

**IN THE NATIONAL BARGAINING COUNCIL FOR
THE ROAD FREIGHT INDUSTRY**

IN THE MATTER BETWEEN:

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Applicant

And

SBV Services
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Respondent

AWARD

CASE NUMBER: D126/JHB/0000/07

Date/s of arbitration: 25 September 2007

Date of award 01 October 2007

Head-note: Dismissal for misconduct- Supplying false information on the employment application form-Application dismissed

1. DETAILS OF THE HEARING AND REPRESENTATION

The dispute is an alleged unfair dismissal referred to the Council for arbitration in terms of section 191(1) (a) (i) of the LRA 66 of 1995(as amended and herein referred to as “the Act”). The arbitration heard was held on 25 September 2007at the offices of the National Bargaining Council for the Road Freight Industry in Johannesburg.

Both parties were present. Representing the Respondent party, SBV Services (Pty) Ltd was Mr. Komane; it’s IR Officer and herein referred to as “the Respondent”. The

Applicant, Mr. Seanego, was represented by Mr. Bregman, a legal practitioner and herein referred to as “the Applicant”.

The hearing was mechanically recorded and the services of an interpreter, Mr. Baloyi, were also utilized.

ISSUES TO BE DECIDED

Whether the Respondent dismissal of the Applicant was both procedurally and substantively fair. Should the finding be that the Applicant was dismissed unfairly, I must determine the remedy in terms of the LRA, 66 of 1995, as amended. (“the Act”)

2. BACKGROUND TO THE ISSUE

An unfair dismissal dispute was initially referred to the Council. No settlement could be reached and a certificate of non-resolution was issued. The matter was then scheduled for arbitration.

The Applicant was employed as a Protection Officer and was dismissed following a disciplinary hearing and after being found guilty of ***supplying false information in his application for employment***. The Applicant on the other hand, stated that he was not guilty as he did not supply false information in his application for employment.

Respondent and the Applicant tendered the same bundle of documents. Both parties accepted that the documents are what they purport to be. The parties agreed that the Respondent would begin presenting its evidence. Furthermore, both parties handed in their written closing arguments subsequent to the arbitration proceedings and must be duly noted. The said arguments are referred to as the Applicant’s closing and the Respondent’s respectively.

The Applicant seeks either reinstatement or compensation as envisaged by the Act. Before the commencement of the arbitration hearing, a party held a pre-arb conference and herewith is a brief synopsis of what was stated;

Common Cause;

- The Applicant was employed as a Protection Officer on 14 December 2006.
- He was dismissed on 5 January 2007.
- He was earning a salary of R3925-00 at the time of his dismissal.
- He was dismissed after being found guilty of supplying false information.
- There was a disciplinary hearing held on 4 January 2007.
- The Applicant attended and by choice, was not represented.
- He was suspended.
- The hearing was chaired by De Vries.
- The Applicant appealed the chair’s decision and such was held on 26 January 2007.
- The procedural merits are not placed in dispute.

Issues in Dispute;

- Whether the Applicant was dismissed for misconduct from Coin Security group.
- Whether failing a polygraph test constitute misconduct or a dismissible offence.

3. SURVEY OF EVIDENCE AND ARGUMENT

Respondent's evidence:

Mr Joubert ("Joubert")

CIT Manager-Midrand Division

Under oath and in his evidence in chief, Joubert testified that he is the Respondent's manager situated at the Midrand branch. The Respondent's main clients are four major banks to which he is responsible for in terms of cash processing and replenishment thereof.

The Applicant was stationed at the East Rand division and was dismissed for not declaring that he was previously dismissed by Coin Security Group. Joubert knew this as he was informed by Mr Shipton ("Shipton"), one of the managers, who received such information from one William, a Coin Security manager, stating that the Applicant was dismissed from their services. The purpose of the call was made to the Respondent after William saw the Applicant in the Respondent's uniform. William then notified the Respondent that the Applicant was dismissed. Joubert requested this information in writing as he was not aware that the Applicant was in fact dismissed from his previous employer, Coin Security. He received the requested information. (page 50 of the bundle). The said letter stated that; *verbatim*

Please be advised that you were dismissed on the 1st February 2006 for the following reasons;

You failed polygraphy (sic) test for the theft/money shortage where u made the pick up as a Crewman on the 27/12/2005.

Upon receipt of the letter mentioned *supra*, he noted that the Applicant did not declare that he was dismissed by Coin Security. The Applicant had stated that he was suspended at Coin Security (page 11 of the bundle)

The Applicant was subsequently suspended pending the outcome of the investigations. The investigations entailed retrieving the Applicant's file from Coin Security and interviewing Ms Myeko, the HR manager responsible for managing the application forms received from potential candidates who were filing the application forms. During the interview with Myeko, she indicated that she answered all questions asked by all the participants/candidates. She explained the contents of the application forms and invited questions from the candidates. He also spoke to the Applicant afterwards.

