

SOUTH AFRICA / JUDGMENT

Kgwedi v Bidvest Protea Coin (Pty) Ltd (JS1052/16) [2018] ZALCJHB 425; [2019] 6 BLLR 562 (LC) (18 December 2018) [2018] ZALCJHB 425

COURT

Labour Court Johannesburg

BEFORE

Mahosi

CASE / FILE NUMBER

JS1052/16

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: JS 1052/16

In

the matter between

MISHACK

KGWEDI Applicant

and

BIDVEST

PROTEA COIN (PTY)

LTD Respondent

Heard:

06 – 07 December 2018

Delivered:

18 December 2018

JUDGMENT

MAHOSI.J

Introduction

- [1] The applicant approached this Court by way of a statement of claim to challenge the substantive and procedural fairness of his dismissal based on the respondent's operational requirements. The relief sought is that he be retrospectively reinstated.
- [2] This matter was heard from 6 November 2018 until 7 November 2018. At the end of the trial, the parties agreed to submit written heads of argument not later than 13 November 2018. The heads of argument were filed as agreed.

Background

- [3] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the claim, it is necessary to outline the facts that form the relevant background to the dispute between the parties.
- [4] The respondent is a private company providing guarding security services to various clients across various industries. The applicant commenced employment with the respondent on 12 September 2012 as a security guard. He was placed at the premises of the respondent's client, Impala Platinum Refinery, to perform guarding services.
- [5] On 27 October 2016, the respondent subjected the applicant to a polygraph test. The following day, on 28 October 2016, the applicant had a meeting with the company investigator, Marieta Buurman (Ms Buurman), in the presence of Mr Shaun Ackerman (Mr Ackerman). The purpose of the meeting was to inform the applicant about the outcome of the polygraph test.
- [6] After the meeting with Ms Buurman, the applicant was referred to the Human Resource office for a meeting with Ms. Dorothea Nel (Ms Nel). Subsequently, on 31 October 2016, the applicant signed a retrenchment agreement. His last working day as per the agreement was 31 October 2016.
2016. The applicant's case is that the retrenchment agreement is invalid as he signed it under duress.

Evidence of parties

- [7] The applicant led evidence in support of his case and two witnesses led evidence for the respondent.

The respondent's witnesses

Mr Shaun Ackerman

- [8] Mr Ackerman testified under oath that he was employed by the respondent as a senior shift supervisor and had been employed for 11 years. He further testified that in terms of the agreement between Impala Platinum Refinery (the client) and the respondent, the respondent's employees are required to undergo a pre-employment polygraph test. Thereafter, the client may randomly schedule polygraph tests for the respondent's employees who are placed at its site. The polygraph tests are conducted by a third party who is appointed by the client. In addition, the client bears costs associated with such tests.
- [9] Mr Ackerman further testified that he was not always involved with the employee's polygraph test. However, he became involved in the applicant's case as a result of the invitation by Ms Buurman for him to attend a meeting as a witness. During the meeting, Ms Buurman informed the applicant that she had received the polygraph report, which outlines his polygraph results. According to the polygraph report, the applicant's results were found to be negative in that deception had been detected in the answers he had given by during the polygraph test.
- [10] In addition, Ms Buurman explained to the applicant that the test was standard protocol and that all the employees were asked the same questions during the tests. Further that it was the client's requirements that all the respondent's employees placed at its site pass the polygraph tests. The applicant was further informed that failing polygraph test was not a condemnation and that he would still remain the respondent's employee.
- [11] Furthermore, Mr Ackerman testified that Ms Buurman inquired with the applicant whether or not he understood the questions posed to him during the test, whether there was anything that bothered him during the polygraph test and whether he was comfortable with how the polygraph test was conducted. The applicant answered in the affirmative and even confirmed that he had signed a consent form prior to the test being conducted.
- [12] Under cross-examination, Mr Ackerman confirmed that the applicant did not dispute anything during the meeting with Ms Buurman. Mr Ackerman disputed that the applicant was informed that his services were terminated as a result of failing the test. Instead, he testified that the applicant was informed that the client had requested his removal from the site and was referred to the Human Resource (HR) for a further meeting.

Ms Dorothea Nel

- [13] Ms Dorothea Nel (Ms Nel) testified under oath that she was employed by the respondent as a Human Resource administrator and that she was based at the client's premises. On the practice of subjecting the respondent's employees to polygraph tests, she testified that numerous security guards placed at the client's site undergo polygraph testing if and when required by the client. In cases where an employee fails a polygraph test, the client would normally request the removal of such an employee. The respondent would thereafter commence with a process of investigating alternative sites for possible placement or

transfer.

