



**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT DURBAN  
JUDGMENT**

Not Reportable

Case no: D1154/13

DESMOND EMMANUEL DEVRAJ

Applicant

And

UNITRANS PASSENGER (PTY) LTD t/a  
GREYHOUND COACH LINES

First Respondent

SOUTH AFRICAN ROAD PASSENGER  
BARGAINING COUNCIL

Second Respondent

DR HILDA GROBLER

Third Respondent

Heard: 02 December 2014

Delivered: 10 July 2015

Summary: Review of an award – applicant uttering a threat to inflict violence – threat serious to justify dismissal - piecemeal or a fragmented analysis of an award inappropriate – application dismissed.

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**JUDGMENT**

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Cele J

Introduction

[1] This application in terms of section 145 of the Labour Relations Act<sup>1</sup>

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<sup>1</sup> Act number 66 of 1995, hereafter referred to as the Act.

has been brought for an order in the following terms:

- (1) the arbitration award handed down by the third respondent under case no: RPNT 1613 dated 14 September 2013 and received by the applicant on 20 September 2013 is reviewed and set aside in terms of the provisions of section 145 of the Labour Relations Act ,66 of 1995.
- (2) That in the circumstances the applicant`s dismissal was unfair.
- (3) That the applicant is reinstated by the first respondent.

The first respondent opposed the review application in this matter.

#### Factual Background

- [2] The applicant was in the employ of the first respondent (employer) for a period of about 6 years as a Bus Driver in a transport industry. The first respondent was the owner of a fleet of luxurious buses some of which were used in the tourism industry. The first respondent had an arrangement with the Private Safaris to convey tourists to various destinations, including hotels where such tourists would be accommodated. One such Hotel was the Pine Lake Inn.
- [3] One employee, a Food Beverages Manager of Pine Lake Inn, was a lady known as Sally. For whatever reason and circumstance the applicant and Sally did not get along. The result was that the applicant could no longer be accommodated at Pine Lake Inn overnight as he brought in tourists. He used another Hotel across the road from Pine Lake Inn.
- [4] On 20 February 2013 the applicant was driving tourists to Pine Lake Inn for an overnight stay. He also needed to have accommodative. In his bus there was also a Tour Guider known as Alex. The applicant was advised by Alex that Sally had declined accommodation for the applicant in an arrangement that Alex had made with Sally on the previous day. The applicant, while still enroute to Pine Lake Inn, booked a telephone call to the inn and asked to speak to Sally. The

duty Manager Ms Charlene Minaar received that call and reported that Sally was not in at the time. The applicant asked to speak to the General Manager and was told that he was also not in.

- [5] The applicant that left a message for Sally with Ms Minaar, according to the applicant he said that:

"I am coming and I am going to f\*% bash her head in ".

- [6] According to Ms Minaar the applicant used an 'f' word but not freaken. Ms Minaar reported the matter to Mr Daniels of Pine Lake Inn who in turn telephoned Mr Koos of the first respondent. The first respondent immediately sent another bus driver to Pine Lake Inn to replace the applicant. Ms Minaar also conveyed the message to Sally and she overheard Sally making arrangements with High Tech Security to make available guards upon the arrival at the Inn of the applicant. The first respondent instructed the applicant to report at its offices. It then suspended him and charged him with misconduct which it described as:

"Placing the company's name into disrepute in that you threatened Sally from Pine Lake Inn telephonically over the secretary of Pine Lake Inn".

- [7] The internal disciplinary hearing was scheduled and it took place but none of the staff from Pine Lake Inn testified. The applicant was found to have committed the act of misconduct he was charged with. The first respondent dismissed him. He referred an unfair dismissal dispute for conciliation and when the dispute could not be resolved he referred it for arbitration. The third respondent was appointed to arbitrate the dispute. Various witnesses were called by the first respondent, including Ms Minaar. The applicant was the only witness to testify for his case.

- [8] The third respondent found that the applicant committed the misconduct proffered against him. She found also that the dismissal was procedurally and substantively fair and she dismissed his

application. Her chief findings may be summarised as follows hereunder.

