

SOUTH AFRICA / JUDGMENT

Rolfes Chemicals (Pty) Ltd v Moni N.O and Others (JR 2734/19; JR 472/21)

[2024] ZALCJHB 408 (14 October 2024)

[2024] ZALCJHB 408

COURT

Labour Court Johannesburg

BEFORE

Tlhotlhlamajane

CASE / FILE NUMBER

JR 2734/19; JR 472/21

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

FLYNOTES:

LABOUR – Dismissal –
Stock losses –
Investigation into losses by
company – Attributable to theft by employees – Adopted
method of polygraph testing
– Refusal by employees to
consent – Polygraph testing was rationally connected to
purpose it sought to achieve
– To establish cause of losses
– Solid basis for company to harbour suspicions against
employees – Request
for consent for test not unreasonable –
Failed to show loyalty and good faith – Dismissals
substantively fair.
IN THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not reportable
Case Nos: JR 2734/19
JR 472/21

In the matter between: ROLFES
CHEMICALS (PTY) LTD
Applicant
and
NATASHA
MONI N.O
First
Respondent
THE
NATIONAL BARGAINING COUNCIL FOR
THE
CHEMICAL INDUSTRY
Second
Respondent
SACWU
obo MEMBERS
Third
Respondent
and

in re: SACWU
obo MEMBERS
Applicant
and
NATIONAL
BARGAINING COUNCIL FOR THE
CHEMICAL
INDUSTRY
First
Respondent
HASSINA
DOCRAT N.O
Second
Respondent
ROLFES
CHEMICALS (PTY) LTD
Third
Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date for hand-down is deemed to be on 14 October 2024

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] There are two separate review applications before the Court which have since been consolidated as they emanate from essentially the same set of facts. The employees in both applications were employed and dismissed by their erstwhile employer, Rolfes Chemical (Rolfes). In both applications, orders are sought to review and set aside the arbitration awards issued by different Arbitrators

who arrived at different outcomes regarding the fairness of the dismissals.

[2] Under case number JR 472/2021, the employees seek to review and set aside the arbitration award issued by Commissioner Docrat in which it was found that the dismissal of the employees was substantively fair. In the matter under case number JR 2734/19, Rolfes seek to review and set aside the arbitration award issued by Commissioner Moni in which it was found that the dismissal of the employees was substantively unfair. In all instances, the applications are opposed.

The background to the dispute:

[3] The individual employees were employed at various times and in various positions by Rolfes, which is in the business of distributing an extensive range of raw materials for the manufacturing sector. Rolfes contends that during June, July and August 2017, it suffered stock theft and losses of approximately R1 million and had then initiated investigations with a view of ascertaining the cause. The stock losses and investigations came against the backdrop of one of the subsidiaries of the holding company (The Rolfes Group), having been liquidated due to stock theft. Investigations into the demise of the subsidiary company had revealed that the losses and ultimate liquidation were because of theft attributable to some of its employees.

[4] The investigations conducted by Rolfes in this case entailed an evaluation of its internal systems and controls and had revealed that the losses could not be attributed to internal systems or accounting errors. Rolfes contends that a second method of investigations entailed subjecting employees to polygraph testing. This method was adopted after one of Rolfes' Directors had received an anonymous tip-off that its employees were actively involved in the stock losses. A further investigation had led to one of the drivers being subsequently arrested. This was after he was caught with more goods than what was recorded on the delivery/control

sheet. That driver had then agreed to be a whistleblower and to identify members of a syndicate involved in the stock losses, in

exchange for the criminal charges against him being dropped. He had subsequently however refused to testify against other employees who might be involved in the syndicate.

[5] The CEO of Rolfes had then ordered that all employees be subjected to polygraph testing including management personnel and directors, as part of investigating the cause of stock losses. At least four meetings were held with all employees and their representative unions from August 2017, at which management discussed its concerns surrounding stock theft and losses, and the steps to be taken in that regard as directed by the CEO. Rolfes contends that during the meetings, no objections were raised by the employees or their union representatives regarding the taking of the polygraph tests, which were again announced on 7 September 2017 and scheduled

to take place the following day.

[6] At a further meeting held with the employees on 8 September 2017, Rolfes' management again reiterated the purpose of the test to be undertaken, further informing them that a mere failure of the test would not result with a dismissal. A polygraphy technician was also present at the meeting to address the employees about the process of testing, which required of them to first complete a consent form indicating whether they agreed or declined to undergo the test. Rolfes contend that about 60% of the employees had

completed the consent forms and went through the test.

[7] The remaining 40%, which includes the dismissed employees, declined to complete the consent forms, and thus were not subjected to the polygraph test. Management then called all the employees who had refused to complete the consent forms to one-on-one meetings to again explain the process of testing and its purpose, and to impress upon them that they had a duty to assist management in determining the source of stock theft.

[8] According to Rolfes, after the one-on-one meetings with those employees who refused to complete the consent forms, they were then advised to go back to their workstations. The employees had however refused to resume their duties, and they are alleged to have

adopted an aggressive attitude, caused chaos, and began intimidating management personnel that had addressed them individually in the offices. The situation as it unfolded at that point is said to have deteriorated to the extent that the management personnel that had addressed those employees was forced to barricade themselves in an office. Members of the South African Police Service (SAPS) and those of the private security had to be called in to diffuse the situation.

[9] The employees who had refused to complete the consent forms and who allegedly caused the chaos and intimidation of management personnel had in refusing to resume their duties, then allegedly invited management to issue them with letters indicating that they should leave the premises. These employees were then issued with letters of suspension. Further letters were issued on 11 September 2017, confirming the suspensions, wherein it was also indicated that further action was to be taken against the employees who had refused to obey instructions to complete the consent forms and refused to go back to their

workstations.

