

Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J5079/00

2001-04-10

In the matter between

FOSCHINI GROUP (PTY) LIMITED

Applicant

and

CCMA

First Respondent

LESANE MELI SHADRACK SESELE

Second Respondent

ELINA MOKHALO

Third Respondent

J U D G M E N T

Delivered on 10 April 2001

REVELAS, J:

- 1.This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"), to review an award reinstating the third respondent in the applicant's employ. The award was made by the second respondent ("the arbitrator"), a commissioner appointed by the first respondent.
- 2.The third respondent was dismissed on 29 February 2000 following a disciplinary inquiry into an incident relating to the third respondent's stabbing of an employee from a nearby store.

The incident occurred on 8 January 2000.
- 3.The applicant referred her dispute concerning her dismissal to the first respondent for conciliation, which failed. The matter came before the

arbitrator, who found that the third respondent indeed stabbed an employee of a nearby store several times, while she lay on the ground. The arbitrator further found that this conduct **"on its own, did not justify the dismissal"** since the stabbing **"did not take place on the premises of the employer"**, and the victim was not a **"colleague"** of the third respondent.

4.The arbitrator declined however to reinstate the respondent **"because of the potential to disturb the harmonious relationship among the employees"**.

5.The application was launched one week outside the 6 week time limit prescribed in section 145 of the Act. I have read the papers filed in the condonation application brought by the applicant. The prospects of success are strong and the delay was rather insignificant. Condonation is therefore granted.

6.I now return to the merits of the case. The arbitrator accepted the evidence of the third respondent that the knife with which the victim was stabbed, had been concealed by the victim in her umbrella, and that the third respondent had feared for her life. The arbitrator appears to have accepted this evidence of the third respondent because the victim herself was not called as a witness. The applicant argues that in accepting this evidence the arbitrator failed in his duties to assess the value of the evidence that was properly before him, and the probabilities where the versions of the parties conflicted.

7.Miss Carelli of the applicant, testified that after the third applicant and the victim started arguing on the morning in question, the victim had run to the telephone to call the police. This is consistent with the third respondent's own evidence. Miss Carelli was an eyewitness to the stabbing, and stated that although she did not see where the knife had come from, she first saw the knife in the third respondent's hand, and also testified that there was no umbrella anywhere to be seen. There seems to be no reason given why Miss Carellis' evidence was ignored.

- 8.The arbitrator was apparently influenced to accept the third respondent's evidence on these matters because Lydia did not testify.
- 9.It is not clear to me from the reasoning of the award why the arbitrator held the view that because the offence was not committed on company premises, it did not warrant dismissal. It appears that he had taken it into account as a mitigating factor, precluding dismissal, and not as a factor which precluded any form of discipline.
- 10.In my view, the fact that the assault did not take place on the applicant's premises, is of small significance when considering the other facts surrounding the assault. There were various other factors which indicated that the conduct of the second respondent impacted on the employment relationship and on the business of the applicant.
- 11.The applicant contends that the following factors were ignored by the arbitrator:
- 1.The victim had fallen over after receiving the first stab wound and had been stabbed by third respondent several more times while she lay on the ground. The incident occurred five doors away from the entrance door of the applicant's shop.
- 2.The incident occurred in Hennenman, a small town in the Free State where, on the unopposed evidence, everyone knew everyone. It was therefore no small matter that one shop's assistants should stab another shop's assistant on the pavement.
- 3.When bypassers tried to stop the incident the third respondent indicated that she wanted to **"kill the dog"**.
- 12.Reports were also made to the applicant that if the third respondent were kept on as a shop assistant the applicant's shop would not be supported by customers. The third respondent also entered the shop with the same knife with which she stabbed the victim, still in her hand, in front of other employees.

13. Employers are most certainly entitled to regard violent conduct such as demonstrated in this matter, in a most serious light. Co-employees and customers are entitled to feel safe on an employer's premises.

14. The aforesaid factors, which appear to have been overlooked by the arbitrator, are factors which in accordance with the principles laid down by the Labour Appeal Court in *SA Polymer Holdings (Pty) Ltd t/a Megapipe v Lallie and Others*, should not have been overlooked. Labour Court Digest 1994 (3) Part 4 at 226:

"We agree with the submission that ostensible criminal conduct on the part of an employee off the employer's premises and not during working hours does not preclude the employer from assessing such conduct in the context of the actual or potential effect in the workplace and to the personnel and the property of the employer. The fact that the conduct is not directed at or against fellow employees is equally immaterial. Whether such conduct had the effect of destroying or seriously damaging the relationship of the employer and employee, depends on a number of factors. These include the nature of the criminal conduct, the nature of the work or services performed by the employee, the potential effects which the conduct may have on the employer's business, and in particular its profile in the eyes of its clients and the public, and the impact which the conduct may have on the relationship between the employer and the employee, and between the employee and his co-workers. These are broad outlines and are not intended to be exhaustive."

15. The arbitrator was required to determine whether the dismissal was for a fair reason, and not whether, in his view the dismissal was the appropriate sanction. The offence was very serious and impacted on the employment relationship. This much was found by the arbitrator. It is therefore incomprehensible why the third respondent was compensated by the second respondent. Where the arbitrator perceived his function as one of having to determine a fair sanction, he misconceived his powers,

and in doing so exceeded those powers. His decision therefore falls to be set aside in terms of section 145 of the Act (See: *De Beers Consolidated Mines Ltd v CCMA and Others* 2000 (21) ILJ 1051 LAC; *County Fair Foods (Pty) Ltd v CCMA and Others* 1999 (20) ILJ 1701 LAC; [1999] 11 BLLR 1117 LAC; *Toyota SA Motors (Pty) Ltd v Radebe and Others* 2000 (21) ILJ 340 LAC).

16. In the circumstances the application is granted.

E. Revelas

NT: MR CHRIS TODD

BOWMAN GILFILLAN INC