



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR1074/20

In the matter between:

DSV HEALTHCARE (PTY) LTD

Applicant

and

PULENG JOYCE MADUNA N.O

First Respondent

NATIONAL BC FOR ROAD FREIGHT AND

LOGISTICS INDUSTRY

Second Respondent

LANGUTA VICTOR CHAUKE

Third Respondent

Heard: 10 January 2024

Delivered: 06 March 2024

(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 SAFLI. The date on which the judgment is delivered is deemed to be 06 March 2024.)

JUDGMENT

BUIRSKI, AJ

Introduction

- [1] At the outset of this hearing, both parties agreed to condone each other's respective procedural failings in presenting their respective cases to the Court. Hence in the case of the Applicant (DSV Healthcare), this meant that the 3rd Respondent (Chauke) agreed to condone the late filing of the review application and in the case of Chauke, DSV Healthcare agreed to condone the late filing of the latter's answering affidavit. In my view, questions of condonation will not alter the outcome of this matter, this matter is decided on the merits only and on the basis that condonation to all parties is granted.

Material facts and evidence

- [2] Chauke was dismissed on 27 March 2019 after having been found guilty of a number of offences, including gross negligence and dereliction of duty in that on 13 December 2018, pin IHD00065372128 went missing and that Chauke did not follow standard operating procedure and the parcel was only located on 23 January 2019. It was cold chain stock and due to the delay, it was out of validation and therefore had to be written off. This resulted in a loss of R263 848.50 to the company.
- [3] Chauke thereafter referred his dismissal to the CCMA and secured an award in his favour from Commissioner Puleng Joyce Maduna (Commissioner) who on 14 February 2020 found the dismissal of Chauke to be substantively unfair and ordered his full and retrospective reinstatement.
- [4] This is the award which I am asked by DSV Healthcare to review and set aside.
- [5] Any Commissioner called on to arbitrate and determine disputes involving acts of negligence or gross negligence, should always in assessing the validity of the charge, attempt to place him/herself in the position of that somewhat gormless figure, the *diligens paterfamilias*, and then attempt to understand what steps, if any, he or she would take so as to guard against his or her conduct

causing injury to another and causing it patrimonial loss were he/she so placed and having done so, then to measure those notional steps with the steps actually taken by the defendant. For negligence the question of whether or not a particular person has acted negligently is always a very fact specific question. Nowhere is this test better stated and set out than in the famous *dictum* of Holmes JA in *Kruger v Coetzee*¹ where the Court held that:

'For the purposes of liability *culpa* arises if-

- (a) a *diligens paterfamilias* in the position of the defendant-
 - (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
 - (ii) would take reasonable steps to guard against such occurrence; and
- (b) the defendant failed to take such steps.

This has been constantly stated by this Court for some 50 years. Requirement (a) (ii) is sometimes overlooked. Whether a *diligens paterfamilias* in the position of the person concerned would take any guarding steps at all and, if so, what steps would be reasonable, must always depend upon the particular circumstances of each case. No hard and fast basis can be laid down. Hence the futility, in general, of seeking guidance from the facts and results of other cases. (own emphasis)

[6] It is a test that the Commissioner in this matter manifestly failed to apply.

[7] The facts of this matter are well recorded in the award.

Analysis

[8] The company DSV Healthcare conducts business in the pharmaceutical industry where it administers stock on behalf of its clients by managing the sale and delivery of products for its clients. The company deals with pharmaceutical

¹ [1966] 2 All SA 490 (A).

goods and lifesaving medicine which when received is supposed to be stored in a special condition failing which it will lose its viability.

- [9] Once the goods are received, they have to be packed and delivered to the client within the validation period. A box is validated in under 72 hours and a large parcel known as Kryoton must be validated within 144 hours (6 days), which period, if exceeded, will result in damage to, and the writing off of, its perishable contents. If a parcel is misplaced it has to be reported and must be kept in a fridge if it cannot be delivered immediately.
- [10] Chauke was a Zone Leader and was employed by DSV Healthcare as such.
- [11] On 13 December 2018, three parcels were received by DSV Healthcare at the workplace where Chauke operated. One went missing immediately. It was a Kryoton (that is a large parcel) valued at R278 000.00 and looks like a freezer and is easy to locate. The fact that this parcel went missing came to Chauke's attention who on 14 December 2018 sent an email that the order was not received in full. The validation period would have expired on 20 December 2018.
- [12] Yet Chauke, having reported the matter on 14th December, thereafter did nothing more about the matter, until he returned from leave in January the next year. According to the uncontradicted evidence of Chauke's direct superior Rayno Sass, Chauke only escalated this matter to him when he came back from leave in January 2019.
- [13] Chauke testified before the Commissioner. He said he was a Zone Controller rather than a Zone Leader. He admitted that on 14 December 2018, a Kryoton was missing and that he had sent an email to Longmeadow in this regard. He said he was wrongly dismissed and placed the blame on others. Whereas he did everything he had to do and took the initiative by reporting the matter on 14 December 2018, that did not mean he was responsible. The correct procedure was not followed by the night shift when they received the fridge stock. The people responsible were not charged.

