

SOUTH AFRICA / JUDGMENT

Endeto Engineering (Pty) Ltd v Metal & Engineering Industries Bargaining Council and Others (JR823/20) [2023] ZALCJHB 26; [2023] 11 BLLR 1188 (LC) (20 February 2023)

[2023] ZALCJHB 26

COURT

Labour Court Johannesburg

BEFORE

T Govender

CASE / FILE NUMBER

JR823/20

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No. JR823/20

In

the matter between:

ENDETO
ENGINEERING (PTY) LTD Applicant
and
METAL
& ENGINEERING INDUSTRIES
BARGAINING
COUNCIL First
Respondent
LESIBA
KABELO MFATI Second
Respondent
ALI
ROOI
NKABINDE Third
Respondent

Heard:

5 May 2022

Delivered: 20 February 2023
This judgment was handed down electronically by emailing a copy to the parties. The 20 February 2023 is deemed to be the date of deliver of this judgment.

JUDGMENT

GOVENDER, AJ

Introduction

- [1] The matter before the Court is a review application of an arbitration award. The arbitrator found that the third respondent's (Mr Nkabinde) dismissal was substantively unfair and awarded him compensation of eight months in the amount of R62,592.00.
- [2] Prior to assessing whether the award is reasonable or not, it is necessary to consider the factual matrix underlying the arbitration award.

Material

background

- [3] The Applicant commenced employment on 6 February 2013 as a steel engineer.
- [4] On 31 October 2019, an incident occurred at the workplace.
- [5] On Mr Nkabinde's version, he was using the bathroom, and was in a stall, when the Applicant's Mr Lovett, peeked over the stall wall and looked at him while he was relieving himself. Being upset by the incident, Mr Nkabinde went to look for Mr Lovett thereafter and later saw him leaving the bathroom. Mr Nkabinde approached a shop steward in the workplace before approaching his union externally. Mr Nkabinde's union, in turn, addressed an email to Mr Lovett that evening, calling for an apology concerning the incident. When an apology was not forthcoming, a formal grievance was lodged by Mr Nkabinde against Mr Lovett. The outcome of the grievance, at that juncture, was that both parties submit to polygraph testing.
- [6] Mr Lovett, who describes himself as the owner of the business, vehemently disputed the allegations during the arbitration. Mr Lovett admits having entered the bathroom at the same time as another employee of the Applicant, namely Mr Enoch Maduana (Mr Maduana), having used the urinal and having left the bathroom slightly ahead of Mr Maduana. The Applicant also relied heavily on clock in reports during argument to demonstrate that Mr Maduana and Mr Lovett were in the bathroom for around the same amount of time, i.e. approximately 2 minutes. This, it was submitted, rendered Mr Nkabinde's version

improbably.

[7] Polygraph testing was arranged to take place on 18 November 2019. On 4 November 2019 Mr Nkabinde signed a “Consent to [Undergo] Polygraph Examinations As Part Of Grievance Enquiry”. The terms of the “consent” are as follows:

‘1. The Parties agree that the Employee shall undergo a Polygraph Examination on a date and time to be determined as part of an ongoing grievance investigation where it has been determined that the Cautionary Rule Applies.

2. The Employee acknowledges that he/she has been placed in a position of trust within the Company, as a result the employee is required to always act in the best interest of the Employer and at all times be

honest.

3. Refusal to undergo a polygraph in any test in any manner will constitute a breach in the trust relationship between yourself and the employer and will result in the inference being drawn that the allegations made by the Employee are untrue.

4. The employee agrees to undergo a polygraph test, where the employer is investigating any incident of the commission of fraud and/or the theft and/or gross dishonesty and/or gross negligence in which the employee or others may be implicated.

Acknowledgement

Herewith, I acknowledge that I have read and understood this specific document as relates to the use of polygraph testing and agree to the contents thereof. This agreement was explained to me in a language that I fully understand.’ (Emphasis added)

[8] Ultimately, Mr Nkabinde did not attend his polygraph test, because his union representative was not available on the day and his union representative’s attendance was required, on his version, since he was not au fait with matters of this nature.

[9] Mr Lovett did attend the polygraph testing and the outcome of his test was that no deception was detected. The questions posed to him were along the lines of enquiring whether he peeked over the toilet stall or not, which he disputed.