- [14] On 28 October 2016, she had a meeting with the applicant during which she explained that the respondent will attempt to secure an alternative site for him and should that fail, the respondent would proceed with a retrenchment process. It was during this meeting wherein the applicant indicated that he did not want to go through retrenchment meetings and he requested to be retrenched. In response, she told the applicant to go and think about the issue over the weekend before making any final decision. A further meeting was arranged for 31 October 2016.
- [15] During the meeting on 31 October 2016, Ms Nel informed the applicant that there were sites available and positions wherein he could be placed. In response to same, the applicant confirmed that he did not wish to engage in the process or to continue being employed by the respondent but would rather enter into a voluntary retrenchment agreement. Ms Nel took the applicant to Mr Taljaard's office where she explained to Mr Taljaard that the applicant chose not to go through the retrenchment meetings. Mr Taljaard said that in that case, the only process to be followed would be to enter into a written agreement of retrenchment with the applicant.
- [16] Ms Nel and the applicant went back to Ms Nel's office where she printed out the agreement. Ms Nel presented the agreement to the applicant, explained it thoroughly and further asked the applicant to read it. Ms Nel invited questions from the applicant and asked if he had any reservations, concerns and/or queries in respect of the agreement, to which the applicant confirmed that he had none. The applicant read the agreement and signed it.
- [17] Ms Nel explained the terms of the agreement to the applicant and requested that he initial each section as an indication that he understood the contents thereof. On page 2 of the agreement, the applicant signed to confirm the last working day, the severance package and the reason for termination. After signing the agreement, she informed the applicant to return the uniform that had been provided during his tenure with the respondent.
- [18] Under cross-examination, Ms Nel testified that there was no written proof that he requested to be retrenched. She disputed that the applicant was coerced into signing the agreement and that she told him that he was dismissed because he had failed the polygraph test.

The Applicant's case

Mr Mishack Kgwedi

- [19] Mr Kgwedi (the applicant) testified that he was employed by the respondent on 12 September 2012 as Security Officer and was later promoted to the position of Supervisor. He was placed at the client's premises to perform guarding duties.

- [20] On 27 October 2016, his Manager, Mr. Cassie van Eeden (Mr van Eeden), advised him to attend to a polygraph test prior to the end of his shift. He attended to polygraph testing after 15:00 p.m. as he had been quite busy with his duties on that date. The polygraph testing took a period of 45 minutes after which the examiner informed him that he had passed the test.
- [21] On 28 October 2016, he was advised to meet with the company investigator, Ms Buurman. At the meeting, Ms Buurman informed him
- that he had failed the polygraph test in that he failed a question relating to taking a bribe on site, which meant that he was dishonest. Out of shock he requested to be provided with the results of the polygraph test, but Ms Buurman refused to provide the results to him.
- [22] Ms Buurman further informed him that he should return his employment uniform, as his employment with the respondent had been terminated. Further that there was no alternative site at which he could be placed. He then advised Ms Buurman that the examiner had informed him after the polygraph test had been completed that he had passed the test. He further informed Ms Buurman that should he have failed the test, the respondent ought to have charged him and subjected him to a formal inquiry. Ms Buurman said she knew nothing about the disciplinary process and referred him to the Human Resource office. He was dispossessed of the access card and escorted out of the site.
- [23] The applicant disputed Mr. Ackerman's version of what happened at the meeting. He stated that he (Mr Ackerman) probably forgot what transpired as he was just there without taking part in the meeting.
- [24] On 28 October 2016, he met with Ms Nel who told him that he was dismissed for failing the polygraph test. He pleaded with her for an alternative site but was told that there was no alternative site. He requested to see Mr Taljaard but was refused access to him. He was told to return on 31 October 2016 to hand in the company's property.
- [25] On Monday, 31 October 2016, he went back to Ms Nel's office where he found all the documents prepared for his signature. Although he confirmed that the signature on the retrenchment agreement was his, he submitted that Ms Nel did not go through the document with him and that he was told to sign the agreement in order for the respondent to process what was due to him.
- [26] The applicant denied that all signatories to the settlement agreement signed the agreement in the presence of each other, that the operational process was explained to him and that he chose to be retrenched. To show that he was aggrieved, he wrote a letter to the CEO of the respondent to complain about his dismissal. The CEO telephoned the applicant and promised to revert to him after dealing with the management. The applicant gave the CEO two weeks to revert to him and when he was not calling him back he referred a dispute to the CCMA.

