THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No. JR1471/21

In the matter between:

BIDVEST PROTEA COIN (PTY) LTD	**Applicant**
and	
PTAWU	**First Respondent**
MAKHOLA, WINNIE MOKGADI	**Second Respondent**
ABNER CHOKWE *N.O.*	**Third Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Fourth Respondent**

Heard: **6 February 2025**

Delivered: **14 March 2025**

This judgment was handed down electronically by consent of the parties' representatives by circulation to them via email. The date for hand-down is deemed to be 14 March 2025.

JUDGMENT

MAKHURA, J

[1] The applicant in these review proceedings is Bidvest Protea Coin (Pty) Ltd (company). It seeks to review and set aside the arbitration award issued by the third respondent commissioner under the auspices of the third respondent. In terms of the award, the commissioner declared the dismissal of Mokgadi Makhola (employee) to be substantively unfair and ordered the company to reinstate her. The commissioner also ordered the company to pay the employee four months' remuneration in backpay and to issue her with a final written warning.

[2] The employee was charged with the following allegation of misconduct:

> 'Dereliction of duty in the way that you handled the alarms at Lentegeur BTS (Tower) on 26 June 2020 at about 01h29 until 01h44 and again at about 04h08 until 04h11, while on duty in the control room you neglected to respond when your monitor screen went dark during several alarms from Lentegeur B activated, you failed to respond as a direct result of your negligence.'

[3] In terms of the company's disciplinary code, the offence of dereliction of duty attracts a sanction of *"dismissal or final written warning depending on severity"* for a first offender and dismissal for a second offender. It was not in dispute that the employee was seen motionless during the relevant time and that there was an incident of theft during the night of the incident.

[4] The commissioner started his analysis of the matter by setting out the common cause facts. He noted that the underlying *causa* for the dismissal was a break-in and

theft incident that occurred at the client's site, Lentegeur and that the employee was the control room operator on the evening of the incident.

[5] The commissioner found that the employee failed to execute her duties as a reasonable control room operator. However, he found that the employee had no intention to derelict her duties by way of deliberate, conscious or wilful negligence. The commissioner observed that the company did not quantify and present evidence of the damages it had suffered as a result of the misconduct. He considered the employee's evidence that she was working the night shift and the medical certificate she presented which showed that prior to the incident, the employee was admitted to hospital and was on medication which resulted in her dozing off or being sleepy during the night. The commissioner concluded that the employee was guilty of negligence and not dereliction of duty.

[6] With regard to sanction, the commissioner found as follows:

> 'I considered the employer's disciplinary code. The employer's disciplinary code prescribed the sanction of dismissal or final written warning depending on severity. I was also guided by schedule 8 items 3(4) and 3(5) [of the] code of good practice – dismissal… She was a first offender. She has approximately 7 years of service with the respondent.'

[7] The commissioner concluded that the sanction of dismissal was inappropriate and declared the employee's dismissal to be substantively unfair. He proceeded to deal with the remedy and found that there was no reason why he could not award reinstatement. He awarded reinstatement retrospectively from the date of the employee's dismissal with partial backpay because of her negligence. The employee was awarded 4 months out of the approximately 12 months period of her unemployment from the date of dismissal. The company was ordered to issue the employee with a final written warning in terms of the disciplinary code.

[8] Dissatisfied with the award, the company brought these proceedings. The company attacks the award on various grounds. First, it contends that the commissioner found the employee guilty of negligence when there was no evidence of negligence because the employee was dismissed for dereliction of duty. Second, the company contends that the commissioner applied the incorrect test when he found that there was no evidence of intention on the part of the employee to derelict her duties. In this regard, the company submits that the evidence presented showed the employee leaning backwards and being motionless with all her monitor screens off and that this happened at the same time as the break-in and theft. The company submitted that it was not necessary to prove intention.

[9] The third attack flows from the finding that the employee was guilty of negligence and not dereliction of duties. The company contends that the commissioner failed to explain or elaborate why the evidence presented was insufficient to sustain the charge. Again, the company submits that the commissioner cannot substitute the charge of dereliction of duties with his own charge, that of negligence, which did not form part of the reason for the employee's dismissal. It was submitted that the employee was not charged with negligence and that the commissioner's finding in this regard showed *"a clear preference towards the employee"*.

[10] The fourth and fifth grounds relate to sanction and remedy respectively. These grounds were also elaborated in the company's supplementary affidavit. The company criticised the commissioner for imposing a final written warning instead of dismissal. It contends that the commissioner failed to consider the disciplinary code and the nature of the misconduct. Further, the company contends that the employee *"deliberately and intentionally disregarded the rule"*, leading to the company suffering financial loss. The submission is that had the commissioner considered these factors, he would have found that the trust relationship had broken down and found that dismissal was an appropriate sanction, alternatively, reinstatement was not an appropriate remedy. In addition, so the company continues, the employee's evidence was marred with contradictions, making him an unsuitable candidate for reinstatement.

Analysis

[11] The review test is trite. This Court must determine whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach[1]. It is a test that is outcome-focused and seeks to ensure that awards are not interfered with based on minor irregularities and/or errors. In *Duncanmec (Pty) Ltd v Gaylard NO and others*[2], the Constitutional Court reminded us that:

> 'This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
>
> The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.'

