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IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J1839/99

2001-06-19

In the matter between

MACSTEEL (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION,

1st Respondent

2nd Respondent

NATIONAL UNION OF METALWORKERS

3rd Respondent

4th Respondent

J U D G M E N T

Delivered on 19 June 2001

REVELAS J:

1. The applicant, Macsteel, seeks to have two awards made in favour of the fourth respondent, Mr Ntombela, set aside in two review applications which have been consolidated by an order of this court dated 14 December 1999.
2. Mr Ntombela seeks to have the second award to be made an order of court.
3. The factual background which gave rise to the three applications are sketched as follows:

4.Mr Ntombela was employed by Macsteel as a driver in 1978.

5. During February 1998 Mr Ntombela was found guilty on a disciplinary charge of failing to carry out a lawful instruction in that he refused to drive a three ton truck without a driver's assistant unless he was paid R100 per hour extra. This refusal resulted in a final written warning which was to remain valid for six months. Mr Ntombela referred a dispute concerning the warning to the Commission for Conciliation, Mediation and Arbitration, ("the CCMA").

6.The unsuccessful conciliation meeting about this dispute was held on 31 March 1998 the same day on which the decision was taken to dismiss Mr Ntombela on the basis of his refusal to obey an instruction to undergo an eye test along with six other drivers employed by Macsteel.

7.The final warning was taken into account by Macsteel in determining the sanction of dismissal.

8.Mr Ntombela also referred a dispute about his dismissal to the CCMA. The arbitration in relation to the dismissal to which I shall refer to as the "dismissal arbitration" was held on 29 September 1998, but the arbitration in respect of the final written warning, to which I shall refer to as "the warning arbitration", was only arbitrated on 13 January 1999.

9.The arbitrator who conducted the dismissal arbitration, held back the award in which she reinstated Mr Ntombela pending the outcome of the award in the warning arbitration, wherein she set aside the warning.

10.In the dismissal award, the arbitrator held that Mr Ntombela was guilty of refusing to undergo an eye test despite a reasonable instruction, but found that in the light of the final written warning having been set aside, dismissal was not the appropriate sanction.

11.I will now deal with the two awards.

12.**The final written warning award:**

13. When Mr Ntombela was required to drive a horse and trailer truck which is a large articulating vehicle, he was usually accompanied by his assistant whose duties included off-loading the truck and giving directions when the truck had to be reversed. Some drivers entered into an agreement in 1992 with Macsteel in terms of which they would forego an assistant, but would be paid an hourly rate of R1 per hour in stead.

14. Mr Ntombela had not entered into such an agreement chose to have an assistant.

15. On 9 February 1998 Mr Ntombela's assistant did not report for duty and there was no other assistant driver available to accompany him. Mr Ntombela was required to drive a horse and trailer truck without an assistant. He refused to do so unless he also received the extra hourly rate in terms of the agreement, which was not applicable to him. He was requested to drive a three ton truck in stead. Drivers of three ton trucks, not require assistants and therefore the R1 per hour rate is not applicable to them.

16. Mr Ntombela also refused to drive a three ton truck without an assistant, unless he was paid the hourly rate. He also complained that he would have to off-load steel from the truck. He was assured that the off loading would be performed or undertaken by the customer to whom he had to make deliveries. He still persisted in his view that he would not drive the truck without being paid the extra hourly rate.

17. The arbitrator found that Macsteel had refused to obtain the services of a casual employee to replace the driver assistant and refused to pay the applicant the extra hour rate which was being paid to drivers who drove three ton trucks without assistance.

18. The arbitrator considered the applicant's evidence that some of the deliveries required assistance and found that the applicant's refusal to

perform the duties normally performed by an assistant was unreasonable. This finding he premised on his observation that there was no evidence before him that Mr Ntombela was contractually obliged to perform the duties of an assistant.

19. The arbitrator also found that the refusal not to pay the applicant an extra amount, was unfair as the applicant was treated differently to other employees. Accordingly he set aside the final warning as unfair.

