Reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 1022/12

In the matter between:

NUMSA	**First Applicant**
B SANGWENI	**Second Applicant**

and

NASIMA RAFEE *N.O*	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
KROST OFFICE PRODUCTS (PTY) LTD	**Third Respondent**

Heard: 18 May 2016

Delivered: 31 May 2016

Summary: (Review – dismissal – competing right of privacy and right to protect confidential information – misdirection – result not unreasonable despite misdirection)

JUDGMENT

LAGRANGE J

Introduction

[1] The second applicant Mr B Sangweni ('Sangweni'), a driver and a union shop steward employed by the third respondent ('the company') was dismissed after being found guilty of two charges namely:

1.1 failure to delete photos of the company from his mobile phone, or alternatively failed to confirm that he had done so, and

1.2 refusing to make his phone available to verify that the photographs had been removed, which was a lawful instruction.

[2] The charges came about after an incident on 18 August 2011. It was reported to the director of the company that Sangweni was taking photos of the production line at different stages of the production process. Sangweni did not admit to taking any photos as alleged. Nevertheless, he was informed he would be given an oral warning that he was not allowed to take any photographs, which would be reduced to writing. Krost also confirmed his testimony recorded in the disciplinary enquiry that when Sangweni was confronted on 18 August about taking photographs, his response to the accusation was simply "no comment".

[3] On 23 August 2011 the issuing of the warning was recorded in the following terms:

> "Sipho Sangweni was warned that taking photos with the management consent during working hours of any items, personnel or property of crossed of this product is strictly forbidden. Should he continue taking photos it would because for instant dismissal. He was also instructed to delete all the photos that he had taken from his cell phone and warned that the use of any photos for any reason that he had taken would because for instant dismissal. Mr Sangweni was also warned that taking the photos of KO P that is Krost Office Products was considered to be industrial espionage and will be cause for instant dismissal."

[4] The company's director, Mr P Krost ('Krost'), testified that the purpose of the warning was that, Sangweni should not take any photos and should delete the ones on his phone and not to use them in any way to harm the

company. Upon the warning being issued, Sangweni was asked if he had deleted the photos from his phone, to which he replied cryptically 'no comment'. This then prompted Krost to give him a further instruction to hand over the phone to see if there were any pictures of the company on the phone. He agreed that Sangweni had said that he could not give him his phone because it had photos of his family on it and that it was his private phone, but denied that he had said there were photographs of his wife and himself which he would not like anyone to see. Krost also testified that throughout the disciplinary proceedings, Sangweni had failed to deny that he had been taking photos. He further confirmed that Sangweni had been dismissed for both charges.

[5] According to Krost and the evidence of the minute taker of the meeting Ms N Willemse ('Willemse'), Sangweni responded by saying that his phone was his property and that the employer had no right to look at it and also that he said "I am working here I have the right to take pictures." After the request to hand over his phone for inspection was made four times, Sangweni was suspended and the following day was issued with notice of a hearing to answer to the two charges mentioned above. It should be mentioned that in setting out the charges, reference was made to Sangweni's alleged statement that he had the right to take photos because he worked in the company, which the company interpreted to mean that he clearly intended to continue doing so. The letter also recorded the company's concern that it operated in a highly competitive environment and its business operations are furniture and office product designs which are of considerable value to it and needed to be kept confidential. The letter recorded that the alleged conduct and breached the trust relationship which should exist between Sangweni and the company. In her evidence, Willemse was adamant that Sangweni had said he had the right to take photos as he was working at the company.

[6] At the arbitration hearing, Sangweni denied ever taking any photos at the company. Krost was questioned why there was no CCTV footage of Sangweni taking photographs and explained that the system had been struck by lightning and was inoperative at the time. It was claimed by a witness called by Sangweni that the cameras were working, but under

cross-examination he could not provide an adequate explanation why he believed that was the case. He claimed that he never saw Sangweni taking any photographs on the day in question.

[7] The company's production manager, Mr R Maluleke ('Maluleke') gave evidence that Sangweni had arrived before 08H00 on the morning of 18 August 2011 and had started to take photos of the production lines, the shift machine and letter trays. He had then proceeded to the planters and taken photos of them. Maluleke asked another manager whether he had given Sangweni permission to take photographs and was told that he had not, so he informed Krost. He also confirmed that the CCTV cameras were not working and said that other workers also asked why Sangweni was taking photos.

[8] At the arbitration hearing, Sangweni claimed that he had not been given an opportunity to respond to Krost when he was accused of taking photographs of the production line and asked to hand them over. He claimed that at the meeting on 23 August 2011 where he was issued with the oral warning he had said he could not hand his phone over because it contained photographs of his wife and he needed to protect his family's privacy.

The arbitration award

[9] The arbitrator rejected Sangweni's version of what transpired on 23 August 2011, because it did not accord with the minutes recorded by Willemse, who had taken verbatim minutes of the meeting, and whom the arbitrator found to be a credible witness. The arbitrator felt that the instruction to hand over his phone was a reasonable one in the circumstances and that he had been given a number of days to delete the photographs taken. She found his refusal to obey the instruction was serious and warranted his dismissal.

Review grounds

[10] The main thrust of the applicants' ground of review is that the arbitrator unreasonably concluded that the instruction to Sangweni to hand over his

cell phone for inspection was lawful, because she failed to consider that it was his private property and that it contained private information of a confidential nature. In so doing, the applicants contend that the arbitrator neglected to consider whether the instruction violated the applicant's right to privacy contained in section 14 of the Constitution, which states:

> "Privacy
>
> 14. Everyone has the right to privacy, shall include the right not to have-
>
> (a) their personal homes searched;
>
> (b) their property searched;
>
> (c) their possessions seized; or
>
> (d) the privacy of their communications infringed."