[10] On 15 September 2017, all the employees who had refused to sign the consent forms were issued with notices to attend a disciplinary hearing. They were charged with misconduct related to;

‘Refusal to carry out a lawful and reasonable instruction, which includes but not limited to: The refusal by way of attitude, words and/or deeds, to obey/accept/execute a lawful and reasonable instruction’.

[11] Following a disciplinary enquiry, the employees were found guilty and dismissed on various dates between September and October 2017. Rolfes contends that because of the dismissal of the employees, the problem of stock theft disappeared almost immediately, and that its financial position had improved from September 2017.

[12] There were 23 employees who were dismissed in total. With the assistance of SACWU, they referred a dispute to the second respondent, the National Bargaining Council for Chemical Industry. When attempts at conciliation failed, the matter was referred to arbitration. At the commencement of the arbitration proceedings before Commissioner Docrat, 3 of the individual employees were found not to be members of SACWU. This had necessitated the separation of their case from the other employees, hence two arbitrations were held by two different commissioners.

The dispute before Commissioner Moni and the review application under JR 2734/19:

[13] The dispute involved three employees being Messrs Sibusiso Motloun; Edward Sikhosana; and Eric Gazu. Against the background summarised above, evidence was led on behalf of Rolfes by its Operations Director (Mr Vernon Naidoo), who had further testified that because the surveillance cameras at the premises could not assist with the investigations due to inadequate memory capacity of the system, a decision was taken to subject everyone to the polygraphy test after the whistleblower had indicated that there was a syndicate operating in the premises.

[14] Naidoo and the Human Resources Director (Ms Lesego Ngubo) had held meetings with employees and their union representatives, at which the rationale behind the testing was explained. Instructions were issued to the employees to complete the consent forms and were further informed of the consequences of their failure to adhere. Naidoo confirmed that after one-on-one meetings were held with the employees on 8 September 2017, it is at that stage that they had refused to go back to their workstations, and the situation got out of control, necessitating that he and Ngubo barricade themselves in an office until the members of the SAPS and private security arrived.

- [15] Naidoo had further testified regarding one of the individual employees, Sikhosana, who had turned out to have been already suspended when the instructions were issued to the employees to undergo the test or return to their workstations when they refused to complete the consent forms. He had however testified that after the suspension of the other employees who were already out of the premises on 11 September 2017, an ultimatum was issued to the employees to either agree to complete the forms or face a disciplinary enquiry.
- [16] Ngubo had also testified regarding the events commencing with meetings held with employees from 28 August 2019, and the change in stance by some of the drivers when they had initially agreed to complete the consent forms and undergo the test. She was also present when the Polygrapher explained the voluntary nature of the process to the employees, and further that they could not be dismissed for merely failing the test. She had confirmed the events of 7 September 2017 when at the meeting the employees were informed that the testing will commence the following day, and of 8 September 2017, when one-on-one meetings were held and the subsequent events

leading to her and Naidoo barricading themselves in an office after the employees had refused to go to their workstations and became

aggressive.

- [17] Motloun's testimony on behalf of Sikhosana and Gazu was to confirm that all employees were informed of the test, but he had however not received a proper explanation as to how the tests would be conducted. He however confirmed that the Polygrapher had explained the process to them in the presence of Ngubo on 8 September 2017. Motloun contended that there were conflicting messages as to whether they were obliged to undergo the test, and the employees were aggrieved with the manner with which the instructions

were issued. He had confirmed that he did not wish to subject himself to the test.

- [18] Against the background and the evidence before her, Commissioner Moni concluded that management had a prerogative to subject all employees to a polygraph test. She however concluded that there was no contractual obligation on the employees to subject themselves to the test, which was voluntary, and that their dismissals had nothing to do with the object and purpose of the polygraph testing exercise. The Commissioner further concluded that Rolfes sought to 'run a blanket polygraph test' without any genuine or legitimate reason to suspect the employees of any involvement in any wrongdoing.

- [19] The Commissioner upon a consideration of the principles applicable to insubordination concluded that the instruction issued to the employees was unreasonable, and since Rolfes did not have any rules or regarding polygraphy testing. The Commissioner essentially found the charge of insubordination to be an opportunity to dismiss the employees since Rolfes could not dismiss them for failing the polygraph test.

[20] To this end, it was found that a reinstatement order was appropriate since Sikhosana did not receive the instruction as he was already suspended when it was issued; that Guzu was subjected to discipline twice and dismissed on both occasions; and that Motlounng was found guilty and dismissed for disobeying an unreasonable instruction. Regarding relief, the Commissioner ordered the retrospective reinstatement of the individual employees together with 18 months' back-pay.

The dispute before Commissioner Docrat and the review under Case Number JR472/2021:

[21] The 20 employees before the Commissioner Docrat had only challenged the substantive fairness of their dismissal. Against the background as summarised elsewhere in this judgment, the Commissioner had accepted as being common cause that polygraphy testing was not a term of the employees' contract of employment, nor was it a policy or practice at the workplace.

[22] Naidoo in his testimony before Commissioner Docrat had repeated the same evidence as was before Commissioner Moni. He had added that the basis of the dismissal was insubordination in that the employees failed to obey a reasonable instruction by refusing to

provide consent or to subject themselves to a polygraph test. He had added that the employees were insubordinate and belligerent when asked to return to their work stations and resume their duties, after they had made it clear that they would not complete the consent forms or subject themselves to the test. This was in addition to the fact that they were already on a final written warning for participation in an unprotected strike.

[23] Under cross-examination, Naidoo testified that one of the employees who had consented to the test had failed it but was never dismissed. He had testified that other employees had completed the consent forms, but had refused to take the test, but that they were nonetheless not dismissed. His contention was that the employees were not necessarily dismissed for refusing to take the polygraph test, but that it was because of other reasons related to the refusal to subject themselves to the test.

