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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR1175/18

In the matter between:

TUMELO MUSI **Applicant**

and

PFG GLASS (PTY) LTD **First Respondent**

NATIONAL BRAINING COUNCIL FOR THE CHEMICAL INDUSTRY **Second Respondent**

COMMISSIONER THANDO NDLEBE N.O **Third Respondent**

Enrolled: **27 January 2021 (decided the on papers)**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 26 March 2021.**

Summary: **Photographic evidence – authenticity impugned – evidence must be led to prove reliability, veracity, originality and accuracy of a photograph.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this era of digital imaging or image design, it is becoming increasingly easy to manipulate photographs, video and audio tape, making the imagined real. Since the legal system cannot be spared the adverse effect of this trend, that begs the question: are the measures for authentication of evidence in a form of photographs and videotape stringent enough?

[2] In this review application,[1] the applicant Mr Tumelo Musi (Mr Musi) is challenging the arbitration award issued by the third respondent (Arbitrator), under the auspices of the second respondent, the National Bargaining Council for the Chemical Industry (NBCCI) under case number GPCHEM534-17/18, dated 23 November 2018. The Arbitrator found Mr Musi's dismissal fair solely on the basis of a photograph depicting him sleeping on duty.

[3] Mr Musi's main polemic against the award is that the Arbitrator misconceived the nature of the enquiry by failing to deal with the issue of the authenticity of the photograph. The first respondent, PFG Glass Pty Ltd (PFG), is vigorously opposing the application.

[4] The matter was enrolled to be heard via Zoom. However, due to technical glitches that affected the hearing of the matter, it is decided on the papers by agreement between the parties. The Court is indebted to the legal representatives for being considerate.

Background

[5] The facts in this matter are not laden with controversy. Mr Musi was employed as a Process Controller Cold End with effect from 1 April 2012. He was dismissed on 18 May 2018 after he was found guilty for sleeping on duty.

[6] Mr Musi was charged and dismissed solely on the strength of the photographic evidence which depicts him sleeping on the operating station. The photograph emerged during arbitration proceeding where National Union of Metalworkers of South Africa (NUMSA), Mr Musi's trade union, was challenging the dismissal of another member sometime in September 2017. NUMSA presented the

[1] In terms section 145 of the Labour Relations Act 66 of 1995, as amended(LRA).

photograph to support its contention that PFG incontinently applied discipline. Mr Musi was not part of those proceedings nor aware of the existence of the photograph.

[7] During the disciplinary enquiry, Mr Musi conceded that the photograph depicts him, but took issue with its authenticity and the fact that there were no details provided as to when the photograph was taken and by whom. He was, nonetheless, found guilty and summarily dismissed.

[8] Displeased with his dismissal, Mr Musi, assisted by NUMSA, referred a dispute to the NBCCI. The dispute was arbitrated after a failed conciliation; hence the impugned arbitration award.

[9] It is common cause that PFG did not call any sponsoring witness to testify that the photograph is a fair and accurate representation of the subject matter. As such, its source of origin, date and time of incident and person who took it remain unknown.

[10] Mr Mark Scrivens (Mr Scrivens), the chairperson of the disciplinary enquiry, testified that even though Mr. Musi pleaded not guilty, he conceded that he was sleeping on duty and apologised for his conduct. Mr Musi, on the other hand, testified that he was presented with the photograph for the first time during the disciplinary enquiry. He was confused as he could not recall the incident hence he admitted that the photograph depicts him. However, to him the photograph looks old and could have been taken sometime in 2010 or 2011 when he was still employed by Masakhe, a contractor which placed him with the PFG.

Was Mr Musi guilty as charged?

[11] Mr Musi contends that the Arbitrator misconceived the nature of the enquiry and failed to determine the key dispute before him, which is whether he contravened a rule applicable to the workplace. Mr Musi was charged with a '*totally unacceptable behaviour in the work situation in that [he was] sleeping on/at an operating station, endangering [his] own safety*'.

[12] Mr Musi's impugn is two pronged. First, the authenticity or originality of the photograph. Second, probative value of photographic evidence.[2] As mentioned above, in the era of digital imaging, the photographic evidence must be subjected to a more stringent scrutiny before it could be admitted into evidence and/or any probative value could be attached to it. A party introducing the photographic evidence bears the onus of proof.