Regarding the Respondent's application for employment forms under the heading, '**Have you been dismissed for misconduct at a previous employer?**' the Applicant indicated "**no**". According to the Respondent's code contained in page 31 of the bundle, par 10.11, the Applicant deliberately breached the code.

Joubert further testified that he got along well with the Applicant during his short-lived employment relationship.

This concluded Joubert's testimony.

During cross-examination, Joubert was asked if the Applicant was dismissed or whether he was dismissed 'for failing a polygraph test' by Coin Security. His response was that the Applicant was dismissed for failing a polygraph test.

Joubert was further asked if he agreed that it was not clear why the Applicant was dismissed by Coin to which he stated that it was a fact that the Applicant was dismissed and that he did not indicate that in his application forms. The Applicant stated that having said "no" was in response to a question asked –**'have you ever been dismissed'**.

It was at then put to the Respondent that it should 'change their application form' as it misleads, that the Applicant was dismissed for misconduct. The Applicant only stated no because he comprehended the question to mean '**no**', "I have not been dismissed **for misconduct**". In response to this, Joubert stated that the dismissal came about due to the Applicant 'not keeping up with the terms and conditions of his suspension' (page 11 of the bundle).

Respondent's 2nd Witness
Ms Myeko (herein referred to as "Myeko")
HR Officer- Coin Security Group

In her evidence given under oath, Myeko testified that;

She is Human Resources Officer for the Coin Security Group and invigilated the candidates for employment on the day in question. The Applicant was one of the candidates. She explained the contents of the application forms for the Applicant. She further explained the implications of not telling the truth, that should it be discovered that he did not tell the truth, he will be immediately dismissed and escorted off the premises. The Applicant had to elaborate his statement in page 21 of the bundle if the answer was a 'yes'. She had explained this to the Applicant.

Upon completing the forms, the Applicant declared that he had stated the truth in all the replies he provided. The Applicant signed the declaration.

During cross-examination, Myeko stated that the forms were completed at an open space at the Respondent's place and that about 30 candidates participated. Before giving out the application forms, she explained everything upfront to indicate if clarity may be sought.

She further confirmed that several candidates did ask questions of clarity. She denies that the Applicant raised his concern regarding the question asked and that if the Applicant had indicated that he was dismissed, she could have asked him to leave the premises immediately.

During re-examination, new evidence brought was why SBV (Respondent) was intolerable of false information given; the response was that being a security industry

dealing with cash, honesty plays an important part. I then gave the other side an opportunity to cross-examine on the new evidence. The response was that the Applicant was not dismissed for misconduct and that he was honest in the completion of the forms.

This concluded Joubert's evidence.

**The Applicant's version
Mr. Seanego ("the Applicant")**

In his evidence given under oath, the Applicant testified to the following:

He was employed by the Respondent as a Protection Officer. He had good relationship with his manager during his employment relationship. Coin had a grudge against him for information he does not intend disclosing, hence it called SBV for 'whatever reasons' so that his services can be terminated.

Coin Security Group dismissed him for failing a polygraph test. He was not criminally charged. He did not deliberately supply false information. The question asked stated "have you been dismissed", he said 'no' because he was not dismissed for misconduct. He asked questions from Myeko and wanted to know how the forms should be completed. Almost 30 people participated. It took a while for the forms to be completed, it was 'a whole day affair and the lady (Myeko) was in a hurry'.

Being in a hurry, Myeko just said 'cross and refer to CV'. He did likewise. He believes that he should have been told if he was to indicate that he was dismissed.

During cross-examination, the Applicant confirmed that he matriculated and that he could read and write. Asked why he supplied false information in relation to the fact that he was dismissed, his response was that he did not, that he supplied the truth.

Asked why he did not disclose that he was dismissed for failing a polygraph test, the Applicant response was "I said there was no space. If I said 'yes', I would not have supplied correct information, I was dismissed but not for misconduct." He does not believe that failing a polygraph test is another form of misconduct, furthermore, he had other issues with Coin that he does not wish to disclose'.

Asked why he did not refer those 'issues' to the CCMA, the Applicant stated that he did not want to work for Coin anymore. Asked whether he was dismissed for failing a polygraph test or for failing to comply with his suspension conditions, the Applicant stated that he was dismissed for failing a polygraph test. The Applicant further confirmed the suspension from Coin.