[24] Ngubo had also repeated the same testimony as in the other matter before Commissioner Moni. Her other contention was that the employees had a duty to assist Rolfes in establishing the cause of the losses and to act in its best interest. Because they failed to do so, this had resulted in a breakdown of a trust relationship. She again confirmed that some employees had failed the test but were not dismissed, as well as others that had completed the form but had refused to subject themselves to a test.

[25] Ngubo had further added that the reason behind all employees being subjected to the test was that all of them had access to the Rolfes' property. She had contended that the fact that there was no polygraph testing policy at the workplace was not a bar

to its use where the need arose for the purposes of investigations. She reiterated that the employees were not dismissed for refusing to subject themselves to the test but simply because they refused to obey reasonable instructions including completing the consent forms and

returning to work. To the extent that the employees sought reinstatement, Ngubo had testified that Rolfes had recently at the time, embarked on a retrenchment exercise which made reinstatement inappropriate. She had further contested that the employees were entitled to 18 months' salary in backpay as the dispute involved an ordinary misconduct dismissal.

[26] The employees' evidence was presented by their sole witness, Mr Tshililo Mufamadi, who was also a SACWU shop steward. He did not dispute that Rolfes had suffered stock and financial losses. Their case, however, was that they challenged the manner with which the polygraph tests were to be implemented, especially since there was no policy or term of contract that forced them to subject themselves to the test. They disputed that Rolfes had a reasonable suspicion before subjecting them to a test. They further

contended that since the theft was occurring in the warehouse, the tests should have been confined to employees working in that area, and not extended to the drivers.

[27] Mufamadi testified that the employees regarded the instruction requiring them to complete the consent forms and to subject themselves to the tests as being unreasonable and in conflict with their rights, since the tests were voluntary. The employees also regarded the tests as being harmful to their health. They further disputed the relevance of the final written warnings, as these did not relate to the charges preferred against them.

[28] Mufamadi conceded that it was five employees instead of one that were involved in the theft of six drums inclusive of a security guard. He conceded that meetings were held with management where they were informed of the R1 million losses over three months, and where management had further informed them of the need to take polygraph tests. He however contended that management had agreed to discuss the matter further with them, after they were furnished with minutes of the meetings to consider its proposals.

[29] When management informed shop stewards on 7 September 2017 that the polygraph tests were to take place the next day and that consent forms were to be completed, they (shop stewards), were unhappy as they were still waiting for the minutes of the meeting to discuss the matter with employees. According to Mufamadi, Ngubo had however insisted that the employees should undertake the tests and had threatened those that refused to participate that they would be 'in trouble'.

[30] Mufamadi did not dispute that a Polygrapher had also addressed them at the meeting held with Ngubo and Naidoo. He added that on 8 September 2017, one of the employees was at that point suspended for refusing to take the test. A group of other employees had then confronted management and informed them that they would not be taking the test. It was at that stage that management had called members of the SAPS and private security, who had advised the employees to leave the premises. The employees had however refused to leave, demanding letters from management indicating that they were required to leave. He had confirmed that when employees refused to complete the consent forms and undertake the tests, they were then suspended.

- [31] Mufumadi contended that employees were dismissed for merely refusing to consent to the test in circumstances where there was no obligation on them to do so as it was voluntary. He contended that Rolfes was attempting to force employees to take the test and assist with investigations in respect of stock losses, when there was no contractual obligation to do so.
- [32] The Commissioner's conclusions in the light of the above evidence and background, was that upon it being clear after one employee was caught stealing goods, and from that employee's statements, Rolfes was convinced that a syndicate was operating in its premises which led to the losses. Rolfes therefore had no alternatives but to utilise all available tools to combat the losses, including the use of polygraph tests.
- [33] The Commissioner reasoned that the use of the test was met with resistance, which further confirmed Rolfes' suspicions that employees were involved in the thefts and activities of the syndicate. The Commissioner having had regard to inter alia the Code of Good Practice and CCMA Guidelines for Misconduct Arbitrations, concluded that Rolfes acted fairly in dismissing the employees for failing to adhere to the request to undertake the test, and for insubordinate behaviour and conduct that was not in its best interests. The Commissioner regarded the instruction as reasonable,

which was further supported by the whistleblower's statements about the syndicate that was operating in the premises. The

Commissioner concluded that the misconduct was not seriously disputed, and that the employees' only defence was that they

needed more time to discuss the request. This was despite the employees' position that even if they had waited longer, they

would still not have agreed to undertake the test, as their view was that it was not their responsibility to assist Rolfes in curbing the losses.

Rolfes' reinstatement application under case number JR2734/19:

- [34] The award of Commissioner Moni was issued on 12 October 2019. Rolfes launched the review application on 27 November

2109. It is not in dispute that Rolfes and the attorneys representing the three employees in whose favour the award was issued, had engaged

in settlement discussions. These discussions took place prior to the filing of the transcribed record. The settlement discussions

culminated with an agreement on 18 August 2020, and Rolfes contends that it saw no need to take any further steps in prosecuting the review application.

[35] On 30 March 2021, Rolfes was served with contempt proceedings for non-compliance with the arbitration award. The matter came before the Court on 7 May 2021 and the parties were granted an extension until 11 June 2021 to further resolve the dispute. Deadlock was however reached on 19 May 2021, and at the time, the time periods for compliance with the then Rules 7A(6) and 7A(8) of the now

repealed Rules of the Court had lapsed.

[36] Rule 7A of the Rules had to be read with Clauses 11.2.2 and 11.2.3[1] of the equally repealed Practice Manual of the Court, and this implied that the review application as of 19 May 2021 had been deemed

withdrawn. The 60 days within which to file the transcribed record of arbitration proceedings had expired on 22 August 2020. Clause 11.2.7 imposes an obligation on an applicant seeking a review to ensure that all the necessary papers in the application are filed within 12 months of the date of the launch of the application, and the registrar is informed in writing that the application is ready to be set down for hearing.

