

Sneller Verbatim/MM

CASE NO. J1103/98

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

2000-11-24

In the matter between:

(10)

STEEL MINING & COMMERCIAL WORKERS UNION

obo JUDAS KGOEDI

Applicant

and

PARTY DESIGN CC (DOLL'S DIARY)

Respondent

J U D G M E N T

Delivered on 24 November 2000

(20)

REVELAS J:

- 1.This is an application in terms of section 145 of the Labour Relations Act 66 of 1995, the Act, to review and set aside an award made by an arbitrator in favour of the respondent, in terms of which the arbitrator found that the dismissal of Mr J Kgoedi ("the employee") was fair.
- 2.The arbitration was conducted under the auspices of the Commission for Conciliation Mediation and Arbitration ("the CCMA"), after conciliation proved to be unsuccessful. Mr Kgoedi was dismissed because he allegedly intimidated a former temporary employee who worked for the respondent

during a previous strike situation. The employee was looking for more work at the

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time.

1. According to the evidence of Mr Sibiya, (the former employee) who also testified before the arbitration hearing, the employee had threatened to kill him. The arbitrator found that this version was more probable than Mr Kgoedi's evidence because Mr Sibiya's evidence was supported by the evidence of Mr Mtshali. (10)

2. The arbitrator also gave consideration to the fact that Mr Sibiya was not an employee of the respondent at the time of the incident.

3. The union has brought the application for review on behalf of Mr Kgoedi on the following grounds as set out in the applicants' founding affidavit from which I quote as follows:

"3. It is respectfully submitted that the award is defective in that the commissioner committed misconduct in relation to the duties of the commissioner as an arbitrator, for the following reasons:

3.1 That the commissioner was biased in that he made findings of facts and conclusions of law (20)

apparently based on the evidence of the respondent who was the initiator, the prosecutor and the judge at the same time and rejected everything from me as an applicant.

3.2 I was dismissed for having warned of the people who were working during our strike. That person I (sic) was dismissed for was not even an employee of the company."

4. None of the grounds put forward are supported by facts or are grounds for review in themselves. There is no indication that the arbitrator did not apply his mind.

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He made a credibility finding in favour of the respondent's witnesses and then gave due consideration to the fact that the incident occurred outside the respon-

dent's premises. He concluded as follows:

"The ultimate issue then to be determined is whether an employee who threatens to kill a person seeking employment outside the company premises may be dismissed. It is generally accepted that an employer's control over an employee does ⁽¹⁰⁾ not extend beyond the parameters of the company premises."

5.The arbitrator then relied on an extract from P A K Le Roux and Andre Van Niekerk The South African Law of Unfair Dismissal 1994 (184) where the learned authors state that as a general rule, an employer has no right to institute disciplinary proceedings against an employee unless it can be demonstrated that the employer has some interest in the conduct of the employee. An interest would normally exist where some nexus exists between the employee's conduct and the employer's business. In the absence of the nexus the conduct complained of is sometimes termed "off-the-job conduct".

(20)

there was a nexus between the conduct of Mr Kgoedi and the business of the employer (the respondent). The confrontation took place in close proximity of the respondent's premises and in full view of the public, affecting the company's reputation. The threat made to Mr Sibiya was work related.

7.No employer needs to tolerate that former and prospective employees are threatened with death, when indicating that they are interested in working for the respondent, even during a strike situation.

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decision is reviewable where conclusions reached are not capable of reasonable justification when regard is had to the factual premises on which they are based.

(See: Shoprite Checkers (Pty) Ltd v CCMA & Others (1998) Vol 19 ILJ 892 (LC) at 900 D-G.

9. Once a reviewing court is satisfied that the tribunal has applied its mind it will not interfere with the result even if it would have come to a different conclusion. **"The best demonstration of applying one's mind is whether the outcome can be sustained by the facts found and the law applied. The emphasis is on the range of reasonable outcome and not the correct one."** See Coetzee v Libea NO & Another (1999) 20 ILJ 129 (LC) at 133 E-G per Cheadle AJ.

10. No grounds were advanced which permits me to find that the outcome arrived at by the arbitrator is not sustainable by the facts of the matter and the law which was applied.

11. In the circumstances the application for review must fail.

12. I now turn to the question of costs. The applicant has pursued a matter which had no merit. Vexatious allegations about the commissioner being biased were made without putting forward any facts, as to why this should be so. Litigants should be discouraged from engaging in litigation in this manner.

13. Consequently the application is dismissed with costs.

E. REVELAS

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(30)