed to cross-examine the witnesses of the applicant on pertinent issues and/or to place a cogent version during cross-examination to the witnesses of the applicant. The applicant was accordingly denied a fair hearing in that despite its version not being tested or challenged, the commissioner proceeded to apply her mind in a manner that resulted in an unreasonable finding.

- c) She seemed to have considered an irrelevant and speculative version on the consistency as she failed to take into account that each case is dealt with on its own merits. It was thus irregular for her to consider that other employees who had failed polygraph before were not dismissed. There was no evidence presented before her to support this view. Having noted that there were no specific examples on the issue of consistency, it was inappropriate for her to make a finding against the applicant in that regard.
- d) The commissioner limited probable inferences to be drawn from uncontested evidence in particular the evidence that the stock losses had to be “an inside job”.
- e) The commissioner failed to take into account that polygraph examination has largely been accepted in the rich history of case law at Bargaining Councils and the CCMA as a tool to be used and there are guidelines to that effect. Her explanation as to why she excluded the polygraphs is irrational and unreasonable.
- f) She used a stricter test than what is required in the law of evidence. The inference sought to be drawn must be one of many inferences, not the only inference.
- g) She failed to take into account the two factors namely that stock losses went missing during the shifts of the third respondents and dropped significantly after their departure.
- h) She failed to make a credibility finding against the third respondents having expressed reservations on their evidence. The commissioner had found that the witnesses of the applicant were clear and unambiguous and did not waver under cross-examination. She found that their evidence was consistent and supported by documents, as well as each other, and they made concessions when they needed to do so, there was no suggestion of fabrication. She accordingly accepted their evidence.

- i) With regard to the third respondents, she had found that, whilst she had some reservation about their evidence, when they testified that they did understand English or the value of the stock, in light of admissions made under cross-examination, those reservations were not such that their credibility was affected. Their case was supported by other witnesses all of whom testified about the tight security measures.

### Analysis

- [19] The recent Labour Appeal Court's decision of *Herholdt v Nedbank Ltd*<sup>2</sup> has established the legal position and the test to be applied where the commissioner fails to apply his or her mind on the relevant and material facts before him or her. The commissioner in this instance would have committed a gross irregularity or dialectical unreasonableness. Dealing with what has become known as process related unreasonableness, the LAC held as follows:

"Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in the dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable."<sup>3</sup>

- [20] The question is whether in this case, the commissioner committed any gross irregularity as outlined above. In order to answer that, one has to look at the pot of evidence before her. It is not enough for the commissioner to have

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<sup>2</sup> (2012) 33 ILJ 1789 (LAC) ('*Herholdt*').

<sup>3</sup> *Herholdt* at Para 36.

shown that she gave some thought to the facts and issues before her, she must apply her mind properly to them.<sup>4</sup>

- [21] The thrust of the commissioner's finding is that the results of the polygraph test cannot on their own be conclusive of the finding of guilt, there must be evidence, other than polygraph results to support such a finding. In essence, the commissioner found that nothing separated the third respondents from the other six employees that passed the polygraph, in other words, if they had not failed the polygraph test, they would not have been dismissed.
- [22] The applicant's counsel seemed to accept that polygraph results on their own cannot be conclusive, the applicant's argument is that there was supporting evidence, polygraph results was not the only issue considered by the applicant when dismissing the third respondents, other relevant factors that I have mentioned above were considered. It therefore argues the commissioner should have looked at the polygraph results together with all those other factors and not determine them separately.
- [23] It is well known that polygraph tests are very controversial. It is also widely accepted and has been found in this Court many times that polygraph testing, although admissible standing alone cannot prove guilt. In the case of *Food & Allied Workers Union on behalf of Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*,<sup>5</sup> AC Basson J held as follows:
- "I am in agreement that polygraph testing, as they presently stand, can do no more than show the existence of non-existence of deception. Even on this score, scientists are divided. Moreover, it is an accepted principle in our law that the mere fact that a person lie (in a criminal case) cannot in itself prove that the accused is guilty of a crime. By no means can it be used as conclusive proof of guilt of a crime or misconduct. At best the polygraph test can prove that a person lied, not that he is necessarily guilty of a crime or misconduct."<sup>6</sup> (My own underlining)

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<sup>4</sup> *Herholdt* supra at Para 45.