- [14] The Commissioner in her award devotes the first portion of her analysis to the question of whether Chauke was a Zone Leader or a Zone Controller. The question was clearly irrelevant as all employees, irrespective of status and seniority, owe their employer a duty of loyalty and good faith, and Chauke's duty to follow up on the whereabouts of the missing parcel would have been no different had he been Zone Leader or Zone Controller.
- [15] The Commissioner found next that *"it is not disputed that the Applicant [Chauke] failed to look for the parcel"*. Save for considering the implications of this failure with respect to the charges for which Chauke was found guilty, including that of gross negligence, this finding should have ended her enquiry.
- [16] The Commissioner, however, proceeded to accept Chauke's contentions that it was the night shift who was actually to blame. As the night shift had actually received the parcel, the Commissioner found that DSV Healthcare was inconsistent in failing to dismiss the night shift Zone Leader as well it was this person who had failed, so she found, she had to scan the parcel as per the company policy.
- [17] In the above regard, the Commissioner erred and reviewably so.
- [18] Firstly, the Commissioner was in no position to make this adverse finding against the unnamed night shift Zone Leader, as this person was not a witness in the arbitration proceedings before her. Secondly, and perhaps more importantly because this/these people /s were never identified – a failure that continued into these review proceedings - any finding of inconsistency was always going to be incompetent in that the jurisdictional facts necessary for such a finding were not present. There is no evidence that DSV Healthcare knew that there were other persons who were potentially guilty of this misconduct, apart from Chauke, and who were similarly placed to him, both in their knowledge of the missing item and in failing to follow up on its disappearance. It is trite that an inconsistency challenge will fail when the employer does not know of the misconduct allegedly committed by the

employee used as a comparator (*Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*²).

- [19] The Commissioner accordingly erred in finding inconsistency as she did.
- [20] More importantly, and because she allowed herself to be side-tracked down the blind alley of inconsistency, she erred in failing to apply her mind to the facts of Chauke's misconduct and in failing to find Chauke guilty of the gross negligence of which he was indeed guilty.
- [21] She erred in failing to determine that a reasonable employee in Chauke's position was required to do much more than he did. Such an employee who on 14 December 2018 discovered that this particular Kryoton worth R278 000 had gone missing and who at all times was aware that its validation period was 6 days and that thereafter this product would expire, would not have contented himself with a single email written on 14 December. Such an employee would have followed up with further emails and actions well knowing that by neglecting to do anything further, there was a reasonable possibility that this conduct would cause his employer DSV Healthcare to suffer loss. Unlike Chauke, the reasonable employee would have taken reasonable steps to guard against such an occurrence. Such an employee would, for example, have escalated the matter to his superior within the validation period. It is common cause that Chauke never took these steps. The arbitration record indeed contains a very interesting admission made by Chauke under cross-examination being, "*the only thing I did not do was escalate*". It was precisely however, this type of non-action on his part that served to render him guilty of the misconduct for which he was dismissed.

Conclusion

- [22] The Commissioner erred in finding otherwise. Her award accordingly is not one that a reasonable decision-maker could have reached on the material which was served before her. It falls to be reviewed and set aside. DSV Healthcare

² [2009] ZALC 68; [2009] 11 BLLR 1128 (LC).

has asked that I substitute this award with an order declaring that Chauke's dismissal was fair.

[23] In the premises, I make the following order:

Order

1. The award of the Commissioner is accordingly so substituted with a finding that the dismissal of the 3rd respondent was fair.
2. No order is made as to costs.

P. Buirski

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr Francois van der Merwe

Instructed by: Darren Ledden Inc.

For the 3rd & 4th Respondent: Ms Mmasello Madiwana

Instructed by: Legal Aid

LABOUR COURT