[37] It is trite that arising from both clauses 11.2.3 and 11.2.7 of the Practice Manual as it then applied, in the event that the time-limits for the filing of the record were not complied with and the 12 months had expired before all the papers are filed, the review application will be archived and be regarded as lapsed unless good cause is shown why the application should not be archived or be removed from the archives. This necessitated the filing of a formal application to retrieve the matter from the archives, which application is akin to an application for condonation. The principles applicable to condonation applications are trite and need not be rehashed in this judgment.

[38] Arising from the founding affidavit of Ngubo, it is apparent that the filing of the transcribed record is out of time by some eight months. Ngubo had attributed the delay to Rolfes' reasonable belief that the matter between the parties was settled. In this regard, she averred that following the filing of the review application, the NBCCI failed to file its then Rule 7A(2) (b) notice, necessitating that an application to compel it do so be filed on 19 June 2020. The record was then made available on 23 June 2020 and was uplifted on the same date. At the time, the parties were still engaged in settlement discussions, which had resulted with the settlement agreement as indicated above. Rolfes had in compliance with the arbitration award and settlement agreement, effected the payments to the three individual employees as agreed upon, on 25 and 26 August 2020. As a result of the settlement amounts having been paid, Rolfes took no further step in the matter.

[39] The individual employees through the answering of Motloun in opposing the reinstatement application, contend that Rolfes has not proffered a reasonable and full explanation for the delays. They further dispute that a full and final settlement was reached between the parties in negotiations that commenced in August 2020, and that those negotiations were held without prejudice basis. He contends that the reinstatement application was only triggered by the contempt proceedings, and that Rolfes had been supine. He however conceded that

monetary payments were made in accordance with the negotiations between the parties, but that since the negotiations

were not in full and final settlement of the dispute, they had insisted on their reinstatement in accordance with the award.

Evaluation- re: reinstatement application:

- [40] Inasmuch as I agree that Rolfes had delayed the prosecution of the review application particularly after the settlement agreement was concluded, it is my view that the individual employees on the other hand cannot be said to have shown good faith when agreeing to enter settlement discussions, nor after monetary payments were made. It does not appear to be in dispute that indeed an agreement was reached on 18 August 2020, and that payments to the three individual employees as agreed upon were made on 25 and 26 August 2020.
- [41] If the employees held the view that Rolfes was not in compliance with the arbitration award notwithstanding the acceptance of payments in accordance with an agreement, it is inexplicable that they would have waited for a period of six months after payments were made, in order to launch contempt proceedings. This is particularly so since they appeared to have been more aggrieved with the fact that the settlement agreement[2] did not include their reinstatement. In any event, the issue of their reinstatement was specifically excluded as set out in clause 1.3 of the agreement. Equally so at clause 4, it was recorded that 'all issues between the parties are settled fully'.
- [42] In the light of the above, and to the extent that Rolfes had performed and fulfilled its obligations by making the payments in accordance with that agreement, which was signed by all the three individual employees, that agreement remains extant and is clearly binding on them. Inasmuch as the settlement agreement does not mention that it was concluded in 'full and final' settlement, it is my view that its clause 4 clearly indicates that 'all issues between the parties' were settled. On a plain reading of the agreement, the dispute between the parties had been resolved.
- [43] The Court appreciates that it was not Rolfes' case before it that the dispute was resolved for the purposes of disposing of reinstating the review application after it was deemed to have lapsed. Be that as it may, and against the explanation proffered by Rolfes, I am satisfied that a reasonable and acceptable explanation for the delays was proffered. This is so in that any party to a dispute in the light of the terms of the settlement agreement, would reasonably have believed that the dispute between the parties had been resolved. This was particularly so since the one party had fulfilled its obligations in terms of the agreement, whilst the other had accepted performance in accordance with that agreement and did nothing for a period of six months to indicate that the agreement was not binding.
- [44] Further against the merits of the review and its prospects of success as shall be dealt with below, it follows that good cause has been demonstrated as to why the review application under case number JR 2734/19 ought to be reinstated. The individual employees cannot

complain of any prejudice because of the delays, in circumstances where in the light of the settlement discussions and subsequent agreement, they had approbated and reprobated, and only acted on their non-reinstatement in accordance with the award, some six months after they had enjoyed the benefits of the settlement agreement.

The grounds of review:

[45] Rolfes attacked Commissioner Moni's award on the basis that she failed to apply her mind properly or at all to the evidence before her; erred and/or misrepresented the facts; and failed to identify the real dispute she was required to determine, which was whether the employees refused to adhere to a lawful and reasonable instruction. It was submitted that the Commissioner's

reasoning process in terms of the factual and legal findings as well as her assessment of the evidence was questionable; that she failed to apply her mind to the law relating to insubordination offences, and that on the overall evidence, the award issued was defective as she committed misconduct and/or gross irregularity which had the effect of rendering the outcome reached unreasonable.

[46] The employees attacked Commissioner Docrat's award on the basis that; she failed to consider that there was no rule which governed the issue of polygraph testing, nor was the issue covered in their contracts of employment. They contended that the Commissioner committed a gross irregularity which prevented them from having a fair trial; failed to consider and decide on the issues before her, being whether the dismissal on account of refusing to undertake the polygraph test was fair; failed to consider evidence regarding the trust relationship between the parties; and committed an irregularity when assessing the evidence of Rolfes that they had refused to return to work after they were instructed to do so.