20. It is clear to me that the arbitrator clearly misunderstood the evidence that drivers of three ton trucks never had assistant drivers and that therefore the question of an hourly rate was not applicable to any driver of a three ton truck. The applicant was simply not entitled to any extra payment when he drove a three ton truck. He was also not given a final written warning for refusing to do the work of an assistant, as found by the arbitrator. He was not expected to do such work. He received the final warning for refusing to drive a three ton truck to make deliveries. His employer was under no obligation to pay him an extra rate or provide him with an assistant when his assistant was absent, as found by the arbitrator. Mr Ntombela therefore had no reason to disobey the instruction to perform his normal duties.

21. Since the findings of the arbitrator are incorrect and not supported by the evidence, I have to conclude that the arbitrator did not apply his mind to the evidence before him and did not consider the evidence as a whole which resulted in the applicant not having a proper hearing. This award therefore then falls to be set aside.

22. **The Dismissal Review.**

23. Macsteel instructed the applicant and other drivers of their trucks to undergo an eye test. The reason why a truck driver's eyes should be tested is obvious. It is for purposes of avoiding a road accident. The commissioner found that the instruction to Mr Ntombela to undergo an eye

test was a reasonable instruction. She also found that Mr Ntombela's refusal to go for the eye test was based on his financial circumstances. He had two families in two different households. He feared that as he was getting on in years, he might require spectacles which he was told would cost in the region of R600. He simply could not afford that. He also mentioned that his eyes would be tested within three months' time by the public transport testing authorities.

24. Macsteel assured Mr Ntombela that a loan could be arranged with him for the payment of the spectacles and that he was not required to pay for the eye test. Macsteel permitted Mr Ntombela to be tested by a doctor of his own choice. This doctor did not have the necessary eye testing equipment and Mr Ntombela's eyes remained untested. He refused to go for an eye test despite the fact that as the arbitrator put it, "the employer had gone the extra mile" to explain the importance of undergoing the eye test. It is common cause that his last eye test was taken eight or nine years ago.

25. The arbitrator, having found that the applicant's refusal to go for an eye test was unreasonable, nonetheless found that the dismissal was inappropriate since the final warning was no longer applicable having been set aside by another arbitrator and Mr Ntombela had been employed for 20 years.

26. The arbitrator in her reasoning, appears to have failed to apply her mind, in my view, to a very crucial aspect to which she ought to have applied her mind, that is whether even in the absence of a final warning, the dismissal was an appropriate sanction.

27. The carnage on South African roads is well known and no employer whose business involves sending massive trucks onto the road, should be expected to have in its employ a driver who refuses to have his eyes

tested or to wear glasses. It would be of little comfort to the surviving families of persons who died in an accident caused by a driver of such a large truck to hear that the driver should have been wearing spectacles but chose not to.

28. The arbitrator simply adopted the attitude that a final warning was a prerequisite for dismissal where an employer had a long service record. She also gave no consideration to the fact that the applicant, even at the arbitration hearing, still persisted in his view that he was not required to go for the eye test.

29. The arbitrator's failure to apply her mind as aforesaid to my view, renders her award reviewable and it follows that the dismissal award should be set aside.

30. The next question is whether I should remit the two disputes in question CCMA for a re-hearing or whether I should substitute the awards with my own findings.

31. Insofar as the final written warning dispute is concerned, the effect of my conclusion was that the final warning was justified and the re-hearing of that dispute would serve no purpose.

32. The setting aside of the dismissal award, is based on the arbitrator's failure to apply her mind to certain considerations as outlined above and because her reasoning mainly focussed on the absence of a final warning.

33. I am also concerned by the fact that, much was made of Mr Ntombela's recalcitrance, but on the other hand little consideration was given to the fact that Macsteel had no explanation why they could not assist Mr Ntombela with buying new spectacles. I tend to agree with Mr Buirsky, who acted on behalf of the respondents, that if both parties had treated the matter differently, this dismissal would perhaps not have occurred. This issue should also be placed in the context of all the other

considerations mentioned. Clearly the issues raised by both parties, need to be looked at afresh.

34. I therefore believe that I am not in a position to substitute the dismissal award with my own findings.

35. I make the following order:

1. In case number J1839/99 the arbitration award dated 24 February 1999 is set aside.

2. In case number J3395/99 the arbitration award dated 25 May is set aside and referred back to the CCMA for determination by a different arbitrator.

3. The application under case number J2814/99 to have the award referred to in paragraph 2 hereof made an order of court, is dismissed.

4. The respondents are to pay the applicant's costs.

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E. Revelas