It was put to the Applicant that he failed to challenge his allegation at the disciplinary enquiry to which he stated that he said 'everything he could remember', furthermore, he did the best he could and that he was not represented. Asked why he did not challenge Joubert's evidence, the Applicant stated that he did not work with Joubert but with another manager.

ANALYSIS OF EVIDENCE AND ARGUMENT

Cases of misconduct entitles an employer to dismiss an employee **unless** the employer cannot prove that there was justification for the dismissal of the employee [see **section 188 (1) (a) (i)** of the Labour Relations Act 66 of 1995 and item 3 (4) of schedule 8 on the Code of Good Practise.

Before the commencement of these arbitration proceedings, parties held yet another pre-arbitration conference to narrow down issues. Much was said about how the Applicant's employment relationship with his former employer was terminated. I am however, not required to determine how that relationship came to an end as the issue in dispute is not between the Applicant and his former employer but between the Applicant and his present employer and to determine whether the Applicant's dismissal was substantively fair or not.

Parties held a debate about whether the Applicant was dismissed for misconduct or not. The Respondent stated that the Applicant was dismissed for "supplying false information in your application form". The wording of the application form read;

**Have you ever been dismissed for misconduct at a previous employer?
'yes' or 'no'. If yes, kindly provide details.**

This statement does not need a rocket scientist to determine what the intention of the Respondent was. The statutory definition of dismissal is set out in section 186 (1) of the Act which reads that a dismissal means;

- (a) an employer terminated a contract of employment with or without notice;*
- (b) an employee reasonably expected the employer to renew a affixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favorable terms, or did not renew it'*
- (c) an employer refused to allow an employee to resume work after she (i) took maternity leave in terms of any law, collective agreement or her contract of employment;*
- (d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another; or*

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee;

an employee terminated a contract of employment with or without notice because the employer, after a transfer in terms of section 197 or 197A, provided the employee with conditions of service that are substantially less favorable to the employee than those provided by the old employer.

From this section, it is clear that of importance is that the contract of employment has been terminated- and for various reasons. It would be vague and senseless for the Respondent to just state: "Have you been dismissed" without stating the reasons thereof. What the question needs to achieve should clearly be noted. As mentioned above, a dismissal can be for various reasons, from being initiated by an employer to being initiated by an employee

This question is not unique. It is prevalent in most application forms. It seeks to solicit information relating to the previous dealings be it employment/banks/business/educational etc history. Where more information is needed, the applicant will be asked to elaborate or explain. An example of this is where one would be required to fill in the forms that says, **have you been married, if so how:**

1. In community of property-1. Out of community of property-3. Common law.

Stating that one is married without explaining how will yield no desired fruits. This question was not unique to the Applicant either. , The same line of questioning was used in page 13 of the Respondent's bundle. The question reads '**Do you have any dependents?**' The Applicant said 'yes', furthermore, the question goes on to say "**If yes, kindly indicate their names and ages below**". The Applicant stated the name. I fail to see how the Applicant 'understood' the question and managed to answer it without any hassles. This answer emanated from the question previously asked which said "**If you are married or are in a long term relationship, state full names of partner.** Two different surnames appear. The Applicant is Seanego whereas the partner is Ramaoka. The question did not confuse the Applicant. The Applicant did not mention whether he was married or in a long-term relationship but managed to elaborate further. I fail to see why the same was not done with the question in dispute; save to say that there was a reason why the Applicant chose not to elaborate. The latter question was not prejudicial

in any manner whatsoever, whereas the other, the Applicant stood to lose his job if he elaborated. That is the reason. Furthermore, this version is corroborated by Myeko's evidence that should the Applicant have answered 'yes', he could have been told to leave immediately. The Applicant took his chance and deliberately answered 'no' and hoped for the best.

Myeko testified that 'several candidates asked questions'. Myeko denied that the Applicant asked him a question. She further testified that if the Applicant had stated that he was dismissed, she could have asked him to leave. The Applicant did not refute these allegations. In the premise, Myeko's evidence must succeed.

The question was aimed at soliciting information regarding previous employment relationship and the Applicant knew that should it be found out that he was 'dismissed', 'he would be told to leave immediately', as per Myeko's testimony. The Applicant took his 'chance' and kept silent as he knew the results thereof. I draw this inference not only from the prejudice point of view but also from his own evasive testimony as well, including his dubious testimony regarding why he did not challenge his dismissal with the CCMA. From his evidence, the only question ever posed to Myeko was that about information regarding his CV. He was then told to write '**refer to CV**'. The Applicant did not ask a question relating to how he should answer that question.

The Applicant withheld the information required as it could have prejudiced his chance of ever being employed. The Applicant understood the question and did not seek any question of clarity in this regard because there was no reason to ask a question as the question was very clear, only prejudicial for him.