The legal framework:

[47] The test on review is well-known. The primary enquiry before the reviewing court is whether the conclusion arrived at by a commissioner is one that a reasonable decision-maker could not have reached based on the material before him or her.[3] In Herholdt, the Supreme Court of Appeal reaffirmed the principles that the test on review is stringent, as it ensures that awards are not lightly

interfered with, and that emphasis is on the result of the case rather than the reasons for arriving at that result. The SCA reiterated that on the Sidumo test, there would be justification to set aside an award on review if the decision was entirely disconnected with the evidence, or was unsupported by any evidence, and involved speculation by the commissioner[4].

[48] To the extent that in both cases the Commissioners are accused of having committed gross irregularities, the Labour Appeal Court in Goldfields[5], held that:

‘In a review conducted under s145(2)(a)(ii) of the LRA, the reviewing court is not required to take into account every factor individually,

consider how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with one or some of the factors amounts to a process-related irregularity sufficient to set aside the award. This piecemeal

approach of dealing with the arbitrator’s award is improper as the reviewing court must necessarily consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision-maker could make.’[6]

[49] Against the established legal principles pertaining to reviews, and further in consideration of various grounds upon which a review was sought by both parties, the starting point is the principle set out in *Gemalto South Africa (Pty) Ltd v Ceppwawu obo Louw and Others*(*Gemalto*)[7], which is that in circumstances where employees fail to heed an employer’s instruction to subject themselves to polygraph testing, their failure to comply is per se an act of insubordination. The LAC however held that the real question to be answered was whether their dismissal was substantively fair, considering the surrounding circumstances as well as the events that led to the dismissal.

[50] In *National Union of Public Service & Allied Workers obo Mani and Others v National Lotteries Board*, Froneman J reiterated that insubordination in the workplace context generally refers to the disregard of an employer’s authority or lawful and reasonable instructions[8]. Dambuza AJ in the same matter had added that insubordination occurs when an employee refuses to accept the authority of a person in a position of authority over him or her, and that it is misconduct because it assumes a calculated breach, by the employee, of the duty to obey the employer’s lawful authority. It was further added that the conduct of both the employer and the employee must be considered, and that the gravity of insubordination depends on several factors, including the action of the employer prior to the alleged insubordination, the wilfulness of the employee’s defiance and the reasonableness or otherwise of the order that was defied[9]

[51] In *TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (*TMT Services*), it was held that defiance of authority can be proven by a single act of defiance, and that it is not necessary for the instruction to be issued on numerous occasions for an act of insubordination to occur. This was so in that the employer’s prerogative to command its subordinates is the principle that is protected by the class of misconduct labelled “insubordination”, and addresses operational requirements of the organisation that ensures that managerial paralysis did not occur.[10] In *Sylvania Metals (Pty) Ltd v M.C Mello N.O and others*[11], the LAC in reference to *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[12], reiterated that the sanction of dismissal should be reserved for instances of gross insolence and gross insubordination or the wilful flouting of the instructions of the employer[13].

Evaluation:

[52] Against the evidence before the Commissioners and in applying the above legal principles, the following observations and conclusions ought to be made;

52.1 It was not in dispute that Rolfes was suffering great financial losses because of stock theft. Its investigations had revealed that its internal stock controls and financial systems could not be faulted. It was further not contested that one of the subsidiaries of the Rolfes Group was liquidated because of stock theft and accompanying losses.

52.2 It was not in dispute that prior to the suspensions and disciplinary enquiries of the employees, no less than five other employees had been suspended for their alleged involvement in theft of stock. One of the employees that was caught red-handed had volunteered to be a whistleblower. From these events, Rolfes had concluded that there was a syndicate operating within the premises which was responsible for the significant stock losses.

52.3 As part of its further investigations, all employees and senior management were to be subjected to a polygraph test to establish whether any of them were party to the syndicate and/or involved in the stock losses. The Court accepts that legally, there is nothing that prevents employers from adopting such tests to investigate specific incidents.

52.4 In *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Blue Ribbon Salt River*[14], it was held that polygraphy tests could be used as part of the investigation process to determine wherever or not a further investigation into the conduct of a particular individual is warranted. This method of investigation has been found to be a legitimate component of a process to determine any wrongdoing on the part of an employee, provided there was other supporting information or evidence that cast a suspicion on an individual[15]. This is so in that the results of polygraph tests are not in themselves conclusive nor sufficient to establish guilt or any wrongdoing on the part of an employee[16].

52.5 In this case, the need to use this method of investigation arose from the fact that the employees had access to the property which is the subject of the investigation; there was reasonable suspicion that employees and management personnel were involved in acts of misconduct; and it was not in dispute that Rolfes was subjected to economic losses or injury to its business resulting from stock theft.

52.6 Arising from the position that Rolfes found itself in, it is apparent that the object and purpose of the polygraph testing exercise was to root out the cause of stock losses, and to determine whether the employees including management personnel, were part of a syndicate involved in the losses. Rolfes' suspicions arose from what the whistleblower had said, combined with the fact

that at least one employee was caught out whilst another four were suspended for alleged involvement in the theft.

52.7 The polygraph testing was meant to be part of a chain of investigations into stock theft to ensure the sustainability of the business. I did not understand from the employees' contentions that the sole purpose of the test was to dismiss them. In fact, any such contention would not have been sustainable in the light of the process of engagement with them as to why the tests were necessary, and management's undertakings that a failure of the test would not result with a dismissal.

52.8 It therefore follows that contrary to what Commissioner Moni had found, the polygraph testing was rationally connected to the purpose of which it sought to achieve. It was to establish the cause of the losses, and to determine whether there was cause to subject

employees or management to a disciplinary process for misconduct, following a credible basis to form a suspicion. The facts of this case are clearly distinguishable from those in *Gemalto*[17]. It cannot therefore be correct as Commissioner Moni had found, that Rolfes merely wanted to run a blanket polygraph test and dismiss the employees without genuine and legitimate reasons to suspect them of any involvement in wrongdoing. There was a solid basis for Rolfes to harbour suspicions against all its employees and management.