[10] While the consent to undergo polygraph testing was done in pursuit of the finalisation of the grievance lodged by Mr Nkabinde, following his non-attendance at the polygraph testing facility, he was charged with the following disciplinary offences:

‘1. GROSS MISCONDUCT: Dishonesty in that, you made a false accusation against the CEO of the Company (Mr Raymond Lovett) to the effect that Mr Lovett was watching you relieve yourself in the bathroom on the 31st of October 2019,

And/or Alternatively

2. GROSS MISCONDUCT: Breach of an agreement signed by yourself in that you refused to undergo a Polygraph Examination on the 18th of November 2019 despite agreeing to do so on the 4th of November 2019.’
- [11] A disciplinary hearing was convened on 9 December 2019 where the chairperson of the disciplinary hearing was a Mr van Deventer. Mr De Jager of NUMSA represented Mr Nkabinde and it appears that Mr Lovett was the initiator. Mr Nkabinde pleaded guilty to charge 2, and not guilty to charge 1.
- [12] Following the disciplinary hearing, Mr Nkabinde was dismissed the very same day (9 December 2019).
- [13] Mr van Deventer found that the seriousness of the allegations warranted a dismissal.
- [14] Mr Nkabinde referred an unfair dismissal dispute to the Metal and Engineering Industries Bargaining Council. At the arbitration he was represented by Mr Enoch Nhlapo of NUMSA.
- [15] The Applicant called three witnesses at the arbitration, namely Mr van Deventer as the Chairperson, Mr Lovett and Mr Maduana.
- [16] Mr Nkabinde testified on his own behalf.
- [17] The question before the Court is whether the finding of the arbitrator is reasonable or not.

The test on review

- [18] The test to be applied is that as enunciated in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*.
- [19] The Labour Appeal Court (LAC) in *Gold fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration & others* affirmed the test on review as follows:

‘In short: A review court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts

presented at the hearing and came to a conclusion that is reasonable.’

- [20] The review court is not required to take into account every factor individually, to consider how the arbitrator treated and dealt with each of those factors and then determined whether a failure by the arbitrator to deal with it is sufficient to set the award aside. A piecemeal approach in considering the award is inappropriate because the reviewing court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could reach.

Analysis

- [21] The Applicant objects to the answering affidavit being deposed to by Mr Masutha in the absence of a confirmatory affidavit by Mr Nhlapo, who represented Mr Nkabinde at the arbitration proceedings as set out above. It is on this basis that the arbitration award has been assessed against the totality of evidence led at the arbitration and the arbitration award itself as against the grounds of review.
- [22] I address the substantive grounds of review below, which in the main concern the arbitrator's assessment of credibility and his disregard of Mr Lovett's polygraph test results.
- [23] The technical grounds of review raised in the Applicant's supplementary affidavit concerning what evidence should be disregarded does not take the matter any further since I do not view these issues to be material. In any event, the objective facts are clear from the evidence.
- [24] At the outset, I find Mr van Deventer's role at the arbitration most peculiar. His role was not limited to being a witness, but he also represented the Applicant, as the employer party, at the arbitration.
- [25] This immediately creates a conflict of interest. How could Mr van Deventer act on, the one hand, as an "independent" chairperson seized with determining Mr Nkabinde's guilt and, on the other hand, act for the Applicant in its efforts to defend the dismissal?
- [26] To make matters worse, Mr van Deventer's evidence in essence was in defence of the disciplinary outcome, more particularly the process followed by him as chairperson. Mr van Deventer largely testified that he did allow cross-examination which is why the dismissal was procedurally fair. He also testified about the signed disciplinary outcome where Mr Klaas signed in acknowledgment of the perils of not asking further questions. This was confirmed by Mr Lovett.
- [27] Since procedural unfairness was not really pursued during the hearing and the arbitrator found the dismissal to be procedurally fair, this issue is accordingly not contentious.
- [28] In dealing with the test concerning conflict of interest in the matter of *Robinson v Ranfontein Estate Gold Mining Co Ltd*, Innes CJ said the following:
- '[Conflict of interest] rests upon the broad doctrine that a man who stands in a position of trust towards another, cannot, in matters affected by that position, advance his own interest (e.g. by making a profit) at the others expense.'
- [29] Lord Herschle in *Bray v Ford* stated as follows in this regard:
- 'human nature being what it is, there is a danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those who he is bound to protect.'

