



**IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case No: JA72/2021

In the matter between:

**REINHARDT TRANSPORT GROUP (PTY) LTD**

**Appellant**

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: 6 September 2022**

**Delivered: 18 October 2022**

**Coram : Waglay JP, Coppin JA, Tokota AJA**

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**JUDGMENT**

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TOKOTA AJA

## Introduction

[1] The appellant conducts a national trucking business. Each of its trucks is fitted with a 'drivecam' camera-system (drivecam). The third respondent was employed by the appellant as a truck driver. He was charged with misconduct, having breached the policy relating to the control of the drivecam, and was subsequently dismissed.

[2] Following his dismissal, the third respondent referred a dispute of unfair dismissal to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation. The conciliation failed and the matter was referred to arbitration. The second respondent conducted the arbitration and found that the dismissal was substantively unfair. He ordered that the third respondent be reinstated without back pay. An application to the Labour Court for the review of the arbitration award was dismissed, with costs. This appeal is with leave of this Court.

## Factual background

[3] The appellant, as a transporter, has a fleet of trucks to conduct its business of transportation. As part of its management system, the appellant adopted a policy styled the "Drive Cam Event Recording and Tampering Policy" (drivecam policy). The drivecam is a system consisting of a camera which is installed in each of the appellant's trucks. It is used as a security measure and provides evidence relating to the functioning of the person in control of the vehicle. In this way, the employer is able to monitor what is being done by its truck drivers when on duty.

[4] The third respondent commenced his employment with the appellant as a truck driver on 27 July 2015. All the drivers, including the third respondent, were advised of the policy and its significance. They were aware that if breached, dismissal would follow. Clause 12 of the drivecam policy stipulates:

• Drivers shall not block the view of the drive cam recorder in any event or for whatever reason.

- Any driver found tampering and/or damaging the recorder will be subjected to disciplinary action, up and to termination of employment.
- All drivers will be instructed to sign this document as an addendum to their existing employment agreement with Reinhardt Group (Pty) Limited.'

- [5] It is not disputed, that on 5 January 2018, at about 17h13 and at 19h48 of the same day, respectively, the third respondent covered the drivecam installed in the truck he was driving at the time so that it could not record. It was this misconduct which led to the disciplinary process, at the end of which he was found guilty and dismissed, hence the referral to the CCMA.
- [6] This particular truck was one of those that have an internal compartment with a bed that could be closed off from the driving cabin. At the CCMA, the third respondent admitted that he covered the drivecam and his defence was that he covered it because he was taking a bath in the truck.
- [7] There was evidence that before this incident, the third respondent had enquired from his trainer, one Panuel, what he had to do if he wanted to take a bath in the truck. He was then told that he could close the curtain and take a bath privately in the bed compartment and that if the truck was not moving and he slept in that compartment his privacy would be protected. The third respondent initially denied this. However, when it was put to him that he did not dispute the evidence of Panuel on this aspect he offered no response in reply. The commissioner simply commented that the appellant did not call that witness at the arbitration, but otherwise, made no finding in that regard.
- [8] The commissioner found, correctly in my view, that the third respondent breached the policy and was aware of the contents thereof despite his denial. The drivecam policy was part of his conditions of employment.
- [9] But the commissioner nevertheless held that there was no evidence that the third respondent had a blemished record since his employment with the appellant and declared that his dismissal was substantively unfair. He ordered reinstatement without back pay.

[10] The appellant approached the Labour Court for the review of the arbitration award. The Labour Court held (per Mangena AJ) that the key person to determine fairness of a dismissal is the arbitrator. Relying on *Westonaria Local Municipality v South African Local Bargaining Council and Others*<sup>1</sup> and *Sidumo and another v Rustenburg Platinum Mines Ltd and others*<sup>2</sup> (*Sidumo*), the Labour Court held that determination of fairness is a matter to be left to the arbitrator, and accordingly dismissed the review with costs.