52.9 It can also not be seriously disputed that extensive meetings were held with the employees and their shop stewards regarding the need for the polygraph testing, how the tests would be administered, the objective behind them and how they would be of assistance in curbing the stock loss. A Polygrapher was also called in to explain to the employees how the process of testing would unfold and had again assured the employees that the test was voluntary, whilst management assured them that no dismissals would follow if they failed the test. In addition, one-on-one meetings were held with all the employees that had refused to complete the consent forms.

52.10 At the centre of the disputes was the reason for the dismissals. Since the employees had refused to complete the consent forms or subject themselves to the polygraph test, it is apparent that failing the test was not the reason for the dismissals as the process did not even get at the stage where they undertook the test. Rolfes' contention has always been that the employees were not dismissed for refusing to undergo the polygraph tests, but for refusing to complete the consent forms, and to further go back to

their workstations when instructed to do so, and after they had made it clear that they would not complete the consent forms.

52.11 It is however not in dispute that some of the employees had voluntarily signed the consent forms and subjected themselves to the test. Of these, those that failed the test were not dismissed. Others had completed the consent forms but had refused to subject themselves to the test. These were equally not dismissed.

52.12 The employees in both cases in the review before the Court had refused to complete the consent forms let alone subject themselves to the tests. As I however understood the evidence in respect of most of the employees, they and their union representatives were fully made aware of the need to conduct the tests and had initially agreed to do so. It was only on 8 September 2019 when the tests were to resume, that they had changed their stance. The reasons for refusing to complete the consent forms or undertake the tests varied and will be examined below.

52.13 The primary reason was that polygraphy testing was not a term of their contract of employment. It was not in dispute that polygraph testing was not part of the employees' contractual terms, nor did Rolfes have a standing policy or practice on the issue. In my view however, this was not a bar to the method being adopted, where operational needs of an employer so required, particularly since it is not prohibited by law.

52.14 At most, Commissioner Moni appreciated that this method is within management's prerogative to utilise. Of course, the proviso is that the tests must be conducted through consent, in such a manner that does not infringe upon the employees' constitutional rights, and further that the need for its use is supported by credible evidence. Of equal importance is that the testing must be rationally connected to the purpose it seeks to achieve.

52.15 In the absence of contractual obligations on the employees, Rolfes in this case had as it is within its prerogative, instructed the employees to complete consent forms, with an undertaking that adverse results would not lead to dismissals. The circumstances of this case therefore indicate that the instruction to the employees to sign the consent forms was not unreasonable. This is so in the light of the purpose sought to be achieved by Rolfes with the testing; the explanations given to the employees as to why there was a need for testing; the credible evidence relied on in suspecting the employees and management personnel, and the undertakings made that no adverse results would follow from failing the test. In the end, the mere fact that polygraph testing was not in the employment contract or a practice or policy of Rolfes, cannot make the instructions in that regard unlawful or unreasonable.

52.16 The employees' contention that they were not properly appraised as to how the process was to unfold cannot be correct. This is so in the light of the various meetings held with them between 28 August 2017 into 08 September 2017, including one-on-one meetings held with them and the discussions they held with the Polygrapher. There is therefore no merit in the contention that the employees were not fully appraised of the tests. It is however apparent that an exception in this regard ought to be made in respect of Sikhosana, who it was not seriously disputed that he was suspended prior to the events of 7 and 8 September 2027. I will deal with that exceptional case of Sikhosana shortly.

52.17 A further reason advanced by the employees for refusing to sign the consent forms was that they were told that the consent forms and test were voluntary. This was not in dispute. The mere fact that the tests and consent forms were voluntary did not however entitle the employees to be insubordinate in the manner that they did as shall be dealt with during this judgment.

52.18 The further reasoning of the employees in refusing to obey the instruction was that they were not obliged to assist Rolfes in ascertaining the cause of the stock loss. This contention clearly misses the point, which is that employees owe a duty of good faith towards their employer. It has since been held that an employee is bound implicitly by a duty of good faith towards the employer, and that if he/she breaches that duty especially where the business interests of the employer were being improperly undermined, this breach can justify a dismissal[18].

52.19 The circumstances resulting from the stock loss were such that Rolfes' business was at a risk, and by implication the concomitant loss of jobs. Where the circumstances were such that the whole workforce including management was suspected of involvement, the duty to act in good faith became even more paramount, not only to assist Rolfes in establishing the root cause of stock theft, but also to save the employees' livelihood. Effectively, if an employee does anything incompatible with the due or faithful discharge of their duty of good faith to their employer, the latter has the right to dismiss them[19].

52.20 In *National Union of Metalworkers of South Africa obo Nganezi and Others v Dunlop Mixing and Technical Services (Pty) Limited and Others*[20], it was held, albeit in the context of derivative misconduct, that whilst the duty of good faith is reciprocal, exceptional circumstances may permit that the reciprocal duty of good faith be jettisoned in favour of only a unilateral duty on the employee to discharge it[21]. The facts and circumstances leading to Rolfes' decision to require employees to complete the consent forms and undertake the polygraph test, are in my view, exceptional in this case. This is especially in circumstances where the employees were aware that completing the consent forms or undertaking the polygraph test would not be to their prejudice. In the end, the employees'

unreasonable refusal to assist Rolfes, coupled with their contention that it was not their duty to do so, in my view deserved censure, as the circumstances required of them to discharge their duty of good faith towards Rolfes.

52.21 Amongst other reasons advanced by the employees was that Rolfes in any event had not laid the basis for its suspicion that employees were involved in the syndicate. I have already addressed this issue regarding the statements obtained from the whistle-blower as well as the evidence led about one employee caught in the act and others who were suspended on allegations of having been involved in the theft.

