IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR 1124/19

In the matter between:

GIWUSA obo MALEMONE EDWIN & 2 OTHERS **Applicant**

and

J MASHABA *N. O* **First Respondent**

STATUTORY COUNCIL FOR THE PRINTING, NEWSPAPER & PACKAGING INDUSTRY OF SOUTH AFRICA **Second Respondent**

SILVERAY STATIONERY COMPANY **Third Respondent**

Date heard : 12 August 2021 via Virtual Proceedings

Date delivered: 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 is deemed to be 10h00 on 13 October 2021.

JUDGMENT

BALOYI, AJ

Introduction

[1] An employee's disobedience of his/her superior's instruction often result in a misconduct which the CCMA or Bargaining Councils have to determine the fairness of a decision to dismiss an employee who committed the misconduct in question. This Court is similarly faced with a task of determining whether the first respondent's arbitration award should be reviewed and set aside. The first respondent upheld the dismissal of the three individual employees who are members of the trade union, GIWUSA. They faced two charges; first, failure to follow a legitimate instruction by refusing to submit themselves to polygraph test and second, such refusal amounted to a breach of contract. The third respondent is opposing the application.

[2] The issue to be determined by the first respondent was solely rested on whether the instructions issued to the employees to undergo polygraph test were lawful or not. The applicant's challenge to the lawfulness of the instruction is fully rested on the provisions of section 8 of the Employment Equity Act 55 of 1998. The applicant's contention is that polygraph test is in its nature a psychological test and prohibited in terms of section 8. More on this appear herein below.

Factual background

[3] All the contracts of employment of the employees of the third respondent have a clause in terms of which they agreed to subject themselves amongst others to a polygraph test. On 15 May 2017 the unfair labour practice dispute was referred by GIWUSA on behalf of a group of its members who were issued with

warnings. It was finalized by way of settlement agreement entered into between GIWUSA and the third respondent with the following terms recorded therein:

- "The applicants agree that they will undergo the polygraph test.
- The company will withdraw the final written warnings upon the completion of the polygraph test.
- The company undertakes not to dismiss the employees based on the results of the polygraph test.
- Both parties agree that the polygraph test will be conducted by an independent person."

[4] The parties accepted that the settlement agreement in question became a collective agreement.

[5] In January 2018 the third respondent experienced a stock loss of R170 000-00. All employees including the managers attached to the section in which the loss occurred were required to undergo polygraph test. Ten out of thirteen employees in that section underwent the test. The remaining three, namely, Edwin Malemone, Albert Mohau and Lucas Manamela refused to take the test citing various reasons. The third respondent issued final written warnings against the three employees.

[6] It is recorded in Mr Edwin Malemone's final written warning that he had '*no response'* to the warning in question. The reason for refusal to sign in acknowledgement of receipt of the warning is that he was '*not treated equal'*. Mr Albert Mohau's final written warning reveals both his response to the warning and reason for refusal to sign to be *'not comfortable'*. In Mr Lucas Manamela's final written warning it is recorded that he did not have a response thereto. The reason for refusal to sign in acknowledgement of receipt is recorded as *'not comfortable' to sign – not treating him well."*

[7] On 13 February 2018 a union official, Mr Amos Magadla addressed a letter to the third respondent essentially demanding the third respondent to withdraw the warnings issued to their members. The main reason being that the polygraph test is psychological in its nature and is prohibited in terms of section 8 of Employment Equity Act. From this communication, it became clear that the written warning did not assist the third respondent to achieve the intended purpose. As a result, the third respondent resorted to instituting a disciplinary action against the trio and that resulted to their dismissal.

[8] The first respondent was the appointed arbitrator to deal with the matter. The crux of the evidence that came before him in justification of the refusal to take the tests mainly came from the applicant's expert witness Colin Tredoux, a Professor of Psychology at the University of Western Cape. He testified about the history of polygraph tests and that such tests were developed by the psychologists. There are various types of polygraph testing which are about psychophysiological detection of deception and tries to infer a mental state translating to a psychological state.

[9] Professor Tredoux pointed further that the Professional Board of Psychology recognised polygraph testing as unreliable and in violation of Health Professions Act and Employment Equity Act. Though it is a psychological test in nature but it is not classified by the Health Professions Council of South Africa in terms of Government Gazette notice 155 of 2017. He conceded that the polygraph test is not recognised as an acceptable form of psychological test. Portions of his report were read through the record.

