

REVISED/OF INTEREST

C10.0014
J2052/99

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JUDGMENT

IN THE LABOUR COURT OF SOUTH AFRICA

held at BRAAMFONTEIN

CASE NO. J2052/99

2000-09-29

In the matter between: (10) (10)

CHEMICAL PAPER PRINTING

Applicant

versus

GLASS AND ALUMINIUM 2000 (PTY) LIMITED

Respondent

J U D G M E N T

PILLAY J:

[1] The dispute was referred by the applicant as an automatically unfair dismissal in terms of section 187 of the Labour Relations Act, No 66 of 1995. The applicant alleged that the employee was discriminated against for exercising his right in terms of section 4(1)(ii) of the Labour Relations Act.

[2] The employer contended that the applicant had resigned voluntarily.

[3] The facts were that on 7 October 1998 an employee, one Mr Joseph Kola, reported to Mr Des Williams, the sole member of the respondent, about a job being done the previous day. The

customer had not been satisfied as the louvres supplied had been scratched. Mr Williams was angry and irritated. He assumed that Mr Kola was not willing to work as he had, on a previous occasion, complained that there were not enough workers to complete a job. He also suspected, but could not prove, that the louvres might have been damaged by the workers. He told Mr Kola that as he was not prepared to work properly he should go home and return the next day.

[4] It was common cause that Mr Kola's pay was docked for the rest of the day although Mr Williams testified that he was refunded his pay at some stage. This was denied by Mr Kola. The employer admitted in the statement of defence that Mr Kola would not be paid. The probabilities are, therefore, that Mr Kola was not paid for the rest of that day. Mr Williams conceded that it was unlawful to dock his pay in the circumstances.

[5] After this incident Mr Kola went to change out of his work wear and to report the matter to the employee who was a shop steward. The employee alleged that he, accompanied by Mr Kola, went to Mr Williams's office to discuss the latter's grievance. The employer's version was that the employee had not been accompanied by Mr Kola, but by Mr Masemene, the co-employee who had worked with Mr Kola on the job the previous day.

[6] The employee's version was that when he enquired why Mr Kola was being sent home Mr Williams called him a liar. The employee conceded under cross-examination that he had also raised a complaint of swearing with Mr Williams, which might have elicited the accusation that he was a liar. According to Mr Kola the complaint about swearing was not raised.

[7] Mrs Williams approached and attempted to interrupt the discussion. The employee prevented her from doing so pointing out that he was in a discussion with Mr Williams. The employee testified

that Mrs Williams then grabbed him and shoved him against the wall. Mr Williams's version was that the employee pushed a chair to deliberately hurt Mrs Williams. The daughter, Miss Chantelle Williams, intervened and told the employee to leave. The door was slammed shut as the employee went out and sat outside Mr Williams's office.

[8] The employee's version is to be preferred as to what transpired in Mr Williams's office on that occasion as it was substantially corroborated by Mr Kola and Mr Masemene.

[9] Mr Williams's evidence in this regard must be approached with caution as he was a single witness. Although Mr Williams articulated the need to communicate with the employee as the shop steward and representative of Mr Kola it would appear from his evidence that he would have preferred to deal with Mr Kola and Mr Masemene direct on the issue of the louvres.

[10] Having accepted the employee's version as to what transpired in the office on that occasion the Court must also find that there was an altercation which was caused principally by Mrs Williams intervening in an offensive and aggressive manner. Despite her availability, Mrs Williams was not called to corroborate Mr Williams.

[11] The employee testified that while he sat outside Mr Williams's office with Mr Kola they decided to telephone the trade union office. After giving his evidence in this regard he recalled that Mr Williams had come out and told him that he did not have a job for him and that he should go to the trade union for a job. Counsel for the employee submitted that this was an after thought concocted to make out a case of dismissal for trade union activities.

[12] Given the employer's attitude towards the trade union which is more fully discussed below, it is

quite probable that this was said. It was also corroborated by Mr Kola. Mr Masemene could not hear clearly what Mr Williams had said to the employee when he was sitting outside the office. However, he testified that after the employer and Mr Kola left the office he remained behind. After receiving his instructions he proceeded to arrange for another employee to accompany him. This took about 15 minutes. A short while after the incident in the office he was on his way to a worksite. He then saw the employee and Mr Kola walking outside the employer's premises.

[13] It was the employer's case that shortly before 10:00 that morning Mrs Nagel, a representative of NOESA the employer's organisation of which the employer was a member arrived, she was followed almost simultaneously by Mr Visser, an inspector from the Department of Labour. She was informed either by Mr or Mrs Williams that there was a problem with the employee. The employee was called to the office. On Mrs Nagel's version she asked the employee what the problem was. He immediately responded that he was unhappy, that he did not want to work for the employer, that he wanted his money and that he wanted to leave. Mrs Nagel asked him if he was sure about this and he responded affirmatively. She then asked Mr Williams whether he accepted the employee's resignation and he indicated that he did. Mrs Nagel then informed the employee that Mr Visser would calculate the pay that was due to him. She then left to deliver her decision to dismiss Mr Ruben Ntwampe, another shop steward, who had been charged with misconduct.

[14] In the meantime Mr Visser, after introducing himself to Mr Williams and stating the purpose of his visit, went about his business auditing the UIF registrations in an adjoining office. He was within earshot of the discussion in Mr Williams's office. Although he did not pay careful attention to the discussion he recollected parts of it. He recalled that one Mr Chokwe came into the office. Although he was not sure he identified the employee in court as being the person who had

entered the office and who was referred to as Mr Chokwe. At that stage of his testimony when he was asked to make the identification the employee was no longer wearing the glasses that he had on earlier during the court proceedings. The glasses were being worn by Mr Kola. Despite this, Mr Visser correctly identified the employee. Furthermore, the name and identity number in respect of which he calculated the remuneration due was that of the employee.