- [30] It is clear that Mr van Deventer's role at the arbitration was driven by interest rather than duty. His interest was to act on behalf of the employer and to defend his disciplinary finding. He failed in his duties as chairperson in so doing, because he abandoned his objectivity and impartiality.
- [31] It is glaringly obvious that a chairperson of a disciplinary hearing is non-suited to represent an employer in a subsequent dispute concerning that hearing, in the same vein that a chairperson would be non-suited to represent an employee.
- [32] It should have been blatantly obvious to the Applicant and Mr van Deventer that this approach is not appropriate and while it is not subject of the arbitration award, it bears mentioning to demonstrate the Court's dissatisfaction with this state of affairs.
- [33] Concerning the disciplinary finding, while Mr van Deventer's finding does not articulate a finding of guilt expressly on both charges, it is clear that both charges were evaluated and that the finding of guilt includes charge 2, i.e. Mr Nkabinde's failure to undergo polygraph testing. I say this premised on the following references to charge 2 in the disciplinary finding:
- '2. ... In this instance, this specific agreement as relates to the inference to be drawn by the refusal to undergo the Polygraph [Examination].
- ...
4. Furthermore, the Employee reiterates this lack of trustworthiness by agreeing to terms to resolve the primary dispute and then reneging on this agreement as well.
12. The Employee, through his actions has demonstrated on multiple occasions that he shows no allegiance to his employer and despite having been given multiple opportunities to clear his name has stuck to his version and refused to undergo polygraph examinations which may exonerate him.'
- [34] It seems that, despite Mr Nkabinde pleading guilty on charge 2, his plea had no material bearing on how Mr van Deventer evaluated the evidence or reached a decision. In any event, given Mr Nkabinde's plea of guilty concerning charge 2, this would not have been a dismissible offence on its own, to my mind.
- [35] I must pause to emphasise that the inclusion of clause 3 as set out above in a document intended to be a consent to undergo polygraph testing is loaded and heavy handed to say the least. That the employee signed this consent is neither here nor there in the circumstances where clause 3, among others, is not only offensive to public policy, but also offends the principles of natural justice and the interest of justice.
- [36] This even more so when Mr Nkabinde has provided an explanation for his non-attendance, thereafter, was told to foot the bill for future polygraph testing and pleaded guilty to this charge in any event.

- [37] While the above evidence did not feature in the arbitration award itself, it was led during the arbitration and is relevant to my determination herein. All of the above is relevant to the assessment of the reasonableness of the arbitrator's ultimate finding.
- [38] The main issue in the review is the arbitrator's assessment of the competing versions concerning the incident as set out above by Mr Nkabinde and Mr Lovett respectively.
- [39] Mr Lovett testified that when he entered the bathroom there was one person ahead of him, namely Mr Maduana and that all the cubicles were closed, save for one, which Mr Maduana used. Mr Lovett used the urinal. He further stated that he had no need to worry about why all the cubicles were occupied, that he used the urinal and left the bathroom. He then relied on the clocking reports to demonstrate that he and Mr Maduana entered and exited the bathroom at exactly the same time, i.e. 14h06 to 14h08. Mr Lovett testified that he came out of the bathroom before Mr Maduana.
- [40] Mr Lovett further testified that he had not looked over the stall. He viewed Mr Maduana's evidence to corroborate his version, but Mr Maduana testified that he could not attest to what Mr Lovett was doing after he (Mr Maduana) had entered the stall.
- [41] Mr Maduana testified that as he approached the bathroom, Mr Lovett was in front of him, but Mr Lovett then went into the kitchen, and he went straight into the bathroom. However, as he was closing the bathroom stall that he had entered, he saw Mr Lovett enter the bathroom.
- [42] Mr Maduana also testified that when he was done in the bathroom, he passed Mr Lovett at the urinal as he left.
- [43] Mr Lovett testified that the walls of the stalls were so high that it was not possible to look over while standing on the actual toilet. He also testified that while he had not done this exercise himself, other employees had done so and told him that this was not possible.
- [44] Mr Maduana however, disputed this and said that while he too had not done the exercise, by his estimation, it was possible to look over the stall.
- [45] While I accept that the clock in reports were not disputed, the veracity of the clock in reports is unclear. To my mind, it is improbable that Mr Lovett and Mr Maduana entered and exited the turn-style as reflected on the clock in report at precisely the same time, given that there was a gap between their respective entry and exit of the bathroom, albeit small.
- [46] The arbitrator did consider the clock in reports as part of the evidence provided by Mr Lovett, and he refers to these reports in the arbitration award.
- [47] I do not believe that the arbitrator acted unreasonably in not attaching the weight to the clock in reports that the Applicant would have wanted, based on what is stated above.
- [48] The arbitrator in assessing the evidence found Mr Nkabinde's version more probable. He did this by assessing the credibility of both Mr Nkabinde and Mr Lovett.

[49] The question is whether the arbitrator's assessment is reasonable or not.

[50] When considering competing versions the judgment in Stellenbosch Farmers' Winery Group Ltd and another v Martell Et Cie SA and Others (Stellenbosch Winery) is instructive, where it was held that:

'To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.'

[51] In the arbitration award, the arbitrator assessed the credibility of the respective parties as follows:

'[23] What makes the Applicants version more probable is the fact that he took efforts to raise what he was aggrieved about. Firstly by immediately informing the Union official about what had allegedly happened and before doing so he had went to the shop steward at the workplace who had brushed him of a version which was not disputed by the Respondent. It is my respectful view that the Applicant would not have went to such an extent of raising disgruntlement if Mr Lovett had not "peaked at him whilst he was in the toilet". Furthermore the Applicant gave justifiable reasons as to why he could not undergo the polygraph test, much as it was his contractual obligation to do so. Again the clocking history confirms that at one stage parties were in the bathroom together.