#### Parties' submissions

[11] Mr Bruwer, who appeared for the appellant, submitted that the Labour Court failed to take into account the seriousness of the offence as well as consistency in the application of the policy by the appellant. He submitted that the commissioner's decision to reinstate the third respondent was a decision that a reasonable decision maker would not have made. He argued further that the commissioner ignored the interests of the employer, as well as the gravity of the offence.

[12] Mr Higgs for the respondent submitted that the decision of the commissioner was not unreasonable. He contended that the employer was attempting to overemphasize the importance of the policy *ex post facto* and that the submission made by Mr Bruwer was not made before the commissioner. In his written heads of argument, he contended that the commissioner indeed considered the importance of the rule in his award, but the award itself does not bear him out. He supported the Labour Court's finding that fairness is a matter which must be determined by the commissioner in accordance with the decision of *Sidumo*. Further, in his oral argument before us, he submitted that the policy does not stipulate that an employee may be dismissed for a first offence. He conceded, however, that the policy was reasonable.

<sup>1</sup> [2010] 3 BLLR 332 (LC).  
<sup>2</sup> 2008 (2) SA 24 (CC).

[13] I deem it expedient to begin with the reliance on *Sidumo* for the determination of fairness. I never understood *Sidumo*'s case as laying a rule that the determination of fairness of a dismissal is a matter exclusively reserved for the arbitrator and that the Labour Court cannot scrutinise that decision to ensure that it is in accordance with the evidence which was placed before the commissioner. In any event, that would be contrary to the provisions of the Labour Relations Act<sup>3</sup> (LRA).

[14] The Labour Court is a court of law and equity<sup>4</sup>. Equity refers to fairness and justice. Fairness in relation to labour matters is not a stand-alone concept. It must be determined with reference to facts and law. It would be an intolerable situation where courts of law would abdicate their duty to resolve the parties' disputes in accordance with law and fairness to the arbitrators. The Labour Court is, in my view, obliged to apply its mind, taking into account all the relevant factors, and determine whether the commissioners' decision can be supported by the evidence that was placed before him or her, and whether in making his/her award he/she acted within the bounds of reasonableness. Furthermore, fairness is not a one-sided concept. It should be balanced with the interests of the employer as well.

[15] In *Sidumo*<sup>5</sup> it was, *inter alia*, held that:

'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.'

The court added:

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<sup>3</sup> Act 66 of 1995, as amended.  
<sup>4</sup> Section 151 of the LRA.  
<sup>5</sup> *Sidumo supra* at para 78.

'To sum up. In terms of the LRA a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.'<sup>6</sup>

[16] As I understand *Sidumo's* case, the main reason why the decision of fairness is to be made by the commissioner is because, as against the employer, the commissioner is expected to be impartial and objective in the evaluation of facts and circumstances. If the reasons are not reasonably justifiable for the conclusion that the dismissal is unfair, regard being had to the evidence placed before the commissioner, the Labour Court is not at liberty to simply say fairness is a matter to be decided by the commissioner and refrain from interfering.

[17] The test for unreasonableness was set out in *Sidumo* as follows:

'To summarise, Carephone held that s 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that s 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.'<sup>7</sup> [Reference to footnotes omitted]

[18] In *casu*, the commissioner did not consider the purpose and the importance of the drivecam rule. He did not appreciate the fact that the employer has consistently applied the rule, and that only in exceptional cases would an employee escape dismissal. He did not consider the fact that the third respondent expressed no remorse for what he did. Instead the third respondent tried to mislead him by saying he was unaware of the rule. Having found that

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<sup>6</sup> *Sidumo* at para 79.  
<sup>7</sup> *Ibid* at para 110.

the rule had been breached, the commissioner did not consider any punishment, save to merely order reinstatement without back pay. The Labour Court did not consider whether the decision that the dismissal was unfair was rationally connected with the facts and circumstances of the case presented at the arbitration.

