

(1) REPORTABLE: YES / NO

(2) INTEREST TO THE JUDGES: YES / NO

(3) REVISED

29/3/2021  
DATE

*[Signature]*  
SIGNATURE



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable  
Case No: JR 2172/18

In the matter between:

REINHARDT TRANSPORT GROUP (PTY) LTD

Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD  
FREIGHT AND LOGISTICS INDUSTRY

First Respondent

COMMISSIONER DERRICK MAHLANGU N.O

Second Respondent

BANELE MHLONGO AS REPRESENTED BY TASWU

Third Respondent

Heard: 17 March 2021

Delivered: 29 March 2021

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JUDGMENT

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MANGENA, AJ

Introduction

- [1] This is an application to review and set aside an award handed by the second respondent on 28 August 2017 under the auspices of the first respondent. The application is opposed by the third respondent.

### Background

- [2] The third respondent was employed by the applicant as a truck driver on 27 July 2015. The employer has installed DriveCam in each of the trucks and has adopted a policy which prohibits drivers from covering the DriveCam. The third respondent was trained on the use of the DriveCam and was aware of its purpose. On 5 January 2018, the applicant got a notification on the system that the third respondent had covered the DriveCam on two occasions. Owing to the seriousness of the offence, the applicant instituted disciplinary proceedings against the third respondent. He was found guilty and the employer imposed a sanction of dismissal.
- [3] The third respondent referred an unfair dismissal dispute to the bargaining council for arbitration. The second respondent after hearing the evidence handed an award in which he found the dismissal of the third respondent was substantively unfair. He ordered the applicant to re-instate the third respondent without back pay on terms and conditions no less favourable than those which governs the employment relationship prior to his dismissal.
- [4] The applicant is unhappy with the sanction and has approached this Court for an order substituting the finding of the arbitrator with an order that the employee's dismissal was substantively fair. In support of the prayer in the notice of motion, the applicant argues that the arbitrator has failed to give due regard to the importance of the rule and reasons why the applicant established it. Mr Bruwer, counsel for the applicant, submitted that the rule is so important to the applicant that a policy had been formulated informing the employees that anyone who violates same will be dismissed. The third respondent was aware of the rule and has acknowledged it on 30 October 2017. The denial by the employee in the arbitration that he was not aware of the rule demonstrate, according to the applicant, that he cannot be trusted. It was further argued on

behalf of the applicant that the company had consistently applied discipline in this regard and all employees know that dismissal will be imposed as a sanction in the event of the violation of the rule. Had the arbitrator considered the above factors and the evidence led during the hearing, it is submitted, he would have arrived at a different conclusion. Accordingly, his failure to consider relevant evidence renders his award unreasonable.

- [5] The third respondent defends the award and denies the allegations by the applicant that the arbitrator has committed an irregularity. It is contended on behalf of the third respondent that the arbitrator was guided by case law and statutes in the determination of an appropriate sanction. The arbitrator took into account all the relevant factors including the importance of the rule and it is for that reason that he deprived the third respondent of back pay. The award, it was submitted, is within the band of reasonableness.

#### Fairness of the dismissal

- [6] It is an established law that the key person to determine the fairness of a dismissal is the arbitrator. The arbitrator was aware of his powers and has correctly recorded the issues to be decided as being whether or not the dismissal of the third respondent was fair, and to determine a suitable relief. The arbitrator does this by asking the question: "*Is this dismissal fair*". The answer to this question lies in the assessment of the facts placed before him/her in evidence. The law empowers him/her to answer this question on the basis of his/her notion of fairness.
- [7] In *Engen Petroleum Limited v CCMA and Others*<sup>1</sup>, Zondo JP confirmed the correctness of this approach when he said:

"The existence of the CCMA and other dispute resolution fora provided for in the Act helps to channel, amongst others worker's grievances to where they can be ventilated without any interruption and disruption of production... least

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<sup>1</sup> [2007] 8 BLLR 707 (LAC)

up to a point. It is also right and proper that unions should be encouraged and not discouraged to refer dismissal disputes with employer to the CCMA for arbitration if they feel aggrieved by such dismissals. In that way they can ventilate all issues about their grievances in regard to such dismissal in that forum before a third party who can listen to all sides of the dispute and, using his own sense of what is fair or unfair, decide whether the dismissal is fair or unfair. In that way the workers would have less urge to resort to industrial action over dismissal disputes".

- [8] In *Sidumo and Another v Rustenburg Platinum Mines and Another*<sup>2</sup>, the Constitutional Court gave guidance to commissioners on how to approach a dismissal dispute. It held as follows:

"[78] In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list".

- [9] The applicant has argued vigorously that the commissioner failed to take into account the importance of the rule and disregarding the evidence tendered by the company representative. When it was pointed out that reference has been made to *Sidumo* and the factors to take into account, counsel retorted that the commissioner paid lip service to *Sidumo* and failed to apply it. There is however no evidence to support this.
- [10] Mr Higgs for the third respondent submitted that the commissioner took into account the relevant factors. He states in the award that the third respondent

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<sup>2</sup> 2008 (2) SA 24 (CC)

argued that the employer (the applicant) should have applied corrective disciplinary action, no evidence was produced to prove that the employer suffered any prejudice as a result of the employee's conduct. He further commented that the employee pleaded for a lighter sentence. Having considered all the factors including the gravity of the offence, he found that dismissal was not an appropriate sanction.

- [11] In *Westonaria Local Municipality v SALGBC and Other*<sup>3</sup>, the Court said that the responsibility for determining the appropriateness of dismissal as a penalty is a matter to be left on the discretion of the arbitrator. In *Sidumo* the Court said, the commissioner's sense of fairness is what must prevail and not the employer's view.
- [12] Having considered the submissions made, the contention by the applicant that the commissioner failed to take into account the relevant evidence tendered regarding the importance of the rule is not supported by the record. The commissioner has in recognition of the gravity of the offence and in execution of his duty to balance the interest of the parties ordered re-instatement without back pay. The allegation that he duly over-emphasized the employee's interest can therefore not be correct.
- [13] Consequently, the following order is made:

Order

1. The review application is dismissed with costs.

  
M. I. Mangena

Acting Judge of Labour Court of South Africa

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<sup>3</sup> [2010] 3 BLLR 332 (LC).

Appearances:

For the Applicant : Adv. Bruwer  
Instructed by : Etienne De Heus Attorneys

For the Third Respondent : Mr Higgs of Higgs Attorneys Inc