52.22 Mufumadi's contentions on behalf of the employees before Commissioner Docrat that the theft was only occurring in the warehouse and that the tests should have been confined to employees working in that area and not extended to the drivers, clearly lacks logic. The drivers were part of a chain of handling of goods from the warehouse, and it is not clear how they could have escaped suspicion when they were responsible for ferrying goods out of the warehouse. In fact, the mere fact that one of the drivers was caught red-handed with stolen goods makes it clear that there was cause for Rolfes to have a general suspicion, especially of the drivers. Equally so, to the extent that all the employees including the drivers had specifically indicated that they

would not complete the consent forms, Mufumadi's contentions do not take the matter any further.

53 A further reason advanced by the employees for refusing to complete the consent forms or subject themselves to the test was that they were waiting for minutes of previous meetings minutes to consider Rolfes' proposals about the tests. This contention is a red herring, but it can only confirm that the employees had been fully appraised after several meetings were held with them and their representative union. That explanation in any event fell flat in view of the employees' contention before Commissioner Docrat, that even if they were afforded more time, they would still have refused to complete the consent forms or subject themselves to the polygraph test. Motloun in his testimony before Commissioner Moni had also reiterated that he did not want to complete the consent form or subject himself to the polygraph test.

53.1 Arising from the above observations and conclusions, it is apparent that the employees' refusal to complete the consent forms constituted insubordination. Even if the mere refusal of the employees to complete the consent forms or undertake the test would not on its own have called for a dismissal, the gross nature of the insubordination continued after they were instructed to go back to their workstations and resume their duties. Not only did they on the evidence of Ngubo and Naidoo refuse to obey the instruction, but they also did so by adopting an aggressive, intimidatory and threatening attitude towards them, forcing them to lock themselves in an office.

53.2 It is common cause that members of the SAPS and of a private security company had to be called in. Mufumadi's contention was that at the time, one of the employees was suspended for refusing to take the test, and the employees had then confronted management (Naidoo and Ngubo) and informed them that they would not be taking the test. He contended that it was at that stage that members of the SAPS were called in and they were advised to leave the premises. The employees had however refused to leave, demanding letters from management.

53.3 Arising from Mufumadi's evidence, it is apparent that Ngobu and Naidoo could not have barricaded themselves in an office, unless the situation had turned threatening to them and their safety. It is highly improbable that the members of the SAPS and the private security company had merely intervened out of a courtesy call. The employees had clearly adopted an unsafe, intimidating and threatening environment for Naidoo and Ngubo arising from their persistent refusal to adhere to the instructions. Mufumadi had conceded that the employees as a group had confronted management to question them about the suspension of one of the employees. It is improbable that this 'confrontation' would have been cordial given their persistent refusal to obey instructions, let alone return to their workstations following their refusals.

53.4 Against the above chain of events, it is apparent that in line with TMT Services, the employees' insubordination was egregious. This takes into account that Rolfes prior to the insubordination had at length,

explained the reasons why the consent and polygraph testing was necessary in the light of the stock theft. The instructions to

complete the consent forms as well as to go back to work were reasonable, and the employees had throughout, displayed not only

wilfulness but also a deliberate and serious challenge to the employer's authority.

[53] Against the above conclusions, it follows that the dismissal of the individual employees was substantively fair. The final written

warnings issued to the employees in March 2017 for their participation in an unprotected strike is a factor that a commissioner must take into account in determining the fairness or appropriateness of a dismissal. This also applied to warnings that had lapsed based on the principles set out[22]. It is my view however that even if the previous final written warning were not taken into account, the nature and gravity of the

insubordination as already dealt with in the course of this judgment, clearly on its own justified a dismissal. The issue of evidence

regarding any the sustainability of a trust relationship did not even arise in this case where from the employees' egregious conduct, any form of trust relationship was untenable. It is not clear how Rolfes could have trusted employees who had persistently refused to obey reasonable instructions; who outrightly failed to show their loyalty and good faith by complying with simple instructions that would not have been prejudicial to them, and who on the evidence, there was reason to suspect them of involvement in stock theft.

[54] In the light of the review test, it follows that on a totality of the evidence, the award of Commissioner Docrat fell within the bounds of reasonableness, whilst that of Commissioner Moni did not, as it could not have been made by a reasonable decision-maker faced with the same material evidence.

[55] In respect of the dispute related to Edward Sikhosana before Commissioner Moni, it is acknowledged that only Motlounj had testified. To the extent that Commissioner Moni had concluded that Sikhosana was not aware of the instructions, that conclusion cannot be faulted. This is so based on the evidence of Naidoo, who had confirmed that Sikhosana was already suspended as at 7 and 8 September 2017 when further instructions to complete the consent forms or return to work were issued, or when subsequent events took place.

[56] Notwithstanding the fact that the instruction to complete the consent forms may have been issued on 28 August 2017, it cannot be correct that Sikhosana could have been suspended for refusing to follow the instruction at the time, as it was common cause that meetings were still ongoing at the time, at least until 07 September 2017 when the employees were informed that the tests would

take place the following day. The evidence further indicated that Sikhosana was suspended for alleged involvement in the stock theft. This implied that he could only have been dismissed on those grounds, and not for refusing to obey instructions as other employees. It follows that the review application in respect of Commissioner Moni's award in relation to her finding and the relief she had granted in respect of Sikhosana ought to fail.

[57] I have further had regard to the requirements of law and fairness to the extent either of the parties sought an award of costs. Given the facts and circumstances of the review applications before the Court, it is deemed appropriate that each of the parties must be burdened with their own costs.

