REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/~~Not Reportable~~

Case no: JR 1471/2011

In the matter between:

FAIRWAY AT RANDPARK OPERATIONS (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER T NSIBANYONI **Second Respondent**

SACCAWU obo MOSHOLE AND FIVE OTHERS **Third Respondent**

Heard: **30 June 2015**

Delivered: **13 November 2015**

Summary: Review- Commissioner failing to consider unchallenged facts pointing to guilt of accused on charges of gross negligence. Where refusal to undergo polygraph testing constitutes a breach of the employment contract Commissioner ought to take this into account and may in the appropriate circumstances, draw adverse inference against employee committing such breach. Award not justifiable in relation to reasons given therefor and outcome unreasonable - reviewable and set aside. *Semble*: No clear authority prohibiting a Court or arbitrator drawing an adverse inference against employee refusing to undergo polygraph testing in appropriate circumstances.

JUDGMENT

Bank AJ;

[1] This is an application for the review and setting aside of an arbitration award in which the presiding Commissioner found that the six respondent employees ("the individual respondents") had been unfairly dismissed, both procedurally and substantively, and in which he ordered their reinstatement with back pay.

[2] At the outset it must be stated that this matter is handicapped in several ways: Firstly, it has dragged on for several years since the individual respondents were dismissed in early 2011. Secondly, there is no answering affidavit in the review application. Thirdly, and most importantly, there is no transcript of the arbitration proceedings before the second respondent ("the Commissioner"). I have therefore had to make use not only of the reconstructed record of proceedings but also of the evidence taken at the internal disciplinary enquiries held prior to the dismissal of the individual respondents, in order to arrive at what I believe is a fair and just decision in this matter.

[3] Although there has been an application to dismiss the review launched by the union on behalf of the individual employees, and a subsequent "*explanatory*" affidavit relating to the inability of the company to provide a proper record of proceedings, together with an application in terms of section 158(1)(c) to enforce the arbitration award, I am satisfied that the review can proceed on its merits and to the extent that this may be necessary, I grant condonation for the late filing of these affidavits. It is in the interests of justice and all the parties that this matter be finalised as it has been dragging on for more than four years.

Background

[4] The applicant operates as a hotel and spa and the six employee respondents were either waiters or barmen employed by it. At a combined disciplinary hearing all six employees were charged with theft, gross negligence and unlawful use of company property or money for offences allegedly occurring during the period December 2010 to January 2011. After a disciplinary enquiry, they were dismissed on 9 February 2011. They subsequently referred an unfair dismissal dispute to the CCMA under the auspices of their union, SACCAWU.

The disciplinary enquiries

[5] At a combined internal disciplinary enquiry all employees entered pleas of not guilty to all charges. The only evidence led by the company was from Ms Charla Govender, the company's food and beverage manager ("Govender").

[6] Govender explained that the standard employment contract signed by employees contains a clause in terms of which employees have contractually bound themselves to undergo polygraph testing as well as breathalyser testing should the employer require them to do so. It is further stated that such a refusal to undergo either of these tests may be recorded as such on their personnel file and that such refusal '…could lead to a breakdown in the

employment relationship and to a breach of trust between Employer and Employee'.

[7] Govender testified that the company had become aware of the irregularities when another employee had come forward in early December 2010 after an amount of R800 had gone missing. This employee had provided a statement in the form of an affidavit to the company in which he implicated the present six respondents. This employee had himself been dismissed as a result of his revelations. It was this incident that had led to an investigation and the production of a variance report which Govender had herself generated between the period of December 2010 and January 2011. This report was produced to both the disciplinary enquiry and the subsequent arbitration proceedings. It was at the next stocktake that the company's loss of approximately R28, 000 was established. She had then generated a system log report for each of the six employee respondents and was able to identify specific transactions in which each of the six employees had utilised unauthorised codes whilst on shift. Govender made extensive reference to a system log report and specific incidents in which Sambara, an evening waiter and one of the present respondents, had used a manager's access code in order to transact on the food and beverage computer system. The evidence was that this specific code was unauthorised for transactions in the Balata Restaurant where Sambara worked. The specific incidents of misuse of this access code had taken place on 2 and 11 December 2010. Govender testified that he had gained access to the system by using what is known as a "*TR code*" which is usually only available to the IT consultant and ought never to be available to a person in Sambara's position. The system log reported that he had also used these codes in an unauthorised manner on 24 and 28 December 2010 whilst on duty.