- [27] When asked if he voluntarily signed the agreement he stated that although he was against it, he signed after it was explained to him that the respondent was using a new section 189 of Labour Relations Act[1] (LRA) process. The other reason he signed the agreement was because he was told that if he did not sign the agreement, his salary was not going to be processed.
- [28] The applicant testified that he was currently unemployed and further that his applications for employment with other companies were not successful as the respondent gave bad reference for him. He stated that he was in debt and could not pay rent or take care of his family, which resulted in his wife leaving him.
- [29] The applicant argued that dismissal was unfair because he was initially told that he passed the polygraph test, there was no disciplinary hearing conducted, there was no alternative position offered to him and there was no reason to retrench him as the respondent employed employees from Kwa-Zulu Natal and Bloemfontein.

Legal principles and analysis of evidence

[30] According to the parties' pre-trial minute, this Court is required to determine the following:

'9. Whether or not the applicant was unfairly dismissed;

10. If so, whether or not the applicant should be reinstated, alternatively whether or not the applicant should be compensated for his unfair dismissal;

11. Whether there was a fair reason for the dismissal of the applicant on the basis of the operational requirements of the respondent;

12. Whether a fair process was followed by the respondent in dismissing the applicant.'

[31] The issue is whether the applicant was dismissed for operational requirements and if so, whether his dismissal was procedurally and substantively fair. Section 192 of the LRA requires an employee, in any proceedings concerning any dismissal, to prove the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal was fair. Similarly, section 188(1) of the LRA obliges the employer to prove that the reason for the dismissal was fair, where an employer dismisses employees on account of its operational requirements. The term "operational requirements" is defined in section 213 of the LRA to mean "requirements based on the economic,

technological, structural or similar needs of an employer". Item 1 of the Code of Good Practice on Dismissal Based on Operational

Requirements provides that:

‘The Labour Relations Act (Act 66 of 1995) (“the Act”) defines a dismissal based on the operational requirements of an employer as one that is based on the economic, technological, structural or similar needs of the employer. It is difficult to define all the circumstances that might legitimately form the basis of a dismissal for this reason. As a general rule, economic reasons are those that relate to the financial management of the enterprise. Technological

reasons refer to the introduction of new technology which affects work relationships either by making existing jobs redundant or by requiring employees to adapt to the new technology or a consequential restructuring of the workplace. Structural reasons relate to the redundancy of posts consequent to a restructuring of the employer’s enterprise.’

[32] The Labour Appeal Court restated the test to evaluate the substantive fairness of dismissal related to operational requirements in *Haveman v Secequip (Pty) Ltd*[2] and it stated as follows:

‘A fair reason is one that is bona fide and rationally justified, informed by a proper and valid commercial or business rationale. The enquiry is not whether the reason put up is one which would have been chosen by the court but whether the reason advanced considered objectively is fair.’

[33] The respondent’s evidence is that the applicant was removed from the client’s premises subsequent to him failing the polygraph test. In defending its decision to subject the applicant to polygraph test, it relied on the contract of employment entered into between the parties which states as follows:

‘Special Terms of Employment:

7.1 The Company may in its discretion or a request from a client and upon reasonable notice to you, transfer you to another location when in the interest of the company.

7.6 It is agreed by the Employee that this in contract and continuation thereof, depends entirely on the operational requirements of Impala Platinum Refineries, Springs by its very nature and is entitled to take all reasonable steps to ensure the protection of its assets.

7.7 In so doing it requires from its security service provider to conduct polygraph and other similar tests with the Employees. As such, the Company will require you to undergo polygraph and other similar tests conducted by a polygraphist. The Employees appointment will be subjected to the polygraph test results.

7.8 By the very nature of its business, the organisation is at high risk of stock losses, Impala Platinum Refineries and the Bidvest Magnum Group have instituted various measures to ensure that the specific operational needs of the organisation are met. These measures extend to this contract. The Employee therefore accepts that if there is an unreasonably high risk identified by Impala Platinum Refineries and/or the Bidvest Magnum Group in relation to this employment contract, then Bidvest Magnum Group is entitled to terminate this contract in terms of the LRA. 9

...

Searching, Alcohol testing and Polygraph:

11.3 You may be requested by the Company or the Client, to submit yourself to a polygraph or other similar tests. In the event that you are requested to be tested, this will be done in privacy and with due regard to your constitutional right to human dignity. You may also reasonably refuse a request to be tested.

11.4 Irrespective of section 7.8 of this contract, the Company retains the right and the employee agrees that Bidvest Magnum Group retains the right to commence with Operational Requirements procedures and or transfer the Employee should he/she fail any of the above-mentioned tests and actions indicated above.'