[12] For the review application to succeed, the applicant must demonstrate that on a fair reading of the award and considering the evidence adduced during the arbitration proceedings, the decision reached by the commissioner is untenable and so egregious that no reasonable decision-maker could not reach such a conclusion.[3]

[13] The charge against the employee and the reason for her dismissal was that on 26 June 2020, she was in dereliction of her duties in that she failed to handle the alarms

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[1] *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (Sidumo)* [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) at para 110; *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and others* (2008) 29 ILJ 964 (LAC); [2008] 3 BLLR 197 (LAC) at para 100; *Bestel v Astral Operations Ltd and others* [2011] 2 BLLR 129 (LAC); [2010] ZALAC 19 at para 18; *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 ILJ 2795 (SCA); [2013] 11 BLLR 1074 (SCA) at para 25; *Head of Department of Education v Mofokeng and Others* (2015) 36 ILJ 2802 (LAC); [2015] 1 BLLR 50 (LAC) at paras 31 – 33.

[2] (2018) 39 ILJ 2633 (CC); [2018] 12 BLLR 1137 (CC) at paras 42 - 43.

[3] See: *Makuleni v Standard Bank of South Africa Ltd and Others* [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC) at paras 4 and 13.

and also "*neglected*" to respond to the activated alarms when the monitor screen went dark and that her failure to respond was *"as a direct result of [her] negligence"*.

[14] In *Clicks Retailers (Pty) Ltd v Madikwe and Others*[4], this Court stated that:

> 'A dereliction of duty means that an employee wilfully, wantonly or negligently failed to perform his or her duties or performed them in a culpably inefficient manner. In order to establish this form of misconduct, an employer must, in clear terms, establish the duties of an employee charged and thereafter present evidence which proves on a balance of probabilities that the employee derelicted those established duties. Where an employer alleges grossness, the suggestion is that the dismissed manager failed to perform purposefully.'[5]

[15] Considering the company's grounds for review and the reason for the employee's dismissal, the question before the commissioner was whether the evidence established on a balance of probabilities that the employee deliberately neglected to perform her duties. The commissioner found that she did not deliberately neglect to perform her duties and was therefore not guilty of dereliction of duty. The commissioner found that the employee was however guilty of negligence.

[16] The primary criticism against the award is the argument that the commissioner committed an error and irregularity in finding that the employee was guilty of negligence and not dereliction of duty. The contention is that the employee was not charged with nor was she dismissed for negligence. However, the reading of the charge or allegation does not support the company's contention. It is clear from the charge that whilst it is formulated as dereliction of duty, the allegation that the employee was negligent is expressly made in the charge itself. The only difference being that the company alleged that the negligence was deliberate hence the formulation that she derelicted her duties. Regardless, negligence is a competent verdict to the charge of dereliction of duty[6] and

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[4] [2023] ZALCJHB 67.
[5] Ibid at para 11.
[6] See: *EOH Abantu (Pty) Ltd Commission for Conciliation, Mediation and Arbitration and Others* [2019] ZALAC 57; (2019) 40 ILJ 2477 (LAC).

the commissioner's finding in this regard is reasonable and accords with the evidence led during the arbitration proceedings. The commissioner undertook a careful assessment of the evidence, considered the employee's circumstances and the undisputed evidence regarding her medical condition before concluding that she was guilty of negligence. The commissioner did not substitute the charge or the reason for the dismissal as alleged by the company. His decision in this regard meets the reasonableness threshold.

[17] After the finding that the employee was guilty of negligence and not dereliction of duty, the commissioner proceeded to deal with the issue of sanction. He correctly found that the company did not lead any evidence regarding the impact of the misconduct and the loss, if any, it suffered as a consequence of the employee's misconduct. The company did not lead evidence that the misconduct was gross and warranted a dismissal and not a final written warning. The commissioner considered the company's disciplinary code, which makes reference to either a final written warning or a dismissal. Where the employer's disciplinary code recommends a sanction short of dismissal, the employer must show why the sanction short of dismissal is inappropriate and why dismissal was the only appropriate option. This requires the employer to show inter *alia* the importance of the rule that had been breached, the harm caused by the employee's conduct, why additional training and/or instruction may not result in the rehabilitation of the employee and any relevant factor to justify why the employee is an unsuitable candidate for a sanction short of dismissal.[7]

[18] I am not persuaded that the commissioner's decision that the sanction of dismissal was inappropriate is one that falls outside the reasonableness threshold. Accordingly, the commissioner's decision that the dismissal was substantively unfair is reasonable.

[7] See: *Sidumo* at para 78.

[19] Where a dismissal is found to be substantively unfair and the employee seeks to be reinstated, the primary remedy of reinstatement must be awarded.[8] The commissioner awarded reinstatement with limited backpay. He ordered the company to pay the employee for four months and to issue her with a final written warning. I find nothing untenable or egregious about this finding.

[20] The company feebly suggested that the commissioner showed a reasonable apprehension of bias. This was not argued with any conviction in the papers and during the arguments. There is simply no case made out in this regard that warrants that this Court be detained on this issue.

[21] Having considered the award and the grounds upon which the company seeks to assail it, I am not persuaded that the company made out a case that the award or any part thereof is unreasonable and liable to be reviewed and set aside. The review application stands to be dismissed.

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

Order

1. The review application is dismissed with no order as to costs.

M. Makhura
Judge of the Labour Court of South Africa

Appearances:
For the Applicant: Ms S. Lancaster of Lancaster Kungoane Attorneys
For the 1st & 2nd Respondents: Mr T. Buthelezi (Union Official – PTAWU)

[8] Section 193(2) of the LRA; see *Booi v Amathole District Municipality and others* (2022) 43 ILJ 91 (CC); [2022] 1 BLLR 1 (CC) at paras 39 - 42; *Notisi v South African Police Service and Others* [2023] ZALAC 33; (2024) 45 ILJ 986 (LAC) at paras 58 – 60.