



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JR 1714/14

In the matter between:

HILLARY CONSTRUCTION (PTY) LTD

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

MR. C.A. MANNDE

Second Respondent

NDANDULENI LEONARD SILIMA

Third Respondent

Heard: 20 July 2017

Delivered: 26 January 2018

Summary: The applicant seeks to review and set aside an award of the second respondent in terms of Section 145(1) of the Labour Relations Act 66 of 1995 (the Act). The reasonable decision-maker test is a stringent one and the applicant's grounds of review fell short of the threshold. The application was dismissed.

JUDGMENT

HUTCHINSON; AJ

Introduction

- [1] The applicant is a construction company and is involved in the construction, maintenance and rehabilitation of national and provincial roads. The third respondent was employed by the applicant on 16 November 2010 as a driver and at the date of his dismissal, he earned a salary of R5, 418.63 per month.
- [2] The third respondent was part of a team working at a site of the applicant's in Thohoyandou, Limpopo Province. On 28 November 2013, 27 litres of diesel went missing from a diesel container on the site. There were three sets of keys to the container. The third respondent and a mechanic one Owner, each had their own set of keys. The third set was kept in the cubbyhole of a truck which a security guard employed by a third party service provider had access to.
- [3] Pursuant to the theft, the keys that were kept in the cubbyhole of the truck were handed over to the third respondent's supervisor, Mr Nametesu Chuene (Chuene). On 7 December 2013, 195 litres of diesel was stolen from the same diesel container. An investigation revealed that a key had been used to unlock the container. At the time of both thefts, the same security guard was on duty. By the time the second theft was discovered, the security guard had deserted the site and absconded from his employment. At the time of the theft, Owner and Chuene rented and shared a room in Thohoyandou and drove together daily to and from the site. The third respondent rented his own room approximately 22km from the site and usually arranged for his own transport to and from work.

- [4] All three employees underwent polygraph examinations. The third respondent's test results indicated deception whilst those of Owner and Chuene did not. The deponent to the applicant's founding affidavit, Mr Louis Olivier (Olivier) a Human Resources Manager, states the following: *"As a result of the above mentioned factors the Applicant charged the Third Respondent with the misappropriation of diesel. A disciplinary hearing was held on February 2014 where the Third Respondent was found guilty of the charge and subsequently dismissed."*¹

CCMA referral

- [5] The third respondent was dissatisfied with his dismissal and referred an alleged unfair dismissal dispute to the first respondent. The matter could not be resolved at conciliation and the second respondent was appointed under the auspices of the first respondent to arbitrate the dispute.
- [6] It is apparent from the award of the second respondent that the applicant called three witnesses to testify on its behalf and the third respondent testified in his own defence. The first witness who testified on behalf of the applicant was Ms L. Snyman (Snyman) the person who conducted the polygraph tests. She was qualified to conduct such tests and pursuant thereto, established that the third respondent showed signs of deception whereas, the other two employees did not. The second witness to testify was Mr Eddie Simpson (Simpson) the applicant's Operations Manager.
- [7] Simpson presented evidence in respect of both of the thefts. For the first theft, no-one was charged. After the second theft, the security guard deserted the site and his whereabouts were unknown. It was the third respondent's duty to take care of the company's assets including the diesel container. After making reference to the result of the third respondent's polygraph test, Simpson claimed that he could no longer trust the third respondent.

¹ Index to pleadings 6 at para 4.16.

[8] Chuene, the third respondent's supervisor also testified. He alerted Simpson to the theft. The third respondent rented a room close to where he stayed. On the day of the second theft, the third respondent was staying in a rented room.

[9] The third respondent denied any knowledge concerning the theft of the diesel. He could not explain why the security guard had disappeared after the theft. When he arrived at work on 7 December 2013, he discovered the theft and alerted his supervisor. He disputed the findings of the polygraph test.

[10] The second respondent held as follows:

“[19] I would like to mention upfront that the Respondent did not adduce direct evidence or circumstantial evidence to substantiate its case. It seems to me that the Respondent relied heavily on the polygraph test to find the Applicant guilty of the misconduct it alleged. The Respondent did not bother to probe why the security guard disappeared soon after the diesel was stolen. There was a strong possibility that the security guard committed theft of the diesel. Above all the supervisor and the mechanic had copies of the keys of the diesel tank.

