

Sneller Verbatim/ASS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J1213/2000

2000-02-05

In the matter between

STER KINEKOR (PROPRIETARY) LIMITED

Applicant

and

DAKA, KELVIN

1st Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

2nd Respondent

MOJAPELO, WJ NOMINE OFFICII

J U D G M E N T

Delivered on 9/02/2000

REVELAS J:

- 1.This is an application in terms of section 145 of the Labour Relations Act, 66 of 1995 ("the Act"). The applicant seeks to set aside an award made by the second respondent (the Arbitrator) made in favour of the first respondent, the erstwhile employee of the applicant.
- 2.The first respondent, Mr Daka, was found guilty and dismissed for the following charges of misconduct:
 - "1. Misrepresentation and withholding of important information regarding the insurance claim.
 2. Dishonest and not disclosing full details relating to the insurance claim, i.e. not disclosing that he was under the influence of liquor at the time of the accident and that he was arrested at the scene of

accident.

3. Breaking the trust relationship of Ster Kinekor by not providing all the facts and withholding of important information."

3.It is common cause that the first respondent after a function at work, drove home under the influence of liquor, caused an accident, was arrested at the scene and had his blood tested. A court date was set as he was to be criminally charged.

4.It is also common cause that the first respondent informed his supervisor, Mr Jagga, of the fact that he was under the influence of liquor when he made the accident. Mr Jagga advised him to complete an insurance claim form, titled "Accident Claim Form."

5.The first responded completed such a form. A question was posed on the form as to whether the person involved in the accident was subjected to drug or alcohol tests. The first respondent did not fill that portion in. Neither did he mention the fact that a court case was pending arising from the accident. However, what the first respondent did do was to fill in the case number issued in respect of the criminal court matter relating to the incident. He felt that since he did not have the outcome of his blood results yet, there was no duty on him to complete the form at that stage. He also felt that any enquiries could be made by reference to the case number.

6.The applicant is self-insured to the extent of R100 000,00. For any claims exceeding that amount, the applicant was covered by the insurance company in question.

7.The investigator of the insurance company notified the applicant that the first respondent did not complete the form in full. The Arbitrator found as follows regarding that aspect:

"According to the affidavit of Mr Jagga the finding of the chair person of the disciplinary hearing and the recorded evidence of the applicant, the same Monday after the incident,

informed Mr Jagga of the incident and the court case.

I do not hereby suggest that because the respondent was self insured there was no obligation on the part of the applicant to complete the claim form truthfully. It does, however, seem that the respondent employer was entitled to expect the truth from the applicant was indeed informed when applicant informed Mr Jagga of the accident as well as the pending court case.

Had applicant perhaps not indicated the case number of the accident report it would in my view possibly amount to a misrepresentation in the form of an omission to disclose the true facts. Even such a conclusion would be doubtful in view of the applicant's report to Jagga. However, with the case number applicant indicated contained all the required information an insurer would need including the facts of a pending possible prosecution.

I am satisfied having regard to the circumstances of this particular case, the report to Mr Jagga, the fact that the case number was indicated, the absence of an outside insurer and the knowledge by some senior officials that the applicant had been drinking that the dismissal is substantively unfair."

The first respondent was then reinstated by the Arbitrator.

8.The main complaint or ground of the view on behalf of the applicant is that the finding made by the third respondent or the Arbitrator is not supported by the facts as well as other incidents of irregular conduct by the third respondent as will appear from the founding affidavit.

9.Unfortunately despite the various efforts of the applicant no record was produced by the CCMA. The tapes could not be found and it appears that the commissioner kept no notes. There is thus no record. It would be difficult to establish without a record what irregularities alleged by the applicant occurred.

10.Furthermore the Arbitrator gave sound reasons as appears from his award for the conclusion he came to. Most of the facts on which he based his findings were common cause as it would appear from the award and the founding affidavit of the applicant.

11.In my view, the complaints of the applicant amount to no more than an

appeal. This is not a matter where dishonesty was conclusively proved in which case interference on review would be justified. In the circumstances there is no reason, particularly in the absence of a record why I should interfere in the award on review.

12.The application is dismissed with costs.

E. Revelas

nekor: Mr N Greyline

Daka: In person