<sup>5</sup> (2010) 31 ILJ 1654 (LC)

<sup>6</sup> *Fawu* supra at para 54



[24] AC Basson J, went on further to state that:

‘In the light of the foregoing and in the 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 minimize 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....’<sup>7</sup> [My underlining]

[25] I hear the applicant’s argument that other factors other than the polygraph test results were placed before the commissioner. Be that as it may those factors did not circumstantially point to the guilt of the third respondents. In other words the polygraph test results are such that without them it is virtually not possible to find evidence that separates the two third respondents from the rest of the workforce that was not dismissed.

[26] I do not agree that the commissioner failed to look at the evidence in its totality, including the polygraph test results or committed any gross irregularity. The commissioner in my view simply analysed the legal principles on how polygraphs should be treated as she ought to have done. Having analysed those principles coupled with the negative polygraph test results, she asked herself whether there was any other evidence supporting a finding of guilt. She looked at that evidence and came to the conclusion that but for the polygraph results there was no other evidence that supported a finding of guilt.

[27] I do not see anything untoward with the commissioner’s approach. In fact, the commissioner spent a considerable amount of time dealing with each relevant aspect. The relevant factors she considered were that the third respondents were at work when the stock went missing, they were amongst the group of eight employees who had access to the stock, the stock was valuable and that the stock loss dropped considerably once the third respondents were

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<sup>7</sup> Fawu supra at para 55

suspended. I do not agree that there is any additional material the commissioner failed to consider. Clearly if the two employees had not failed the polygraph test, they would not have been dismissed as the evidence presented by the applicant equally applies to the other six employees that were not dismissed.

- [28] I agree that the commissioner must look at the evidence in its totality. However, in doing so she has to analyse each factor in the pot of evidence before her independently. If she does not do so she might be criticised of glossing over material evidence or of failing to apply her mind to all the relevant factors. The totality of evidence indicates that there was no valid reason to find the third respondents guilty apart from failing the polygraph test.
- [29] The commissioner clearly recognised evidence relating to the considerable decrease in stock after the third respondents' departure but she referred to evidence by a certain Houston, who gave evidence on behalf of the applicant, which was corroborated by Woodhouse and Shange. That evidence tended to nullify the assertion that stock theft almost stopped with the departure of the third respondents. The commissioner also found that it was equally probable that the real culprits decided to 'lie low' for a while (presumably due to the disciplinary action taken against the third respondents). Evidence was also given that additional security measures were put in place. Clearly, it cannot be suggested that the commissioner failed to apply her mind to these material issues.
- [30] Turning to the finding on consistency. It seems to me that this finding was made after the commissioner had already found that the applicant had failed to bring evidence supporting the polygraph test results. It also seems that the finding was based on Houston's agreement that there were other employees who failed polygraph tests but were still in the employ of the applicant. I agree that it is strange for the commissioner to have noted that no specific examples of inconsistency were mentioned by the third respondents and that this evidence was not put on applicant's witnesses but still make a finding on this

issue. This however does not make her award reviewable as it does not go to the heart of her findings. It is clearly a side issue.

- [31] The issue of the commissioner's failure to make a credibility finding against the third respondents, whilst having found the applicant's witnesses credible is of no purpose as the material facts were largely common cause and undisputed. The real issue was the admissibility and the use of polygraph test results and whether the evidence presented by the applicant, undisputed as it was, supported an inference that the applicant wanted the commissioner to draw, which is that third respondents were guilty of stock loss.
- [32] In the circumstances, I find that the commissioner did a thorough analysis of all the material facts presented before her. The criticism brought by the applicant against the commissioner has no merit. Accordingly, the commissioner did not commit any gross irregularity nor is her award unreasonable in any way. There is, therefore no basis to interfere with her arbitration award. The review application can therefore not succeed.
- [33] I do not see a reason why costs should not follow the result.
- [34] I therefore make the following order:
1. The review application is dismissed.
  2. The applicant is ordered to pay the costs of the third respondents.

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BOQWANA AJ

Acting Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT:

Adv F Venter

Instructed by: Johannes de Beer Inc., Rent  
Park Ridge

FOR THE THIRD RESPONDENTS:

Adv D Crampton

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LABOUR COURT