[10] Through the evidence of its three witnesses, the essence of the third respondent's case is that the polygraph tests within its operations were driven by the relevant clause in the contracts of employment. Furthermore, the agreement entered into between itself and the trade union confirmed the employees' consent to polygraph testing. Despite this, the individual applicants had repeatedly refused to undergo polygraph test. There is no law prohibiting polygraph testing.

[11] The third respondent never used polygraph test to determine the employees' guilt but as an investigative measure. There is no law prohibiting polygraph testing.

[12] In his arbitration award, the first respondent took into account that it was common cause that the applicants had repeatedly refused to undergo polygraph test and that they were previously disciplined. He referred to the events that led to the 15 May 2017 settlement agreement and that the contracts contain a clause in which the employees consented to the tests. He further took note of the applicant's submission that the nature of their claim is not about discrimination on any arbitrary grounds or for exercising any right conferred upon them in terms of section 187(1)(a)(f) of the Labour Relations Act 66 of 1995. He found the instruction to be lawful and ultimately found the dismissal to be procedurally and substantively unfair.

[13] Before this Court, the first respondent's decision is mainly attacked for having not dealt with the uncontested evidence of Professor Tredoux. According to the applicant this constituted an error of law. Since the instruction was in contravention of section 8 of employment Equity Act, what follows is that the instruction was unlawful. The provision of section 8 applies to all the psychological tests. He limited his enquiry to the fact that the employees signed a contract of employment to the effect.

[14] The third respondent in opposition contends that polygraph test as admitted by Professor Tredoux was not classified as psychological test, by the Health Professions Council of South Africa. There is no express or implied prohibition of polygraph test in terms of Health Professions Act 55 of 1974. The three employees did not refuse to undergo polygraph test based on evidence provided by Professor Tredoux. The third respondent maintained its point that it conducted polygraph test as an investigative measure not for purposes of establishing an employee's guilt.

Evaluation

[15] Following the Constitutional Court's decision in *Sidumo*[1], there is no doubt that the test for review is well established in our law. The Labour Appeal Court in *Goldfields Mining South Africa (Pty) Ltd* (*Kloof Gold Mine v Commission for Conciliation, Mediation and Arbitration and Others)*[2] cautioned about the approach to the review application on piecemeal fashion and had the following to say at paragraphs 20 and 21.

> "[20] Failing to consider a gross irregularity in the above context would mean that an award is open to be set aside where an arbitrator (i) fails to mention a material fact in his award; or (ii) fails to deal in his/her award in some way with an issue which has some material bearing on the issue in dispute; and/or (iii) commits an error in respect of the evaluation or considerations of facts presented at the arbitration. The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?
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> [21] Where the arbitrator fails to have regard to the material facts it is likely that he or she will fail to arrive at a reasonable decision. Where the arbitrator fails to follow proper process he or she may produce an unreasonable outcome (see *Minister of Health and Another v New Clicks South Africa (Pty) Ltd and Others* **2006 (2) SA 311** (CC)). But again, this is considered on the totality of the evidence not on a fragmented, piecemeal analysis. As soon as it is done in a piecemeal fashion, the evaluation of the decision arrived at by the arbitrator assumes the form of an appeal. A fragmented analysis rather than a broad-based evaluation of the totality of the evidence defeats review as aprocess. It

[1] (2007) 12 *BLLR* 1097 CC
[2] (2014) 1 *BLLR* 20 LAC

> follows that the argument that the failure to have regard to material facts *may potentially* result in a wrong decision has no place in review applications. Failure to have regard to material facts must aactually defeat the constitutional imperative that the award must be rational and reasonable- there is no room for conjecture and guesswork."