[8] She confirmed that, during the internal disciplinary hearing, Sambara acknowledged that he was aware that it was wrong to utilise another person's code and that all codes issued to employees ought to remain confidential. He,

however, went further and even acknowledged that he had distributed his own secret code to other members of staff, whilst knowing this was wrong. It does not appear from the minutes of the hearing that Sambara challenged this evidence in any manner.

[9] Govender had also requested that each of the accused employees undertake a polygraph test as had been agreed to in their contracts of employment. She emphasized that it was not only the present respondent employees who had been requested to undergo such testing but that all employees who had been able to access the applicant's food and beverage computer system had been requested to undergo such testing. There were ten such employees, of whom four agreed to undergo polygraph testing. They were subsequently cleared by these tests of any misuse of the computer system. The remaining six employees all refused to undergo polygraph testing. These are the present individual respondents, all of whom were barmen apart from Sambara who was a waiter. They were subsequently issued with letters regarding their refusal to undergo polygraph testing.

[10] According to the applicant, none of the employees has ever been able to provide a reasonable explanation as to why they committed these irregularities on the computer system, it not being disputed that they were all aware of how the system functions and that they had received adequate training thereon. After holding disciplinary enquiries, this had led the applicant to find that, on a balance of probabilities, they were all guilty of gross negligence. The company had drawn an adverse inference against these employees for their failure to challenge the evidence against them and also by reason of their failure to undergo polygraph testing when they were obliged to do so.

[11] Govender had explained how the computer system was abused by referring to "*kicking the drawer*" of the cash register without recording any transaction, the unauthorised use of managers' codes, the unauthorised use of TR codes, all of which overrode the system and permitted employees to either not record cash

deposits or to remove cash from the system. A system log for the five barmen is attached as annexure "FAR25" to the founding affidavit in the review application.

[12] With specific reference to Sambara, Govender testified that he had been employed as a "*PM waiter*" since 14 June 2010.

[13] Govender also testified regarding the breakdown in the trust relationship between employer and employee that had resulted in this chain of events. The company could not trust them any longer.

[14] The chairman of the disciplinary enquiries, Andries Johannes Fourie ("Fourie"), an official of SAATEA, a registered employers' organisation, had found all six employees guilty of gross negligence in the manner in which they had conducted transactions on the computerised point of sale system. It is not explained why he was unable to consider any findings with regard to the initial charges of theft and misuse of company funds. Be that as it may, the dismissed respondents referred a dispute to the CCMA which heard evidence *de novo* regarding the matter. As mentioned above, the transcript of such evidence is missing from the record. All document bundles are however intact, as are the Commissioner's notes.

The arbitration proceedings

[15] At arbitration, Govender again testified on behalf of the applicant but only two of the dismissed employees testified: Brian Sambara ("Sambara") and Juan Ndlovu ("Ndlovu").

[16] According to Fourie, who deposed to the founding affidavit in the review application, procedural fairness was never in dispute and this was recorded in a pre-arbitration minute, which was recorded in a handwritten note. He also confirms that it was agreed that the dismissals had been procedurally fair and that, for this reason, no evidence was led regarding procedural fairness.

Unfortunately, this minute does not form part of the record and could not be produced. I do not propose to repeat the detailed evidence of Govender as given at the arbitration hearing as this appears to be essentially the same as what she had testified to at the disciplinary hearing.

[17] Sambara, when testifying, stated that he had been forced to sign his notice of disciplinary hearing but did not elaborate further. He also stated that when he did present himself for polygraph testing he was told that he was not obliged to go. He then subsequently refused to undertake it and stated that he was suspended from his duties "*at gun point*". He stated that he did report a problem with the system to his manager, Mr Yugen Naidoo, who was aware of these transactions which had implicated him in the system log report. Importantly, he confirmed under oath that he did provide his code to other members of staff in order to get his tips.