[11] The applicants also contend that the arbitrator failed to consider whether the instruction to hand over the phone would have been a breach of rights in terms of section 25(1) of the Constitution, which states *inter alia*:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

It has been held that any interference with the use, enjoyment or exploitation of private property is a deprivation of that property.[1] In truth, the thrust of the applicant's review case was based more on the claim the arbitrator had neglected the right to privacy rather than a claim based on a deprivation of use of a cell phone in any meaningful sense. It was never contended that Sangweni was asked to do anything more than to permit the inspection of his his phone. There was no suggestion it would be confiscated or he would be denied the use of it.

[12] In *Bernstein v Bester NO*, it was held that:

> "The truism that no right is to be considered absolute, implies that from the outset of interpretation each right is already limited by every other right to ring to another citizen. In the context of receive this would mean that it is only the inner sanctum of a person, such as his/her family life, sexual preference and home environment, which is shielded from erosion by

[1] ***First National Bank of SA Ltd t/a Wesbank v Commissioner, South Africa Revenue Services* 2002 (4) SA 768 (CC)** at 796,[57].

> conflicting rights of the community. This implies that community rights and rights of fellow members place a corresponding obligation on a citizen, thereby shaping the abstract notion of individualism towards identifying a concrete member of civil society. Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[2]

[13] The applicants rightly contend that in the employment context, the competing interests of employee's rights to privacy have to be weighed against the employer's right to protect its business interests. In this instance, the employee has a right to preserve the confidential nature of personal information on his cell phone. The company for its part, asserts its right to preserve the confidentiality of information about its business operations. In the case relied on by the applicants ***Protea Technology Ltd and Another v Wainer and Others***[3], the High Court held that the applicant was not entitled to intercept private calls made by an employee but that where the employee was engaged in matters pertaining to the employer's business, the employee lost the right to the privacy of those communications:

> "The first respondent was employed by the applicants in a position of trust. The telephone conversations were conducted from the applicants' business premises within business hours. The applicants were entitled to require the first respondent to account for his activities during their time. (It will be recalled, in addition, that the first respondent was contractually obliged to devote his full attention to the affairs of the group.)
>
> It may be accepted that, even in this context, and within reason and at the direction of the employer, an employee's private life is not excluded. Thus he may receive and make calls which have nothing to do with his employer's business. The employee making such calls has a legitimate expectation of privacy. Although he must account to his employer if so required for the time so spent, the employer cannot compel him to disclose the substance of such calls. The content of conversations involving his employer's affairs (whether directly or indirectly) is a different matter. The

[2] **1996 (2) SA 751 (CC)** at [67].

[3] **1997 (9) BCLR 1225 (W)**

> employer is entitled to demand and obtain from an employee as full an account as the latter is capable of furnishing. In this sense also, the company can fairly be regarded as the owner of the knowledge in the employee's mind: cf. *Bernstein's* case at 796E–F (although the context differs from the present).
>
> …
>
> As soon as the employee abandons the private sphere of his conversation for that of the affairs of his employer he loses the benefit of privacy. The determination of that moment will not generally be one of great difficulty."[4]

[14] In this instance, if it is accepted on the evidence that it is not an unreasonable inference to draw that Sangweni probably did take photos with his phone of the company's production line, he was capturing information about his employer's business, for which he had advanced no justifiable reason because he never admitted to having taken the photos. It is true that he might originally have defended the idea that, in principle, he was entitled to take photos of the workplace because he worked there himself. However, he never advanced any justification beyond this, such as the photos being necessary for the performance of his functions as a shop steward.

[15] The action of taking such photographs is indistinguishable in principle from copying plans of the company's production layout and putting those copies in a personal briefcase. He may be entitled to the privacy of his own personal data and information on his phone, but that does not entitle him to use his personal phone as a camera to capture confidential information belonging to his employer in which it has a proprietary interest. When he did that, he could hardly maintain that his right to preserve the confidentiality of his personal data entitled him also to retain data about the company he had obtained without permission, which was stored on the same device

[16] It is true that the arbitrator appears to have neglected to consider these issues in coming to her conclusion. Apart from misdirecting herself in this sense, it seems that she also focused only on the second charge against

[4] At 1224-5

the applicant, whereas he was dismissed for both charges. In ***Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*** the LAC held that on review the court must still consider whether, despite the aribtrator's misdirection, "…the result of the award was one which a reasonable commissioner could reach." [5]

[17] In this instance, the arbitrator's finding that Sangweni's dismissal was substantively fair was not an outcome that no reasonable arbitrator could reach. It would not be unreasonable to infer from the evidence that the applicant most probably did take photos of the production line, which he was not entitled to do and that he had not taken steps to delete the photographs from his phone. In those circumstances, given the absence of the applicant even claiming that he had deleted them and also being unwilling to demonstrate that he had such photos on his phone, it would not be unreasonable to infer that he had retained them, which seriously undermines the existence of the trust relationship which is supposed to exist between employer and employee. Consequently, in my view, it cannot be said that the overall conclusion that Sangweni's dismissal was fair is one that no reasonable arbitrator could have reached on the evidence.

Order

[18] The application is dismissed.

[19] No order is made as to costs.

Lagrange J

Judge of the Labour Court of South Africa

[5] (2015) 36 ILJ 968 (LAC) at 974,[15]

APPEARANCES

APPLICANT:	D Cartwright of D Cartwright Attorneys
FIRST RESPONDENT:	S Swartz instructed by Dewey Hertzberg Levy Inc.