[13] It bears mentioning, as a reminder, that a photograph is a real evidence which, subjected to best evidence rule, an original copy ought to have been discovered.[3] However, since arbitration proceedings are less legally formalistic, a secondary copy may be admitted in evidence as long as it can be shown that the Arbitrator satisfied himself that there is a cogent explanation as to why the original copy was not available.[4] In the present instance, it is not clear whether the Arbitrator undertook that enquiry. What is true, though, is that PFG failed to conduct its own independent investigation when it became aware of the photograph. Strangely, it blamed NUMSA for its inability to secure the original copy.

[14] Notwithstanding the fact that the photograph was provisionally admitted in evidence, it was incumbent upon Arbitrator to determine the issue of its authenticity, an issue which includes proof of reliability, veracity, originality and accuracy.[5] Obviously, this issue had to be considered as part of the totality of the evidence that was before the Arbitrator.

[15] Mr Musi's version of defence was that he did not recall the incident and if it indeed happened it must have been during the time when he was still in the employ of Masakhe. This evidence was not seriously challenged because no one knew when the incident took place. Tellingly, both PFG witnesses conceded that they could not vouch for the authenticity of the photograph as they are neither the photographers nor present when it was taken.

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[2] See: *Motata v Nair No and Another* (7023/2008) [2008] ZAFSHC 53 (11 June 2008) at para 28; see also S v Singh and Another 1975 (1) SA 3 (N).

[3] See: *Hoffman & Zeffertt*, The South African Law of Evidence 4th ed at 404, *Cross & Tapper on Evidence* 8th ed at 48.

[4] In line with section 3 of the Law of Evidence Amendment Act 45 of 1988 which deal admissibility of hearsay evidence.

[5] *Supra* n 2.

[16] In these proceedings, PFG contends that Mr Musi's admission during the disciplinary enquiry must be held against him. I disagree. It is well accepted that the determination of fairness is normally not restricted to what occurred during the disciplinary enquiry, but on the basis of all the evidential material before the arbitrator.[6] Mr Musi, certainly conceded that the photograph depicts him sleeping on duty but persistently challenged its authenticity. To that extent the arbitration is a *de novo* hearing, PFG had to show that the photograph it solely relied upon to dismiss Mr Musi is authentic.

[17] The fact that the photograph emerged from NUMSA lends little assistance to PFG's case. NUMSA did not provide any detail on the authenticity of the photograph. In fact, Mr Bongani Skhosana, NUMSA shop steward and Mr Musi's witness, appeared to be distancing himself from the photograph. PFG's submission that the applicant was unable to give any meaningful reason why he had not established from NUMSA officials as to when the photograph was taken is flawed. There is absolutely no way PFG could have expected Mr Musi to prove its case.

[18] Since the circumstances surrounding the photograph are sketchy, it is obvious that PFG's case is circumstantial. The legal principles in this regard are well established and crisply expounded in *Cooper NO and Another v Merchant Trade Finance Ltd*,[7] as follows:

> 'It is not incumbent upon the party who bears the onus of proving an absence of an intention to prefer to eliminate by evidence all possible reasons for the making of the disposition other than an intention to prefer. This is so because the Court, in drawing inferences from the proved facts, acts on a preponderance of probability. The inference of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. In a criminal case, one of the "two cardinal rules of logic" referred to by Watermeyer JA in *R v Blom* is that the proved facts should be such that they exclude every reasonable inference from

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[6] See: County Fair Foods (Pty) Ltd v CCMA (1999) 20 ILJ 1701 (LAC).

[7] 2000 (3) SA 1009 (SCA) at para 7; 1027E – 1028D. See also: *Woolworths (Pty) Ltd) v CCMA and Others* (2011) 32 ILJ 2455 (LAC) at para 34; *National Union of Mineworkers and Another v Mogale Gold, A Division of Mintails (SA) (Pty) Ltd* [2015] 10 BLLR 1016 (LAC); (2015) 36 ILJ 2815 (LAC) at para 23; *CSS Tactical (Pty) Ltd v Security Officers Civil Rights and Allied Workers Union (SACRAWU) and Others* (2015) 36 ILJ 2764 (LAC) at para 22.

