

Sneller Verbatim/MS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J5133/99

2003-05-02

In the matter between

MLA POWER SYSTEMS

Applicant

and

NUMSA

Respondent

J U D G M E N T

LANDMAN, J: MLA Power Systems (Pty) Ltd seeks to review and set aside an award handed down by the first respondent, a Commissioner of the CCMA. The award required MLA to reinstate Mr Gumbi who had been dismissed after assaulting a young boy on the employer's premises.

Gerrit Visser who was 8 years old at the time, entered

the premises of MLA Power Systems (Pty) Ltd. He was in the company of his father who is employed there. Gerrit told the CCMA that he was playing with the workers. He was using swear words and they returned the swear words. He used words referring to the private parts of their mothers. These workers were working at their tasks at this time. Gerrit says that Mr Gumbi, with whom he was not playing, probably thought he was playing with him i.e. swearing at him. Gerrit says Mr Gumbi swore at him. So he threw a plastic insulator sleeve at Mr Gumbi. Gerrit picked up a hammer but said he did nothing with it.

Mr Gumbi then swore at him. Mr Gumbi picked up a bolt (the evidence regarding the size of this bolt varies between 10 millimetres and 25 millimetres). Mr Gumbi threw it at Gerrit and it struck Gerrit on his ribs. A black mark was still visible a week after the incident. Gerrit quit the scene crying and reported the incident to his father. Mr Gumbi did not deny that he had thrown an object, which he said was a washer, at Gerrit. Mr Gumbi said at the arbitration hearing:

"I was at the drilling machine drilling some plates and I was hit by an object right at the, and he is indicating showing close to the corner of the right eye. I then asked who is the one who is

hitting me and I was told it was the young boy. In that I did not know why I was being hit by him, I went to him and asked why do you hit me with this object. As I approached him he picked up a hammer and said to me: "Come" and then used the words to me: 'Fucking Kaffir fucking black.' Then he used the swearing words: 'Malebe kanyoko.' I then reprimanded him for that and I went back to the machine where I was working. I continued drilling. Then when I was busy working he went to the dustbin and picked up a sort of stick and he came back and hit me therewith. And then I picked up a washer from the floor and I sort of scared him away therewith. In that I did reprimand him as a child, I know even your child you first reprimand and then give him strong notice. I was not intending to hit him or injure him. I was just scaring him off and I believe that it can be seen by the type of washer I used, that I had no intention to injure him.

And a short while thereafter Roger appeared as well as the child's mother. Then the child's mother uttered words which she said, that a black man or black person has hit the child and then I gave her an explanation of what happened and I also give the same explanation to Roger. In that Roger appeared immediately after the incident, I have no reason to

go and report this matter anywhere else and that is all."

The Commissioner came to the following conclusion:

"It is common cause that Mr Visser [this is a reference to the 8 year old boy] was injured by Mr Gumbi. There is evidence, that although it was denied by Mr Visser, Mr Gumbi felt insulted by Mr Visser's reference to his mother's private parts. If Mr Visser did not make such a reference there would be no reason for Mr Gumbi to retaliate. In addition there is evidence that some objects were hurled by both of them. From this perspective, I am satisfied that on a balance of probabilities, Mr Gumbi felt provoked by Mr Visser. However, in the circumstances his reaction was disproportionate to the threat posed by Mr Visser an eight (8) year old boy. Assault is viewed as a serious violation of bodily integrity and frowned upon by the society. Employers are not expected to show any degree of tolerance towards such conduct. Assault is viewed as gross misconduct which could lead to summary dismissal. However, the presence or absence of mitigating circumstances in each individual case must be considered. One of the factors that should be taken into account is the assailant's state of mind. Provocation may diminish the assailant's guilt. I must determine whether Mr Gumbi was provoked to the degree that

he was justified to assault Mr Visser. South Africa has just managed to avert a civil war which could plunge this country into an abyss. Despite this racial hatred cultural insensitivity and hate speech are still in existence in every facet of the society. It is in this context that the provocation should be viewed. At the same time, sight should not be lost to the fact, that the victim was a child. There is no evidence that Mr Gumbi is inclined to violent behaviour. From this point of view, I am satisfied that Mr Gumbi is guilty of assault, but dismissal was inappropriate in the circumstances."

MLA complained that the award is reviewable and relies upon eight grounds of review. The first ground, is that the Commissioner failed to apply his mind to the material placed before him and failed to justify, alternatively rationally justify, why he accepted Mr Gumbi's version on the issue of alleged provocation to that of MLA, on a balance of probabilities. It is clear from Gerrit's own evidence that he allows for the possibility that Mr Gumbi thought he was swearing at him. In view of the admitted use of highly offensive swear words by Gerrit on this occasion, this admission is justified. The Commissioner finds that Mr Gumbi felt provoked. This finding 'I think' is a generous one.

The second and further ground of appeal are found in paragraphs 8.2 and 8.6 they read:

"8.2 The Commissioner failed to rationally justify his finding, that the dismissal was an inappropriate sanction, in view of the conclusions he reached as set out in paragraph 7.1, 7.2, 7.4 to 7.6 of the founding affidavit and in view of the material placed before him at the time.

8.6 The Commissioner exceeded his constitutionally granted powers, in that he interfered without justification with the reasonable response of the applicant at the time, to dismiss the fourth respondent in respect of the assault."

The Commissioner's finding, that dismissal was inappropriate, is in my view a justifiable decision. The incident was not of Mr Gumbi's own making. He was executing his tasks at the time. The assault was in the circumstances an understandable pardonable response to severe oral and provocation. This notwithstanding that Gerrit was young boy. I may point out that here too, the Commissioner may have been generous towards the employer, as regards the question whether Mr Gumbi intended to harm Gerrit. This was not investigated in any detail.

A Commissioner will not likely interfere in the sanction

imposed by an employer. In this case, the Commissioner was entitled to intervene, as the employer's sanction was disproportionate in the circumstances.

The next ground is set out in paragraph 8.3. It is said, the Commissioner contradicted himself in clauses 8 and 9 of his award, in view of the findings that he made, which were set out in paragraphs 7.1, 7.2, 7.4 and 7.6 of the founding affidavit. The Commissioner has not contradicted himself. He has properly taken into account the context in which the assault occurred.

The next ground is set out in paragraph 8.4. It is that the Commissioner misconducted himself and that used his personal racial perceptions to justify a finding against MLA. There is no merits in this. What is termed, the Commissioner's "personal racial perceptions", is a factual statement regarding the effects of racial intolerance. It is one which concerns every right thinking citizen in this country. It was entirely appropriate for the Commissioner to take this into account.

Lastly, it is said that the Commissioner failed to apply his mind to the interests of MLA, and the submissions made on its behalf, regarding the impact of the assault and the trust relationship between the parties. The Commissioner diligently

took into account considerations and factors which must be weighed in considering an appropriate sanction. These include:

- (a) The nature of the offence including its context.
- (b) The interests of the employer.
- (c) The interests of the employee; and
- (d) The interests of society at large.

The trust relationship was not MLA's cause of concern. It was not mentioned at the disciplinary enquiry. There is nothing to show that Mr Gumbi cannot be trusted. On the contrary, he has a good record. The incident is unlikely to repeat itself. Hopefully Gerrit will resist from playing his game, which he must by now know, is totally unacceptable.

There is no reason to interfere with the award. The application is dismissed.

SIGNED AND DATED AT BRAAMFONTEIN ON 5 JUNE 2003

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT: GUARDIAN EMPLOYER'S ORGANISATION