[18] Ndlovu was the only other respondent to testify at the arbitration hearing. Govender had confirmed that Ndlovu had previously acknowledged his responsibility for a loss by reason of the bar shortage whilst he was on duty as per annexures "FAR41" and "FAR42". In his evidence-in-chief, Ndlovu denied that he had distributed his code to anyone else as he was aware this is wrong and criticised the company for providing only system log audit reports for the afternoon shifts but not for the morning shifts. He acknowledged that he had refused to undergo polygraph testing and that he was aware in a clause in his employment contract obliging him to do so.

[19] The remaining employees, Peterson Madondo, Sammy Moshole, Julius Zulu and John Sibanda all failed to testify at the arbitration hearing. Govender confirmed that Zulu also had previous warnings for stock losses whilst on duty at the bar, as per annexure "FAR43".

<u>The Arbitration Award</u>

[20] The company submits that although it was agreed that written closing arguments would be submitted on behalf of both sides, it is clear from the arbitration award that the Commissioner had failed to consider any of the written submissions filed on behalf of the company on 20 May 2011. It is also argued that the employees' union representative had failed to supply a copy of his written argument to the company.

[21] As mentioned above there are no answering affidavits in this matter.

[22] In heads of argument filed on behalf of the individual employees, much is made of the apparent weakness of the company's case in relying on evidence that was simply not before the presiding Commissioner. According to this argument, the computer printouts showing that the codes were used don't show anything at all and that there is no nexus between any loss on the part of the company and the conduct of the individual employees.

[23] When one has regard to the arbitration award, one is struck by the relatively detailed survey of evidence and argument but a relative paucity of analysis of the evidence and argument. This analysis amounts to nine short subparagraphs. What is notable about the Commissioner's analysis of the evidence is the following:

23.1. There is no reasoning or justification for his finding of procedural unfairness. There is in fact no evidence of any procedural unfairness apart from some half-hearted challenged to the applicant's refusal of an appeal hearing. This however, cannot be of any weight or significance, given the right of the employees to challenge their dismissal under the auspices of the CCMA. They have fully utilised that right;

23.2. There is no consideration whatsoever of the appropriate inferences to be drawn (if any) from the individual respondents' refusals to undergo

polygraph testing. Although it is trite that employees can never be compelled to do so, in light of the facts of the matter (and in particular, in light of the fact that four co-employees volunteered to undergo such tests and were cleared of any wrongdoing) the Commissioner cannot be said to have properly applied his mind to this matter without at the very least considering whether such inferences could be drawn or whether the applicant was entitled to draw the adverse inference against the respondents that it did. Although the refusal to undergo polygraph testing was, in the case of the individual respondents, a clear breach of their employment contracts, it is well-settled that an adverse inference of guilt should not be drawn by mere dint of such refusal.[1] In this matter, however, alternative evidence was available to the Commissioner;

23.3. He failed to consider the fact that the computer reports did not simply speak for themselves. Govender, as food and beverage manager, had produced these computer reports, had personal knowledge of how and what they purported to show and was in the best position to testify as to their interpretation and how they effectively implicated the individual respondents in guilt. There was, however, no credible evidence led to gainsay what she had said other than blanket denials from the two respondents who chose to testify;

23.4. He failed to take into account the complete absence of testimony from the four remaining respondents apart from Sambara and Ndlovu;

23.5. He found that 'the [respondents] were not given all the information to prove their innocence' which was found to be of importance. It is not stated what this information might have been. This completely glosses

[1] *Sedibeng District Municipality v SA Local Government Bargaining Council and Others* (2013) 34 *ILJ* 166 (LC) at para 37; *Truworths Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 *ILJ* 677 (LC) at para 36 citing *Kroutz v Distillers Corporation Ltd* [1999] 8 CCMA 8.8.16 (CCMA).

over the fact that the respondents did not meaningfully challenge the compelling evidence against their guilt;

23.6. He made an order of reinstatement after finding that there was "*no proof of a broken relationship.*" This despite the company's insistence that it could no longer trust the individual employees in the face of their steadfast refusal to undergo polygraph testing (and concomitant breach of contract) and without taking into consideration the position of trust that these employees find themselves in having to work with cash monies on a regular basis.