> them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct. This rule is not applicable in a civil case. If the facts permit of more than one inference, the Court must select the most "plausible" or probable inference. If this favours the litigant on whom the onus rests he is entitled to judgment. If, on the other hand, an inference in favour of both parties is equally possible, the litigant will not have discharged the onus of proof.' (Emphasis added)

[19] Consequently, inferential reasoning entails an evaluation of all the evidence and not merely selected parts.[8] In the present instance, it is clear that the inference drawn by the Arbitrator is unreasonable as it is inconsistent with the totality of evidence that was before her and is based on conjectures. In *Solari v Nedbank Ltd and Others,*[9] confronted with similar misdirection by the Commissioner, the LAC stated that:

> 'Allied to what was said above is the fact that where it is clear on the totality of the evidence before the commissioner that he did not properly consider all the evidence and therefore arrived at a conclusion that a reasonable decision maker could not reach then the award ought to be set aside. The same will apply when the commissioner makes certain inferences from the proven facts that are totally out of sync with those facts. The inference reached without a proper consideration of the proven facts would be an unreasonable decision or a decision which a reasonable decision maker could not reach.' (Emphasis added)

[20] It follows, in my view, that the Arbitrator's finding that Mr Musi was guilty as charged solely on the strength of the unauthenticated photographic evidence is untenable. In the judgment in *Samancor Chrome Ltd (Eastern Chrome Mines) v Commission for Conciliation, Mediation & Arbitration & Others,*[10] the LAC crisply encapsulated the review test as follows:

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[8] See: *Minister of Safety and Security and Another v Madikane and Others* (2015) 36 ILJ 1224 (LAC) at para 44.
[9] (2014) 35 ILJ 3349 (LAC) at paras 29; see also *Madikane supra* at para 46.
[10] (2020) 41 ILJ 2129 (LAC) at para 13.

> 'The task of the commissioner, as was made clear in *Sidumo & another v Rustenburg Platinum Mines Ltd & others*,[11] was to determine whether the dismissal of the employee was fair or not. In doing so, he did not undertake the wrong enquiry, nor did he fail to 'tie the evidentiary knots' or approach the misconduct allegations narrowly and incorrectly in the manner contended by the appellant. On a conspectus of the material before him, the outcome reached by the commissioner was not one which a reasonable commissioner in his position could not have reached.'

Conclusion

[21] In the circumstances, it is evident that the Arbitrator undertook the wrong enquiry, failed to 'tie the evidentiary knots' and consequently rendered an unreasonable outcome. On this grounds alone, the award stands to be reviewed and set aside.

[22] I, however, agree with the parties that the matter should not be remitted back to the NBCCI. As the quality of record is not put in issue, I am in a position to deal with the matter to its finality in the interest of justice.

[23] After a careful perusal of the record and in the light of the findings I have arrived at above, I am convinced that the dismissal of Mr Musi is substantively unfair. When it comes to the relief, there is no reason why Mr Musi should not be afforded the primary remedy of reinstated. It is common cause that the photograph came to the attention of PFG in September 2017 but Mr Musi was only charged in May 2018 for the incident that no one knows when it happened. Mr Musi continued to work uninterrupted up until the time of his dismissal. Therefore, a contention that trust is broken or intolerability of the continued relationship is superficial and not supported by evidence.

[24] It is almost three years since Mr Musi's dismissal on 18 June 2018. The reason for the delay is not apparent from the papers. In my view, it is in the interest of justice and fairness to both parties that a back pay be limited to 16 months (R11 692.61 x 16 = R187 081.76).

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[11] 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); [2007] 12 BLLR 1097 (CC); 2008 (2) BCLR 158 (CC) at para 79.

Costs

[25] As a rule, costs do not follow the result in this Court in line with the requirements of the law and fairness, especially where the parties have a persisting collective bargaining relationship.

[26] I, accordingly, make the following order:

Order

1. The arbitration award under case number GPCHEM534-17/18 dated 23 November 2018 is reviewed and set aside and substituted with the following order:

    2.1 The dismissal of the applicant, Mr Tebogo Musi, is substantively unfair.

    2.2 The first respondent, PFG Glass (Pty) Ltd, shall reinstate Mr Tebogo Musi in his position as Process Controller Cold End retrospectively with immediate effect.

    2.3 PFG Glass (Pty) Ltd, shall pay Mr Tebogo Musi a back pay amount of R187 081.76 within 30 days from the date of this judgment.

2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Mr S Mabaso from Mabaso Incorporated
For the First Respondent:	Advocate?
Instructed by:	Kirchmanns Inc.