IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR2552/21

In the matter between:

DSV SOUTH AFRICA (PTY) LTD **Applicant**

and

WILLEM KOEKEMOER *N.O.* **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT & LOGISTICS INDUSTRY **Second Respondent**

BHEKI LUSENGA **Third Respondent**

ANDRIES MATLOGA **Fourth Respondent**

Heard: **24 April 2024**

Delivered: **26 April 2024**

This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email. The date for hand-down is deemed to be 26 April 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] DSV South Africa (Pty) Ltd (company), brought these proceedings in terms of section 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award (award) issued by the first respondent (commissioner) on 1 November 2021. In terms of the award, the commissioner found the dismissal of the third and fourth respondents (collectively referred to as employees) to be substantively unfair, and ordered the company to reinstate them without back pay.

[2] Although the employees filed an intention to oppose the application, they did not file an answering affidavit. Both employees attended the hearing and were given an opportunity to make oral submissions.

Material facts

[3] The third respondent is Bheki Lusenga (Lusenga). He was employed as a driver, heavy vehicle articulated. The fourth respondent is Andries Matloga (Matloga) and he was employed as a general worker, vehicle assistant. Both were employed with effect from 1 January 2021.

[4] On 8 February 2021, the employees were charged with breaching the disciplinary code of conduct and unauthorised use of the company property for their private purpose in that at around 8h00 on 14 January 2021, they:

> 'deviated from prescribed route (as confirmed in your attached statement) by visiting Prime-serve H/O in Greenstone JHB without authorisation. As a result of

[1] Act 66 of 1995, as amended.

> this unauthorised deviation, you have breached DSV Code of Conduct and remedial action would be taken against you in this regard.'

[5] The charge was preceded by an investigation where both employees made written statements. In his written statement dated 25 January 2021, Lusenga stated that:

> 'On the 14th of January 2021 on my way to Heidelberg I pass at Primeserve office to pick up my retirement forms. I made a mistake of not asking a permation (sic) on my manager'.

[6] Matloga's statement, also dated 25 January 2021, read as follows:

> 'On the 14/01/2021 I pass at prime serv to pick up my retirement form. That day we use N3 to Heidelberg. I made a big mistake without let my manager know about that. (sic)'

[7] At the disciplinary hearing, the employees pleaded guilty. Matloga apologised for his conduct and Lusenga acknowledged that he made a poor decision. The employees were dismissed on 17 February 2021.

<u>The arbitration proceedings and award</u>

[8] The employees referred an unfair dismissal dispute to the second respondent, the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI).

[9] During arbitration proceedings, both employees testified. They confirmed that they stood by their respective statements, that they were guilty, that they made a mistake and apologised. The employees also raised an inconsistency argument. They testified that they found other employees at Primeserv who deviated from their routes but they were not dismissed.

[10] The company led the evidence of Ezael Manyeke (Manyeke). His evidence was that the employees understood the risk of deviation and that even though the company suffered no harm, the employees created a risk for potential harm and that the trust relationship has broken down. Manyeke did not work with the

employees. The company disputed inconsistency and contended that there were other employees who were dismissed for the same reason.

[11] In his analysis of the evidence, the commissioner found that the rule contravened by the employees is an important one. He considered the fact that the employees pleaded guilty, demonstrated remorse and apologised.

[12] The commissioner found that committing a serious offence does not axiomatically lead to dismissal. The totality of the circumstances must be considered. In other words, the commissioner must consider, as a separate enquiry after a finding of guilt, whether the sanction of dismissal was appropriate.

[13] With reference to the various case laws, the fact that the company did not suffer harm, the Code of Good Practice[2] which places a high premium on corrective measures being followed before a sanction of dismissal is imposed, the duration of the employees' employment *vis-à-vis* the alleged regular meetings conducted by the company where the serious nature of the offence of deviation was allegedly repeatedly emphasised, the commissioner found that the sanction of dismissal was unfair and ordered the company to reinstate the employees.

[14] The commissioner ordered no back pay. This was, according to the commissioner, a mark of emphasising the importance of the rule contravened that was contravened by the employees.

<u>The review grounds</u>

[15] The company seeks to impugn the award on three grounds. First, it contends that the commissioner exceeded his powers or committed misconduct or failed to apply his mind when he found that the company applied discipline inconsistently.

[16] Second, the company criticises the finding that dismissal was not an appropriate sanction. The company contends that in finding the dismissal to be inappropriate in the circumstances where the employees are guilty of serious misconduct, the

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[2] Labour Relations Act 66 of 1995 – Schedule 8: Code of Good Practice: Dismissal.

commissioner has given the employees the “get out of jail free card”. The commissioner is criticised for ignoring that the employee were “*trained and acknowledged in writing that they understood how important it is to not deviate from the approved route*”.

