GLENCORE HOLDINGS (PTY) LTD AND ANOTHER V SIBEKO AND OTHERS (JA16/2016, 2013/JR2189) [2017] ZALAC 65; [2018] 1 BLLR 1 (LAC); (2018) 39 ILJ 138 (LAC) (1 NOVEMBER 2017)

SUMMARY

Glencore Holdings (Pty) Limited ("the Employer") dismissed Sibeko ("the Employee") following an investigation in which it was discovered that the Employee had failed to follow stipulated workplace protocol, namely for failing to wear ear muffs. The Employee chose to refer the matter to arbitration, as he was adamant that he was not guilty of misconduct.

In arbitration proceedings it was established that the Employer had not proved that the Employee was guilty of misconduct. Such was the acrimony in arbitration proceedings that the Commissioner deemed it appropriate to deviate from the primary remedy of reinstatement and award six months compensation to the Employee.

The Employee, was not satisfied with this arbitration award and chose to refer the matter to the Labour Court for adjudication. The Labour Court set aside the Commissioners ruling and chose to reinstate the Employee (being in line with prevailing jurisprudence). The Employer (being dissatisfied with the Labour Court award) chose to appeal the award made by the Labour Court.

The prevailing section under scrutiny was Section 193(2) of the LRA, which reads:

"The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless-

1. *the employee does not wish to be reinstated or re-employed;*
2. *the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;*
3. *it is not reasonably practicable for the employer to reinstate or re-employ the employee; or*
4. *the dismissal is unfair only because the employer did not follow a fair procedure."*

The Labour Appeal Court found that the commissioner's award demonstrated a flagrant disregard for the jurisprudential origins of Section 193(2) of the LRA. The commissioner's reasoning, however mindful of the attrition and discord between the parties failed to appreciate that the primary remedy as being reinstatement.

The Labour Appeal Court found that compensation was inappropriate in the circumstances because the Employee's conduct, even if deserving of reproach, could not be interpreted to inhibit his work as a bulldozer driver, and deprive him of the primary remedy of reinstatement as mandated by

legislation and precedent.

The Labour Appeal Court noted the Labour Court's decision made by Hardie AJ and upheld the Labour Court's decision.

HELD

In light of the content of Section 193(2) of the LRA, the Court reaffirmed that the commissioner's award of substituted service in the form of compensation over reinstatement was inappropriate.

The Court was unconvinced by the Employer's contention that the Employment relationship was intolerable and necessitated immediate termination.

In Para 11 of the Judgment the Court stated:

"This conclusion is unquestionably correct because the role performed by the Employee as a dozer driver did not embrace a dimension that a display of bad manners in the arbitration proceedings would render a reinstatement inappropriate."

The court accordingly stated that the Employer's appeal must be dismissed with costs.

VALUE

The Judgment demonstrates that the Court (led by prevailing jurisprudence) deemed reinstatement as the most appropriate form of remedy.

Written by Dingumuzi Ndhlovu and supervised by Anja Van Wijk , 16 October 2018

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