[20] In the matter of **Truworths (Pty) Ltd v CCMA & Others (2009) 30 ILJ 677 (LC)** the court held that: “... a polygraph test on its own cannot be used to determine the guilt of an employee. However a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualification of the polygraphist and provided that it is clear from the evidence that the test was done according to the acceptable and recognizable standards. At the very least, the result of the properly conducted polygraph is evidence in corroboration of the employer's evidence and may be taken into account as a factor in assessing the credibility of the witness and in the probabilities. The mere factor that the employee, however refuses to undergo polygraph test is not in itself sufficient to substantiate an employee's guilt.”

[11] Accordingly, the second respondent found that the dismissal was not for a fair reason and awarded the third respondent six months' compensation. The procedural fairness of the dismissal was not in dispute.

Grounds of review

[12] The applicant enumerates a number of grounds of review however I will only refer to the material ones. It is submitted that the second respondent misdirected himself in finding that the applicant had failed to adduce any direct or circumstantial evidence to implicate the third respondent. The uncontested evidence revealed that only three employees had a set of keys to the container. The locks on the diesel container were not tampered with, confirming that a key had been used to remove the diesel.

[13] It was contended that Owner and Chuene rented rooms at the same premises and travelled together to and from site. The third respondent stayed at another location closer to the site. The third respondent was responsible for completing the fuel site log book. He would take meter readings on the vehicles. As it transpired, the third respondent testified that he discovered the shortage and reported it.

[14] It was submitted that at the time of the first incident, the third respondent was the person responsible for placing a spare key in the cubbyhole compartment of the truck. Accordingly, he was the only person who had knowledge of the location of the extra spare key.

[15] The results of the polygraph tests corroborated and supported the circumstantial evidence adduced by the applicant. The third respondent's version was a bare denial. He was under a duty to provide an explanation for the missing diesel. There was no evidence to suggest that the security guard had stolen the diesel.

Authorities

- [16] The controversy surrounding the evidential weight to be attributed to polygraph tests was discussed and considered in the case of *DHL Supply Chain (Pty) Ltd v NBCRFI*.² The court noted that no expert evidence had been given on the concept of polygraph testing or on the technical integrity of that process. The mere say-so of the operator is unlikely to qualify as expert evidence, and it would be a mistake to treat it as such. Polygraph tests are at best, merely means of establishing whether an investigation should be conducted and cannot in itself, establish guilt.
- [17] Statements that polygraph tests can be used only as corroborative evidence beg the question what a failed test can produce by way of useful information. In the absence of expert evidence to explain why an inference should be drawn from it, nothing remains to contribute to the probabilities. The Court observed that the weight to be given polygraph tests remain an open question, but any litigant who wishes to rely on them must adduce expert evidence of its conceptual cogency and the accuracy of its application.
- [18] Based on the above authority, little if any reliance can be placed on a polygraph test to establish the guilt of an employee. I agree with the second respondent that the applicant placed far too much reliance on the test. In my view it is likely that if Owner and Chuene failed the test, they would have been charged provided the applicant passed the test. Since three persons were in possession of keys, they all had an opportunity to remove the diesel from the container. If the third respondent was the thief, he would in all probability have had to conspire with the security guard. If Owner and Chuene were the thieves, the same would apply.
- [19] Another possibility that cannot be discounted is that the security guard acted alone and managed to have a key made or ensured that the container was not locked when everyone left the site. The possibilities are numerous.

² [2014] 9 BLLR 860 (LAC).

[20] To succeed on review, the applicant would have to show that the second respondent was clearly wrong in his factual findings. The factors relied upon by the applicant barely create a probability one way or another.

[21] For the above reasons I am not satisfied that a proper case has been made out for the relief sought.

[22] Accordingly, I make the following order:

Order

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

W Hutchinson
Acting Judge of the Labour Court

Appearance

For the Applicant: Attorney D. de Villiers

For the Respondent: No Appearance

LABOUR COURT