[15] The employee denied that the incident with Mrs Nagel and Mr Visser, the so-called ten o'clock incident, had ever occurred.

[16] The court has to decide the question as to whether the employee was dismissed or whether he resigned. Within the broad outlines of the facts presented above there are several variances and contradictions within and between each party's version. Much of it arises because of a loss of memory, the events having occurred about two years ago, than a deliberate attempt to mislead the court. However, a distinction needs to be made between material and immaterial contradictions.

[17] The applicant had pleaded that the management was often racist towards the workers who were sometimes called "kaffirs" and "bobbejaan". Although the applicants lead evidence about the use of the word "bobbejaan" there was no evidence of the use of the word "kaffirs". However, Mr Williams made several concessions from which it can be concluded that the employer humiliated and discriminated against the workers on racial grounds. Even if they were not called "bobbejaan", but told that they worked like "bobbejane" the workers would have been legitimately affronted. The relationship with the employer was hierarchical. They were not equals that they could exchange insults in a playful manner. Besides, the comments were made in a work situation and as a manifestation of irritation and anger.

- [18] Separate ablution facilities were maintained by the employer for management, salaried, workers and customers on the one hand and wage earners on the other. This division was entrenched along racial lines. It may well have been that some black customers used the management's facilities. Wage earners were not allowed to use those facilities. All wage earners were black. The facts made out a classic case of indirect racial discrimination. In these conditions, the workers were legitimately aggrieved.
- [19] It also became clear that the unionisation of the work force was an unwelcome development for the employer. As soon as the trade unions sought access rights and not before, the employer became a member of an employer's organisation. Although the employer allowed and unattended meetings with the trade union it adopted a facetious and antagonistic attitude. For instance, when Mrs Williams, a member of management, was unavailable to pay wages, the employer informed the union that she was on strike.
- [20] When the applicants were unsuccessful at an arbitration, the employer addressed the workers to the effect that the union could not help them and merely took their money away.
- [21] The employer, therefore, actively resisted the union. It was not merely tolerated as an unwelcome, but unavoidable intrusion.
- [22] However, if the employer's version of the ten o'clock incident is to be rejected then the court must accept that there was a conspiracy between the employer, Mrs Nagel and Mr Visser. Hoffmann and Zeffertt in "The South African Law of Evidence" fourth edition at 528 point out that criminality or other dishonest conduct will not lightly be inferred because

“in a civilised community there are moral or legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.”

[23] A conspiracy involving the employer and Mrs Nagel is possible. The employer is in a way a customer of NOESA. Customer satisfaction would be an objective of NOESA. If this means delivering a tidy termination of employment, Mrs Nagel might oblige. Her skills as a prosecutor and as a part-time commissioner with a bargaining council could assist her in fashioning a problem-free termination for the employer.

[24] However, would Mr Visser have risked 15 years of service with the Department of Labour to consent to being party to the conspiracy? Was the employer's resentment for the union so intense that it would risk corrupting an official of the Department of Labour? I think not.

[25] In Ramakulukusha V Commander, Venda National Force 1989 (2) SA 813 (V) the court observed :

“It is said that in civil matters the onus of the proof is discharged upon 'a balance of probabilities' but this simplistic statement must be used with care since, even if the onus-bearing party puts into his 'pan of the scale of probability' slender evidence, as against no counter-balance on the part of the opponent, and although the scale should therefore automatically go down on the side of the onus-bearing party, the Court may still hold that the evidence tendered was not sufficiently cogent and convincing - 'it is not mere conjecture or slight probability that will suffice'.

(See also National Employers Mutual General Insurance Association v Gany 1931 AD 187)

[26] Mr Kola confirmed that the employee had not been called back into the office after the altercation.

Mr Masemene might well have seen the employee and Mr Kola walking outside the employer's premises. However, there is nothing to suggest that it was not possible for the employee to return before 10h00 that day. In fact, if he believed that he still had a job then he probably did return as soon as possible.

[27] The more likely scenario is that the employee had reached the end of his tether and in the heat of the moment declared his desire to terminate the relationship.

[28] Mrs Nagel pounced on the opportunity and formalised it. By a mechanical process of enquiring whether he wished to resign and whether Mr Williams accepted the resignation, she formalised his resignation.

[29] Mr Visser confirmed the encounter with the employee. Although the Court exercised caution with Mrs Nagel's evidence as she was not completely independent as a representative of the employer, the evidence of Mr Visser must be accepted.

[30] The Court is fortified in its view that the employee resigned and was not dismissed after considering two further aspects of the evidence: The employee did not quite believe that he had been dismissed after the altercation in Mr Williams's office. He returned on his version the following day, because he thought he still had a job. Although he might have reported to the union that both he and Mr Kola had been dismissed, he did not believe this to be the case at the time. The Court accepts that he was not dismissed after the altercation.

[31] The second consideration is that the employee was extremely evasive when he was asked whether he knew Mrs Nagel. The Court finds that he must have recognised her having attended a

disciplinary enquiry which had been chaired by her. The most probable reason for wanting to avoid admitting this must have been to fortify his denial of the ten o'clock incident.

[32] In the circumstances the matter is dismissed with no order as to costs.

D. PILLAY

Judge of the Labour Court of South Africa

APPEARANCES AS FOLLOWS:

FOR THE APPLICANT : MR CACHALIA, Cheadle Thompson and Haysom Inc

FOR THE RESPONDENT: ADV R G BEATON

INSTRUCTED BY : BORMAN, SNYMAN AND BARNARD.