[24] As mentioned above, I am mindful that a full analysis of this matter is severely hampered by the complete absence of any transcript from the arbitration proceedings owing to these records having got lost. Despite my misgivings regarding the arbitration award I am also well aware of the temptation that others might feel to simply remit this matter back for a *de novo* hearing before another commissioner. However, for the reasons mentioned at the outset of this judgment such a solution will prove wholly unsatisfactory by reason of the inordinately long period that has transpired between the dismissals and the hearing of this review application, some four and a half years later.

[25] I have, however, also had regard to the copious documentary evidence and system log audit reports which were produced in evidence and explained by Govender. It is also important to bear in mind that none of the allegations set out in the founding affidavit in the review application have been challenged in an answering affidavit. More than that, however, I find no reason not to accept their veracity as they are, on a balance of probabilities, wholly plausible and in line with the evidence led both in the disciplinary proceedings and at arbitration.

[26] There does not ever appear to have been any substantive challenge to the substance of the applicant's allegations apart from bare denials. One cannot

simply sit back and challenge the authenticity of a computer-generated report that has been produced by a system in the ordinary course of business, especially where this has been commented on, explained and confirmed by a witness, such as Govender, with no substantial challenge being offered to counter such evidence. This cannot be said to be a case of a document speaking for itself. Even if the Commissioner refused to draw any adverse inference from the failure of the individual respondents to undergo polygraph testing he ought at the very least to have considered that this refusal constituted a breach of each of their employment contracts. There is no reason why this clear and conscious breach of employment contract ought not to have been taken into account as an additional factor when considering whether their guilt had been proven on a preponderance of probabilities. As an aside I pause to point out that I do not view the authorities to which I have referred above as suggesting that a Court (or arbitrator) may not draw an adverse inference against an employee for a conscious breach of contract, even if it involves the refusal to undergo polygraph testing. I would even go further to suggest that there does not, to my mind, appear to be any authority which prohibits an adverse inference being drawn against an employee who simply refuses to undergo polygraph testing, under the appropriate circumstances.

[27] It is incorrect of the respondents to argue that the affidavit that had been handed in at the outset of the investigation by a fellow employee who implicated all of them was taken into account by the company in their dismissals. What really happened was that this affidavit and its contents were simply one of the main factors that led to the investigation conducted by Govender and the subsequent stock-take. This in turn revealed that the employees in question were guilty of gross negligence if not complicity in dishonest dealings. This affidavit is of course not evidence in these proceedings and could never in itself have been taken into account in making any findings against the individual respondents.

[28] I note that I am enjoined by the Labour Relations Act ("LRA") as well as by my oath of office to administer justice and to advance the nature and objects of the LRA in accordance with the Constitution. This sometimes means having to take difficult decisions. This case is one of those situations.

[29] In light of all the evidential material before me I find that the evidence at both the original disciplinary enquiry as well as at the arbitration points strongly in favour of the guilt of the individual respondents. This must of course include the fact that an adverse inference ought to have been drawn against them by reason of their manifest breach of contract in refusing to undergo polygraph testing without any reasons having been given for this.

[30] This finding does not in itself mean that the award is in itself reviewable. However, I also find that, faced with the evidence before him, the presiding Commissioner nevertheless came to a result and handed down an award which is not justifiable in relation to the reasons given for it and is not an outcome which a reasonable commissioner could or should have come to. The Commissioner's failure to take into account the abovementioned factors together with his unsubstantiated finding of procedural unfairness lead me to the inescapable conclusion that this is an award which is vitiated by material irregularities. The result arrived at, as well as the arbitration awards itself, is unreasonable. It falls to be set aside and reviewed. I accordingly do so.

[31] In the result, I make the following order:

1. The arbitration award under case number GAJB3836-11 dated 6 June 2011 is hereby reviewed and set aside.

2. The abovementioned award is replaced with the following order:

> 'The dismissal of the six employees represented by the third respondent herein was substantively and procedurally fair'.

3. There is no order as to costs.

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Bank AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mrs FW Moyses

Instructed by: Ren Oosthuzien Attorneys

For the Respondent: Ms K Walker

Instructed by: Snyman Attorneys