[17] The third ground is a reiteration of the second ground. It is an attack on the appropriateness of sanction.

<u>The review test</u>

[18] The Constitutional Court has set out the test for the review of arbitration awards.[3] The Court held that an award would be reviewable when it is one *“that a reasonable decision-maker could not reach”*.[4]

[19] The Labour Appeal Court in *Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and Others*, held that this is a stringent test and that it would not be often that an award is found to be one which a reasonable decision-maker could not have made.[5]

[20] In *Makuleni v Standard Bank of South Africa and Others*,[6] Sutherland JA explained that:

> ‘The test for reviewing and setting aside an award of the CCMA is whether the decision reached by the commissioner is one that no reasonable person could have reached. The proposition has been articulated so often that it is now trite.’

<u>Evaluation</u>

[21] In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and others,*[7] the Labour Court, per Molahlehi J (as he then was), observed that:

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[3] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC).
[4] *Ibid* at para 110.
[5] [2007] ZALAC 12; (2008) 29 ILJ 964 (LAC) at para 100.
[6] [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC) at para 2.
[7] [2007] ZALC 93; (2008) 29 ILJ 1180 (LC) at para 45.

> '[45] It would in my view be unfair for this court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse. An acknowledgment of wrongdoing on the part of the employee would have gone a long way in indicating the potential and possibility of rehabilitation including an assurance that similar misconduct would not be repeated in the future.'[8]

[22] An employee who fails to acknowledge his wrong, show no remorse and is unapologetic about his misconduct and in fact defend his misconduct is clearly not prepared to be rehabilitated. Contrary to other judgments where employees showed no remorse and pleaded not guilty,[9] the employees in *casu*, at the first opportunity presented to them during the investigation of the allegation, were truthful about their conduct and acknowledged that they made a mistake. At the second opportunity during the disciplinary hearing, they owned up to their misconduct and once again apologised. At the third opportunity during arbitration proceedings, they continued to show that they were remorseful and again apologised. They were very consistent.

[23] The review grounds have no merit. The inconsistency ground is hopeless because the commissioner did not find that there was inconsistency in the application of discipline. The commissioner found that the company "*proved the importance of this rule and the strict disciplinary approach they apply*". Later in the award, the commissioner observed that commissioners have been warned not to apply the inconsistency principle willy-nilly and that they must exercise caution. He made no finding thereafter, other than making reference to case law. This much was conceded by Mr Nel, acting on behalf of the company, during the hearing.

[24] Regardless, the commissioner took into account primarily the employees' remorseful conduct, their length of service which was only two weeks, and the purpose of the Code of Good Practice and found that dismissal was not an

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[8] *Ibid* at para 45.

[9] *Timothy v Nampak Corrugated Containers (Pty) Ltd* [2010] 8 BLLR 830 (LAC); (2010) 31 ILJ 1844 (LAC); *Autozone v Dispute Resolution Centre of Motor Industry and others* [2019] 6 BLLR 551 (LAC); (2019) 40 ILJ 1501 (LAC).

appropriate sanction. The onus remained on the company to show that the sanction of dismissal was appropriate. The company was well aware that the employees had been remorseful from the first day. There was no evidence to suggest that the employees' remorse or apology was not genuine and that the trust relationship had irretrievably broken down. Where the employees pleaded guilty to the charge, showed remorse and apologised, the employer must do more than allege, as the company did in this case, that the trust relationship has broken down. It must lead for the reasons set out above, the second and third grounds stand to be rejected.

[25] Mr Nel submitted that the award of reinstatement without back pay is not permitted in terms of section 193 of the LRA. Section 193(1) of the LRA provides that where dismissal is found to be unfair, the court or commissioner may order reinstatement or re-employment or compensation. Whether the reinstatement award is with full or limited back pay (that is, the retrospectivity of the reinstatement) is not dealt with in section 193 of the LRA. This is a discretionary issue to be decided by the commissioner or court.[10] This submission does not take the matter any further and does not assist the company in its quest to set aside the award.

[26] Having considered the above, I am not persuaded that the award falls outside the bands of reasonableness. The findings of the commissioner have been substantiated with reasons and this court must resist any temptation of dealing with this review application as an appeal. The commissioner has not committed the errors or misconduct as alleged or at all that warrant the setting aside of the award. The application must therefore fail.

[27] In the premises, the following order is made:

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[10] See: *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and others* (2010) 31 ILJ 273 (CC); [2010] 5 BLLR 465 (CC).

<u>Order</u>

1. The application is dismissed.

2. There is no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Adv. A.J. Nel

Instructed by: Darren Ledden Incorporated

For the 3rd & 4th Respondents: In person