Order:

1. The application to reinstate the review application under Case number JR 2734/21 is granted.
2. The arbitration award issued by Commissioner Moni under case number GPCHEM 37-18/19 dated 12 October 2019, except insofar as it relates to Mr Edward Sikhosana, is reviewed, set aside and substituted with an order that;
 - (a) The dismissal of Messrs Sibusiso Motlouni and Eric Gazu was substantively fair.
3. The application under case number JR 472/2021 to review and set aside the arbitration award issued by Commissioner Docrat under case number CHEM 43-17/18 is dismissed.
4. There is no order as to costs in both case numbers JR 472/2021 and JR 2734/19.

Edwin Tlhotlhamajane

Judge of the Labour Court of South Africa

REPRESENTATION:

JR 472/21 For the Applicants: Adv. L. Makungu, instructed by Khomola Attorneys For the Third Respondent: Adv. M.D. Madiba, instructed by Sato Attorneys. JR 2734/19 For the Applicant: Adv. M.D. Madiba, instructed by Sato Attorneys. For the Third Respondents: Mr J. Hlatshwayo, of J Hlatshwayo Attorneys.

"11.2.2 For the purposes of Rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received. 11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. ..."

"11.2.2 For the purposes of Rule 7A(6), records must be filed within 60 days of the date on which the applicant is advised by the registrar that the record has been received."

11.2.3 If the applicant fails to file a record within the prescribed period, the applicant will be deemed to have withdrawn the application, unless the applicant has during that period requested the respondent's consent for an extension of time and consent has been given. If consent is refused, the applicant may, on notice of motion supported by affidavit, apply to the Judge President in chambers for an extension of time. ..."

[2] Annexure 'LSG3' to the Founding Affidavit in the Reinstatement Application.

[3] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] 12 BLLR 1097 (CC) at para 110. See also Herholdt v Nedbank Ltd and Congress of South African Trade Unions (Amicus Curiae) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25, where it was held; "... 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 proceedings to amount to a gross irregularity as contemplated in section 145 (2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry 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.

[3] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others

[2007] 12 BLLR 1097 (CC) at para 110. See also Herholdt v Nedbank Ltd and Congress of South African Trade Unions (Amicus Curiae) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA) at para 25, where it was held;

"... 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 proceedings to amount to a gross irregularity as contemplated in section 145 (2)(a) of the LRA, the arbitrator must have misconceived the nature of the enquiry 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.

[4] At para 13.

[5] Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation Mediation and Arbitration [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC).

[6] At para 18.

[7]

[2015] 11 BLLR 1100 (LAC); (2015) 36 ILJ 3002 (LAC) at para 25.

[8] (CCT 75/13) [2014] ZACC 10; 2014 (3) SA 544 (CC); 2014 (6) BCLR 663 (CC); [2014] 7 BLLR 621 (CC); (2014) 35 ILJ 1885 (CC) at para 57.

[9] At paras [213] to [214]

[10] TMT Services and Supplies (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others [2018] ZALAC 36; (2019) 40 ILJ 150 (LAC); [2019] 2 BLLR 142 (LAC) at paras 4 and 19. See also Masscash (PTY) Ltd T/A Jumbo Cash and Carry v Mtsotsoyi and Others

[2022] ZALAC 117; (2023) 44 ILJ 162 (LAC) at para 27.

[11] [2016] ZALAC 52 (22 November 2016).

[12] [2014] ZALAC 81; [2015] 5 BLLR 484 (LAC) ; (2015) 36 ILJ 1511 (LAC).

[13] At para 18.

[14]

(2010) 31 ILJ 1654 (LC).

[15] Gemalto at para 28.

[16] DHL Supply Chain (Pty) Ltd v De Beer NO and Others

[2014] ZALAC 15; [2014] 9 BLLR 860 (LAC); (2014) 35 ILJ 2379 (LAC).

[17] See at para [29] where it was held; ‘The 23 employees may have breached a term of their contract of employment. However, in the circumstances of this case, I am not

persuaded that the enforcement of the term is fair. The employer wanted to use a contractual obligation to run a blanket polygraph

test without any reason to suspect the employees of any involvement in wrongdoing. Once a blanket approach was not possible, to mechanically test the few who were vulnerable to discipline is an unfair invocation of the employer’s rights because it remained dysfunctional to any operational requirement.’

[17] See at para [29] where it was held;

‘The 23 employees may have breached a term of their contract of employment. However, in the circumstances of this case, I am not

persuaded that the enforcement of the term is fair. The employer wanted to use a contractual obligation to run a blanket polygraph

test without any reason to suspect the employees of any involvement in wrongdoing. Once a blanket approach was not possible, to mechanically test the few who were vulnerable to discipline is an unfair invocation of the employer's rights because it remained dysfunctional to any operational requirement.'

[18] Western Platinum Refinery Ltd v Hlebela and Others [2015] ZALAC 20; [2015] 9 BLLR 940 (LAC); (2015) 36 ILJ 2280 (LAC) at para 8.

[19] See Sappi Novoboard (Pty) Ltd v Bolleurs (1998) 19 ILJ 784 (LAC).

[20]

[2019] ZACC 25; 2019 (8) BCLR 966 (CC); (2019) 40 ILJ 1957 (CC);

[2019] 9 BLLR 865 (CC) ; 2019 (5) SA 354 (CC) at para 76.

[21] At para 69.

[22] See National Union of Mineworkers obo Selemela v Northam Platinum Ltd

[2013] ZALAC 10; (2013) 34 ILJ 3118 (LAC)[2008] ZALC 86; ; [2014] 9 BLLR 870 (LAC) at paras 36 – 39.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZALCJHB/2024/408.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/rolfes-chemicals-pty-ltd-v-moni-no-and-others-unknown-topic-alcjhb-2024>

Prepared on 11 October 2026 · Esheria