[19] In the circumstances, it seems to me that the Labour Court merely paid lip service to the principle in *Sidumo* but did not apply it practically. The thrust of the decision in *Sidumo*, as I understand it, is that the arbitrator should not abdicate his duty but should himself, take into account all the relevant circumstances including; (a) the importance of the rule that had been breached; (b) the reason why the employer decided to impose the sanction of dismissal; (c) the basis of the employee's challenge to the dismissal; (d) the harm or potential harm which may be caused by the employee's conduct; (e) whether additional training and instruction may result in the employee not repeating the misconduct; and (f) the effect of dismissal on the employee and his or her long-service record. All these factors do not appear to have been considered by the commissioner. A reference in the award to the third respondent's service was merely made in passing. The third respondent did not have a long service record with the appellant.

[20] The arbitrator is expected to be impartial and take a reasonable decision which would embrace fairness.<sup>8</sup> By reason of the fact that it is difficult to define what is generally accepted as fair, the test for fairness must be objective. It must be obvious from the reasoning of the arbitrator that he determined fairness with reference to all the facts and the law. "A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair".<sup>9</sup> He is not entitled to simply ignore the importance of the rule and take a decision which will render the rule nugatory. Discipline is a prerogative of the employer and the rules set out by the employer to enforce

<sup>8</sup>See: *South African Revenue Service v Commission For Conciliation, Mediation and Arbitration and Others* 2017 (1) SA 549 (CC) (SARS) at para 36; and *Sidumo* at para 73.

<sup>9</sup>*Sidumo* *ibid* at para 110.

discipline must be taken seriously by all employees and must be respected by the courts.

[21] In this case, the employer took the trouble and invested in an expensive device to protect its business from unwarranted claims on the road in the event of accidents. In its policy, the appellant included the manner in which the drivecam should be operated and the consequences of a failure to adhere to the instructions contained therein. On 30 October 2017, the third respondent signed an acknowledgement and acceptance of the policy. All the drivers were trained during that period on how to use the drivecam. Although the commissioner made reference to item 3(5) of Schedule 8 of the Code of Good Practice: Dismissal,<sup>10</sup> he did not make any particular point in that regard. The practice of covering (or not covering) the drivecam seems straightforward enough and does not need any intensive training.

[22] The version of the third respondent that he covered the drivecam because he was taking a bath, is contrived. He was told by Panuel, the trainer, that he was not to cover the drivecam but to simply have the bath in the bed compartment; to draw the curtain, isolating that section, in order to take a bath privately. Covering the drivecam for a reason that is found wanting is serious enough to warrant dismissal. This is one of those cases where an intolerable relationship between an employer and an employee flows from the conduct. The Constitutional Court put it thus:

'It cannot be primarily the duty of the employer to explain the intolerability that flows effortlessly from the obviously repugnant conduct of the employee.'<sup>11</sup>

### Conclusion

[23] The Labour Court erred in dismissing the review without evaluating the circumstances under which the third respondent was dismissed. The order cannot stand.

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<sup>10</sup>Schedule 8 of the LRA.  
<sup>11</sup>SARS *supra* fn7 at para 43.

## Costs

[24] The discretion to make an order of costs in labour related matters is governed by section 162 of the LRA. In terms of the law and fairness, a costs order in this matter is not appropriate.

[25] In the result, the following is ordered:

## Order

1. The appeal is upheld with no order as to costs.
2. The order of the Labour Court is set aside and is substituted with the following order:

“The arbitration award handed down by the second respondent on 11 September 2018 is reviewed and set aside and replaced with an order that:

- (a) The employee’s dismissal was substantively fair;
- (b) There is no order as to costs.”

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B R Tokota AJA

Waglay JP and Coppin JA concurring.

## APPEARANCES:

FOR THE APPELLANT:

A.P Bruwer

Instructed by Etienne de Heus Attorneys

FOR THE THIRD RESPONDENT:

C Higgs of Higgs Attorneys