Sneller Verbatim/DM

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN CASE NO: J578/00

DATE: 2002.02.06

In the matter between

ELIAS MAKHAFOLA Applicant

and

1st Respondent

COMMISSION FOR CONCILIATION

2nd Respondent

3rd Respondent

J U D G M E N T

Delivered on 6 February 2002

REVELAS J:

1. This is an unopposed application for the review of an award made by the first respondent in favour of the third respondent in which it was found that the dismissal of the applicant was fair, both procedurally

and substantively. There has been no opposition on behalf of the first respondent who filed a statement to say that he would abide by the decision of the court in this matter.

1. 1. 2. One of the grounds of attack against the second respondent, the arbitrator, is that he was biased in that he interfered in the proceedings and asked questions on behalf of the third respondent, who was the employer party at the proceedings. There is no typed transcript recording the proceedings. It is therefore not possible for me to make a finding in this regard. However, I have considered the award and the award stands to be set aside if I am able to make a finding that the conclusion arrived at by the arbitrator was not rationally or reasonably connected to the facts before the arbitrator.

3. The arbitrator referred to the misconduct in question which was the failure to carry out an instruction given by the third respondent to the applicant and which the applicant had failed to carry out. The applicant had worked for the third respondent for a period of 12 years. The arbitrator does not mention what the offence was, what the instruction was and he does not deal with the reasons why it was not carried out, whereas there is some reference to the fact that the

applicant was assisting a co-employee at the time the instruction was directed to him.

4. In circumstances where one finds that the dismissal was fair, there should be at least some reference or reasoning as to why the instruction was reasonable. In respect of the reasoning as to why the applicant should be dismissed for this offence, the arbitrator states the following –

1. 1. "**In a contract of employment, my understanding as laid down by labour legislation, is that the employer has the responsibility to provide work, while the employee has the duty to render his services in a subordinate manner. The interpretation of this statement would mean that the employee does not have a choice as to what work to do, but should be instructed. Where there are problems the company grievances procedure should be triggered and used to resolve the complaints and problems which the employee may have.**"

5. This is entirely incorrect. It is trite that the instruction given to an employee must be a reasonable one and there is no precedent or provision in Labour Law which I know of which provides that an employee has to render his or her services in a "subordinate manner." If the employee or the applicant in this matter was insubordinate or refused to carry out a reasonable instruction, that much must have at least

been dealt with by the arbitrator. There is not even a reference as to what the nature of the refusal was neither to the facts, and it is also very difficult to find this in the record provided by the arbitrator.

6. In the circumstances this is a matter where, particularly in the absence of any opposition to the allegations made by the applicant in his founding affidavit, the award should be set aside.

7. This is not a matter where I can substitute the arbitrator's finding with my own findings. I have already made reference to the lack of reasoning. In the circumstances the dispute is referred back to the Commission for Conciliation and Mediation to be heard by another arbitrator.

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E. Revelas