[16] The Labour Appeal Court unpacked the test in *Fidelity Cash Management Service v CCMA & Others*[3] at paragraph 99 as follows:

> "[99] In my view *Sidumo* attempts to strike a balance between, two extremes, namely, between, on the one hand, interfering too much or two easily with decisions or arbitration awards of the CCMA and, on the other refraining too much from interfering with CCMA's awards or decisions. That is not a balance that is easy to strike. Indeed, articulating it may be difficult in itself but applying it in a particular case may tend to even be more difficult. In support of the statement that *Sidumo* seeks to strike the aforesaid balance, it may be said that, while on the one hand, *Sidumo* does not allow that a CCMA arbitration award or decision be set said simply because the Court would have arrived at a different decision to that of the commissioner, it also does not require that a CCMA commissioner's arbitration award or decision be grossly unreasonable before it can be interfered with on review – it only requires it to be unreasonable. This demonstrates the balance that is sought to be made. The Court will need to remind itself that it is dealing with the matter on review and the test on review is not whether or not the dismissal is fair or unfair but whether or not the commissioner's decision one way or another is one that a reasonable decision-maker could not reach in all of the circumstances."

[17] What is of essence here, is that the reasonableness of the decision of the arbitrator is assessed based on his consideration of the totality of all factors placed before him. The Supreme Court of Appeal in *Herholdt v Nedbank Ltd*[4]

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[3] [2008] 3 *BLLR* 197 (LAC)

[4] (2013) 11 *BLLR* 1074 (SCA).

identifies the extent to which unreasonableness may render an award reviewable in paragraph 25 as follows:

> "[25] In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in **s 145(2)***(a)* of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by **s 145(2)***(a)*(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable."

[18] What is undeniable in this matter is that the first respondent did not go beyond the contracts of employment in his reasoning. He did not rule on the evidence of the expert witness upon which the applicant's rested the justification for their refusal. The pertinent question is whether his decision is unreasonable for having not dealt with the point in question. With the complete record before the Court, it is thus imperative to look at whether a case is established to sustain a ground of error of law raised by the applicants. In *Irvin & Johnson v CCMA & Others*[5] the Labour Appeal Court held as follows regarding an approach to a review grounded on error of law at paragraph 48:

> "[48] The fact that the commissioner committed an error of law is not on its own sufficient to justify that her award be reviewed and set aside. A commissioner is entitled to be wrong in law in certain circumstances without his or her award having to be reviewed and set aside. One of those is where the Legislature did not intend that the tribunal concerned should have exclusive authority to decide the question of law concerned and the error is a material one (*Hira & another v Booysen & another* 1992 (4) *SA* 69 (AD) at 93C-H)."

[5] [2006] 7 BLLR 613 (LAC).

[19] It is not in dispute that the polygraph test is not classified as psychological test by the Health Professional Council of South Africa. The report and the evidence of Professor Tredoux were not tendered with specifity on issues in dispute in the current matter. Professor Tredoux was clear in his evidence that he was only offering his expert commentary from his profession's point of view. It is based on general points about the polygraph test, not what the applicants encountered. Having refused to take the test, the second respondent was in no doubt deprived of relevant knowledge as to the kind of test they were set to undergo. Any conclusion that the test was to be administered on the applicants was certainly unreliable and psychological in nature is without doubt premature.

[20] In following the *Irvin & Johnson* approach the first respondent was indeed tasked with a duty to determine an issue that he had no competency to pronounce upon. A regulatory position adopted by the Health Professions Council of South Africa cannot be quietly decided upon at the CCMA without involving the Council. The Council does have interest in the matter and ought to have either been joined or to have its decree challenged in a separate litigation. In the circumstances, the first respondent's omission to deal with the evidence of expert witness does not render his award reviewable.

[21] The Labour Appeal Court's decision in *Gold Fields* fits well into this scenario. An omission to deal with a single issue cannot amount to an irregularity that renders the whole award reviewable. Under these circumstances the first respondent cannot be faulted for having not made a finding on this aspect and stuck to what led to the disciplinary action against the applicants together with the outcome thereof. His decision to uphold the dismissal is the one which a reasonable decision maker could reach. The review application falls to be dismissed.

Costs

[22] This matter falls within the scheme of the labour law litigation where a rule that costs follow the result does not apply. Although there was no indication on

whether there is still an ongoing relationship between the union and the third respondent, I have considered the importance of the issues raised in this matter. It is in this regard, in the interest of law and fairness to make no cost order. Each party must under the circumstances be liable for its own costs.

[23] The following order is therefore made:

Order

1. The review application is dismissed.
2. There is no order as to costs.

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M Baloyi

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Adv. V Bruinders,
Instructed by: Casual Workers Advice Office (Law Centre)

For the Third Respondent: Mr J Crawford of Crawford Attorneys