It is therefore my view that the Applicant knew and understood the question. The Applicant might have asked Myeko some questions of clarity but not on this subject. The Applicant stated that he said 'no' because he was not dismissed for misconduct. If the Applicant's intentions were as good as he'd like everyone to believe, what stopped him from writing the same argument, '**no, I was dismissed but not for misconduct**' or '**yes, I was dismissed but not for misconduct**'. Elaborate if the intentions were good.

There is nothing ambiguous about the question and even if it was, there was Myeko to explain. The Applicant was asked why he did not challenge his dismissal with Coin if he believed that it was unfair. His response was that he did not want to work with Coin anymore. It is not like he had a choice.

The Applicant stated that he was dismissed for failing a polygraph test and not for his suspension which he did not want to elaborate on. Firstly whether the Applicant was dismissed for polygraph or suspension is of no consequence for this matter, the fact of the matter is that the Applicant failed to indicate that such a dismissal took place furthermore, why. The Applicant deliberately withheld this information.

Regarding polygraph, my duty is to determine if there was a dismissal as envisaged in section 191(1) (a) of the Act and as referred by the Applicant. The distinguishing characteristic of workplace misconduct is that the employees concerned were responsible for their actions. In this respect, dismissals for misconduct are distinguishable from dismissals for incapacity or dismissal for the operational requirements. The key word here is '**dismissal**'. What informed such a dismissal is secondary.

Misconduct is the most common justification for dismissal in our country, yet no comprehensive legal definition of the term is to be found in our statute or case law. Misconduct can take many and varied forms. However, the legal basis for dismissal for misconduct is the same in all cases; the employees concerned are deemed to have **committed a breach of a material term** of their contract or destroyed the employment relationship, which justifies termination of the employment relationship.

In labour law, misconduct is said to take place when an employee **culpably disregards the rules of the workplace**. The evidence in *casu* claims that the Applicant was dismissed for failing a polygraph testing. This means that there was a repudiation of a contract of employment which resulted in a dismissed. The dismissal took place '**as a result of**'.

It is not so much as to why the Applicant **failed a polygraph test** or **disobeyed his suspension condition**, it is the '**actual**' **dismissal** that the Applicant failed to disclose and further, the 'reasons' attached to that dismissal that he needed to elaborate on. It is

for this reason that the Applicant was dishonest in not providing such vital information for him to be considered employment-material. The Applicant willfully and intentionally withheld the information required for him to be considered. Failing polygraph test was therefore the 'reason' why the dismissal took place.

Two pertinent questions were asked during cross-examination and both were answered untruthfully. The questions relating to polygraph test and suspension. The Applicant testified that he answered the questions correctly and that if he did not, he would not have supplied correct information. **The truth is that he did not supply any information.** Answering 'yes' or 'no' **does not supply information**, it simply indicates a 'yes' or 'no'. Firstly, if the Applicant intended answering this truthfully, his 'no' could have been elaborated. To say that there was no space is as untruthful as his testimony to say that Myeko was in a hurry but failed to put that to her! Myeko's unchallenged, direct evidence is the most probable version and succeeds. Furthermore;

The Applicant never gave evidence in relation to the questions he asked Myeko save to give a blanket statement that 'people were raising their hands'. The question is what he exactly asked Myeko?

In his evidence, Joubert testified that Respondent's main clients are four major banks. Joubert further stated that the reason why the Respondent places such a high premium on honesty was because the Respondent deals with money. Joubert further testified that the Applicant was in breach of clause 10.11 of the Respondent's code. The said code reads thus;

The supply of false information on any official document pertaining to biographical information or information on the company's application from employment form.-1st offence-summary dismissal.

I cannot agree more. It was held that misrepresentation by an employee before the commencement of employment was sufficient to warrant a dismissal even if the misrepresentation was discovered some time later and the employee had rendered satisfactory performance. See *Auret v Eskom Pension & Provident Fund (1996) BLLR 838 (IC)* and also in *SACCAWU obo Waterson v JDG Trading (Pty) Ltd (1999) 3 BLLR 353 (IMMSA)* in which a book-keeper failed to disclose that he had served a prison sentence for armed robbery. The dismissal was found to have been fair.

In closing, the case laws mentioned by the Applicant unfortunately do not fit this profile as they relate to polygraph testing which is not the issue before me. I am not required to determine whether polygraph testing is permissible or is sufficient evidence, I am required to determine the fairness of the dismissal arising out of the employment relationship between the Applicant and the Respondent in *casu*, SBV.

AWARD

The Applicant's dismissal is found to be substantively fair.
There is no order as to costs.

Signed and dated at Pretoria on 01 October 2007.



Kate Mataboge
Commissioner