[34] The existence of the contract of employment is not in dispute. The applicant confirmed his signature thereon and that he understood the contents thereof. The respondent's submission was that the commercial agreement with its client to subject its employees to polygraph test created the operational requirement once the employees had failed the said test. To support its submission, the respondent relied on *SA Transport and Allied Workers Union and Others v Khulani Fidelity Security Services (Pty) Ltd*[3] where the Court found as follows:

'There is no evidential basis to conclude that there had been non-compliance with the provisions of section 189 of the LRA. To sum up therefore, there was an agreement. That agreement was designed for operational reasons, namely to ensure that only people of proven integrity could be maintained in these position. That was the purpose of the agreement with respondent's client. It was the reason why consultations took place with the first appellant. The position was also known to all the workers employed therein; that is failure of the test gave rise to termination from that post for the reasons I have mentioned, being operational

reasons.

Thereafter there was an obligation to engage in a process of consultation with relevant employees and to offer, if at all possible, alternative positions...'

[35] In this case, the process of consultation was not engaged on. The respondent's evidence is that the applicant refused to take part in the process of consultation and opted to enter into a retrenchment settlement agreement. The applicant did not dispute that he signed the settlement agreement. However, his case is that he signed the settlement agreement under duress as he was advised that failure to sign it would result in him not receiving any of his monies.

[36] Of significance is that, in the settlement agreement, the parties agreed that:

'After consultations, the parties hereby agree to the following as the full and final settlement agreement terms between the above-mentioned parties...

[37] It is an established principle that contracts are binding on parties and are therefore enforceable unless it can be shown that the parties were not on an equal footing when entering into the contract, or that the contract was invalid *ab initio*, or that it is contrary to public policy or it is an illegal contract. In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd and Another* it was held that:

‘[12] Contractual principles apply to any agreement entered into between an employer and employee, including an agreement of compromise in terms of which parties agree to settle any dispute, or claims, that may exist between them.

[15] A contract may be vitiated by duress where “intimidation or improper pressure renders the consent of the party subjected to duress no true consent. Compulsion may be exercised by way of physical force, or indirectly, by way of a threat of harm. In order to obtain an order setting aside a contract on the grounds of duress, actual violence or reasonable fear must be shown. The fear must be caused by the threat of some “considerable evil” to the person concerned, or to his, or her, family. The threat or intimidation must be unlawful, or *contra bonos mores* and the moral pressure used must have caused damage. The burden of proving the existence of duress rests on the party raising it.’

[38] When evaluating the bargaining power between the parties, the Court will take into account the position and status of the employee to the contract. In the current matter, the threat not to pay the applicant for failure to sign the settlement agreement cannot amount to a reasonable fear on the part of the applicant. It is apparent from the facts of this matter that the applicant did not hold a low-level position that could be seen to have been exploited by the respondent in entering into the settlement agreement. The evidence is not only that the applicant had a Grade A Security Certificate, Basic Computer, Bookkeeping and a Certificate in Management, but he was trained on Labour Relations.

[39] In addition, the applicant did not only sign the last page of the agreement but also put his signature on the clauses relating to the reason for termination of employment, the last day of employment and payment of severance pay. In fact, the applicant never raised any concerns with regards to the settlement agreement. In the letter he allegedly sent to the respondent’s CEO, the applicant did not raise the complaint about being coerced to sign a settlement agreement and could not, under cross examination, give a reason why he chose not to. Therefore, the only reasonable conclusion that could be drawn is that he read and understood the contents of the settlement agreement prior to signing it.

[40] In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Limited and Another*[4], the Constitutional Court held as follows:

‘The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. The applicant must be held bound. When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to

courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.’

[41] On the conspectus of all the evidence, the applicant failed to prove the existence of duress or coercion. With the signature of the agreement not being in dispute, the settlement agreement is binding on the parties to it. Having found that the applicant failed to prove existence of duress, the fairness of the applicant’s dismissal does not arise.

[42] For these reasons, it follows that the applicant’s claim falls to be dismissed. Whilst I am of the view that the applicant was ill advised in bringing this application, I am not inclined to order costs against him taking into account the principles of equity and fairness.

[43] In the premises, I make the following order.

Order

1. The applicant’s claim is dismissed.
2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Ms. Kabelo Letsholo of Ismail & Dahya Attorneys

For the Third Respondent: Ms. Lancaster of Lancaster Kungone Attorneys

[1] Act 66 of 1995 as amended.

[2] JA 91/2014 at para 28, delivered 22 November 2016; See also *Johnson & Johnson (Pty) Ltd v CWIU* [1998] 12 BLLR 1209 (LAC). *Kotze v Rebel Discount Liquor Group (Pty) Ltd* (2000) 21 ILJ 129 (LAC) at para 36; *BMD Knitting Mills (Pty) Ltd v SACTWU* [2001] 7 BLLR 705 (LAC) at para 19 and *CWIU and Others v Algorax (Pty) Ltd* [2003] 11 BLLR 1081 (LAC).

[3] (2011) 32 ILJ 130 (LAC).

[4] 2016 (12) BCLR 1515 (CC) at para 24

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