- [24] The Applicant struck me as a credible witness who did not contradict himself or mince his words during his testimony one could observe how deeply hurt and demoralized the alleged actions by his boss had done to him. Although Mr Raymond also gave a compelling testimony even as to how he is contemplating closing shop as a result of the allegations. No evidence was led by the Respondent as to why the Applicant would come up with such a story especially after Mr Lovett confirmed that his relationship with the Applicant was good.
- [25] After serious consideration of all relevant circumstances and facts established, I conclude that on a balance of probabilities I find the Applicant's version more probable. It is my valued sense of fairness I rule that dismissal was unfair in the circumstances.'
- [52] When considering the manner in which the arbitrator assessed the evidence, it is clear that he applied the principles as enunciated in Stellenbosch Winery above.
- [53] In particular, the arbitrator found it highly improbable that Mr Nkabinde would be so persistent with his grievance had he been dishonest about the incident having occurred.
- [54] A further issue which warrants some consideration is the Applicant's contention that the arbitrator failed to take into consideration that Mr Lovett had submitted himself to a polygraph examination "and was found to be truthful".
- [55] As set out above, the result of Mr Lovett's polygraph test was that no deception was detected. The Applicant's recorded that Mr Lovett "was found to be truthful" is a step too far, particularly in the absence of expert evidence in this regard.
- [56] In DHL Supply Chain (Pty) Ltd v De Beer N.O and Others, the LAC held as follows concerning the import of polygraph testing:
- '[29] An example of a polygraph being used in a misconduct case is Truworths Ltd v CCMA (2009) 30 ILJ 677 (LC). In a review, the award was set aside for a myriad of irregularities, including a failure to have regard to all the evidence, amongst which was evidence of polygraph tests. (at para 38) Further, in that judgment, relying on the observations of Grogan A in Sosibo & others v Ceramic Tile Market (2001) 22 ILJ 677 (CCMA), it was held at para 37 that a polygraph is useless on its own but may be 'taken into account' together with 'other supporting evidence'. The dictum goes on to say that a polygraph can serve as corroboration of other evidence.
- [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.'
- [57] This judgement not only demonstrates that polygraph testing is only useful to corroborate other objective evidence, but also drives home the difficulties with questionable clauses being included in consent forms preceding polygraph testing.
- [58] The only other objective evidence that could have corroborated Mr Lovett's polygraph testing was the clock in reports, which reports I am not convinced of for reasons set out above, but which were considered by the arbitrator in any event.
- [59] In addition, the final written warning of 21 October 2019 against Mr Nkabinde for poor timekeeping and his failure to attend a safety meeting was not led as evidence at the arbitration, while it was part of the Applicant's arbitration bundle. It is unreasonable to expect the arbitrator to have read every document in the arbitration bundles and considered evidence therein which was not led at the arbitration.
- [60] The factual errors that the Applicant raises as grounds of review are immaterial to the overall reasonableness of the award.
- [61] Even if I were wrong on the reasonableness of the arbitrator's assessment of credibility, having regard to the heavy handed terms of the consent, Mr Nkabinde's grievance being transformed into a disciplinary hearing against him and the disproportionate reliance on the result of Mr Lovett's polygraph test results, it is clear that dismissal was wholly unfair in these circumstances. After all, the grievance could not have simply concluded with polygraph testing and not have provided for further steps once this was done.
- [62] The arbitrator further understood that, given the strained relationship, reinstatement was inappropriate, even though this is what Mr Nkabinde had requested in his referral forms, while Mr Nkabinde conceded during his evidence that he would not be able to work with Mr Lovett again. This is why the arbitrator awarded compensation, further demonstrating the reasonableness of the award.
- [63] Having regard to the totality of evidence before the arbitrator, the decision reached in the arbitration award is one that a reasonable decision-maker could reach.

Costs

- [64] It is trite that in labour matters, costs do not follow the result.

- [65] In order for costs to be granted the Court's judicial exercise of its discretion to award costs must be engaged and there must be a justification for the departure of the ordinary rule that costs should not be ordered. The dictates of fairness in terms of section 162 of the Labour Relations Act and the constitutional and statutory imperatives that underpin it, must be considered.
- [66] There is no basis for a costs order to be granted against the Third Respondent concerning the late filing of the answering affidavit or otherwise, let alone a punitive costs order.
- [67] I do not believe that there is any basis for costs to be awarded against the Applicant stemming from its application being unsuccessful, because costs do not follow the result in labour matters. The Applicant was making use of its constitutionally entrenched right to access the courts and there was no malice in the Applicant's pursuit of the litigation.
- [68] In the premises the following order is made:

Order

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

T. Govender

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Krugel

Heinsen Incorporated

For the Third Respondent: NUMSA

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Prepared on 11 October 2026 · Esheria