

Sneller Verbatim/JduP

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J4070/00

2002-02-13

In the matter between

NUMSA

Applicant

and

TOTAL SERVICE STATION

Respondent

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J U D G M E N T

Delivered on 13 February 2002

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REVELAS, J:

1. The second applicant was dismissed on 25 November 1998 for allegedly arguing with a customer of the first respondent. The dispute in this regard was referred to the Motor Industry Bargaining Council ("MIBCO") for conciliation on 5 January 1999, together with an application for condonation.

1. 2. Condonation was initially refused, and the first applicant was invited by MIBCO to appeal against this decision in terms of its internal procedures. The appeal was successful and condonation was granted on 11 May 1999.
1. 3. There was an allegation by the respondent's representative that no documentation of the written record of the appeal could be found. However Miss Edmunds, appearing on behalf of the first and second respondents, was able to produce such a document.
4. The respondent in the person of Mr H S Schoeman, Senior, the father of the second and third respondents herein, was present at the conciliation meeting. The arbitration hearing was held on 9 July 1999 after several postponements were granted per the request of the first respondent. The first respondent was properly notified of the arbitration hearing. It failed to attend the hearing and, in the person of Mr Schoeman, Senior, simply addressed a fax to MIBCO in this regard. The whereabouts of this fax has not been disclosed by the respondents.
5. The arbitrator found that the dismissal of the second applicant was procedurally and substantively unfair, and ordered the first respondent to reinstate the second applicant as from the date of his dismissal, on

terms and conditions no less favourable than those which governed his employment prior to his dismissal. The first respondent was ordered to pay the second applicant all arrear wages from the date of his dismissal to the date of arbitration. The first respondent was further ordered to comply with the award within 14 days of the date thereof.

1. 6. On 31 August 1999 the first respondent launched a rescission application with MIBCO. In this application Mr Schoeman, Senior confirmed under oath that he was the manager of Total Service Station and that the first applicant had been employed by Total Service Station. The rescission application was opposed by the applicants, and set down for hearing on 20 April 2000.
7. At the commencement of the hearing the commissioner noted that the dispute was referred out of time - in this regard I may just mention that the dispute was referred one or two days late - and it was not clear to the commissioner where the condonation was granted, and therefore the commissioner did not proceed with the hearing.
8. The applicants' attorney then addressed correspondence to MIBCO, and was advised that condonation had been properly applied for and granted as stated hereinbefore. The respondents' attorneys were advised

hereof and invited to set the matter down for rescission again, on 28 July 2000, failing which application would be made to the Labour Court to have the arbitration award made an order of court.

9. On 31 July 2000 the first respondent's attorneys advised that they would revert by 4 August 2000, and failed to do so. On 14 August 2000 the first respondent's attorneys were advised that an application in terms of section 158(1)(c) of the Labour Relations Act, 66 of 1995, to have the award made an order of court, would proceed in the event of no further steps taken. No further steps were taken by the first respondent's attorneys.

1. 10. The application was proceeded with, and on 28 November 2000 Jammy AJ made an order to the effect that the arbitration award issued by the dispute resolution centre under case number FSA032/99 dated 23 July 1999, (by Mr Bronkhorst), is made an order of court.

11. The respondents did not comply with this order either, and the applicants were compelled to approach the deputy sheriff and have a writ of execution issued.

12. Several attempts were made to execute, but the first respondent failed to comply with the order because the first respondent, Total Service Station, was, it contends wrongly cited as OR Motors which was in actual

fact the second applicant's former employer.

13. It was argued that since the award was obtained against Total Service Station it was invalid against OR Motors. That is not entirely correct. Even during argument it became apparent, and it was conceded today, that Mr Schoeman, Senior and the first and second respondents are involved with both entities. Ms Ruth Edmunds stated in open court that she had "gone and done her homework", and had established that the former employer of the second applicant was indeed OR Motors CC, t/a Total Service Station. It was not disputed.
14. In desperation and frustration the applicants have brought an application, which was before me, for the following relief:
 1. a declarator that the respondents are in contempt of an order of this court (Jammy AJ's order);
 2. that the second and third respondents be committed to detention in prison for a period of 15 consecutive days from the date of this order;
 3. that at the expiry thereof the second and third respondents be brought before court again to show cause why a further period of committal should not be imposed; or
 4. that in the event of the second and third respondents complying with the order of this court, or intending to

- comply therewith, they may at their instance be brought before this court at an earlier date than the expiration of the said period of 15 consecutive days;
5. that the respondents pay the costs of the application on the attorney and client scale.
15. In my view it is not possible for one judge to amend the order of another judge, or even his or her own order, by simply substituting the name of one party for another in the absence of an application for joinder. Amended pleadings have to be served on the other party.
16. In this matter repeating service of amended papers is not necessary since it would appear that Total Service Station, the first respondent and the second and third respondents and Mr Schoeman, Senior, are all commercially connected in such a way that they all participate in the daily running of the first respondent's business as well as that of OR Motors CC.
1. 17. OR Motors CC, t/a Total Service Station, is in fact the person against whom the award was made, and the subsequent award was made an order of court.
18. In the light of the new evidence from the bar, not disputed, as to the real identity of the employer by Miss Edmunds in court I am not able to find beyond reasonable doubt that the respondents were in contempt of a court order, for the reasons I have just set out.

That relief the applicants are not entitled to.

19. It would be of no assistance to the applicants if I were to grant an order to correct the citation of the respondents.
 20. There is a prayer for alternative relief in the notice of motion, and under that prayer I make a declarator which reads as follows:

"The first respondent, Total Service Station, also does business under the name and style of OR Service Station CC, t/a Total Service Station."
 21. Insofar as the question of costs is concerned there is no reason why the respondents should not be liable for the applicants' costs in this matter. All along they were aware of the real state of affairs. Mr Schoeman, Senior had under oath stated that he was the managing director of Total Service Station on affidavit. I gained a strong impression that the second and third respondents, at the behest of the first respondent, were playing a cat and mouse game with the applicants. This matter could have been resolved long ago.
 1. 22. Consequently the respondents are to pay the applicants' costs, the one paying the other to be absolved.
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E. Revelas