### Chief findings

- She said that it made little difference whether the applicant had used the words “ he would knock/smash/bash Sally`s fucking or freaking head as both words, regardless of the aggressive content thereof were no more than adjectives.
- The applicant made two threats. The first was that he would attack her upon arrival at the hotel and the second spoke to the manner in which he would attack her. The threat suggested that he would physically harm her by beating her up. The Hotel took the threat seriously, hence the deployment of two extra security guards.
- While driving the tour bus the applicant represented the first respondent in that he was wearing first respondent's uniform and was carrying out its instructions in driving the tourists to Pine Lake Inn. His conduct was immediately associated with that of the first respondent. The applicant contravened the first respondent's code of conduct in that, while he was on duty, he behaved in an unprofessional manner or failed to in good faith and in the best interest of the employer. Thus his conduct had the potential, at the very least, to call into question the reputation of the employer.
- The understanding of the applicant that there was no relationship between the first respondent and Pine Lake Inn was fallacious. There was a link between the first respondent, Pine Lake Inn and the Tour Guide.
- There was no negative impact on the tourists being transported only because the first respondent intervened immediately and sent another driver to replace the applicant.
- The first respondent proved that the applicant brought the name of the company into disrepute.
- The applicant had threatened a Tour Guide before, even though he was not disciplined for it as the company accepted his explanation. He had a propensity for such misconduct.

- On procedural fairness, there was nothing to show that the internal chairperson deliberately excluded the applicant's witness from testifying. In any event that witness was not present when the incident in question took place. There was thus nothing to show that the dismissal was procedurally unfair.
- The sanction of dismissal was the only appropriate sanction in the circumstances.

Grounds for review.

- [9] The submission is that the award of the third respondent fell to be reviewed, set aside and corrected in that the third respondent committed a gross irregularity by making findings that were not rational and justifiable in relation to the evidence placed before her. It was hence not a decision a reasonable decision maker could have reached.
- [10] The third respondent was said to have erred by misinterpreting vital evidence and by employing flawed reasoning in making a determination of the matter. There was hence a defect in relation to the interpretation of evidence by the third respondent. The third respondent erred by making a finding that the first respondent provided a service to the Tour Operator known as Private Safaris in the same way that Pine Lake Inn Hotel provided an accommodation service.
- [11] It was contended that the Tour Operator was a customer of the first respondent. The Pine Lake Inn Hotel was a service provider providing an accommodation service to tourists, tour guides and drivers travelling on the coaches of the first respondent. The result was that it could therefore be said that the Tour Operator and the first respondent were customers of the Pine Lake Inn Hotel. The reasoning used by the third respondent that the first respondent would have been

prejudiced by the conduct of the applicant was therefore said to be flawed. The Pine Lake Inn Hotel was there to provide an accommodation service to its customers. The applicant, like the first respondent, was a customer and should have been treated with courtesy and respect by the staff of the Pine Lake Inn, said the submission.

[12] The applicant said that there was no negative impact on the tourists the applicant had transported to the Pine Lake Inn. The only negative effect was that the applicant was not provided with accommodation at the Pine Lake Inn. The submission was that the respondent did not sufficiently examine the entire context in which the incident had taken place. The third respondent did not consider the entire context specifically the concessions made by the chairperson of the disciplinary enquiry, *inter alia*, that:

- She was aware of the history between Sally and myself,
- That the issue remained unresolved
- That she considered the fact that Sally was a difficult person and that the applicant was very frustrated.

[13] It was also applicant's submission that the effect of the incident and/or his conduct was exaggerated by the third respondent. The applicant said that he did not misbehave on the premises of the Pine Lake Inn. Neither did he have any direct telephonic contact or direct confrontation with Sally on the day in question. He was further advised that it was trite that in accordance with the concept of progressive discipline, dismissal should only be imposed as a last measure in a series of penalties or in respect of serious misconduct which did not warrant progressive discipline. The third respondent was said to have erred by not taking into consideration in addition to the gravity of the misconduct, factors such as applicant's circumstances including length of service, previous disciplinary record and personal circumstances as those aspects were not dealt with in her award. The

applicant was advised that those factors ought to be considered and weighed up together to decide whether dismissal was justified, or whether a less severe sanction would be more appropriate. The third respondent was said to have erred by not furnishing any reasons for finding that the sanction of dismissal was the only appropriate sanction in the circumstances.

#### Opposition to the review application

[14] The submission by the first respondent was that a piecemeal or a fragmented analysis of an arbitrator's award as done by the applicant was inappropriate. The question was not whether each and every step along the way of the arbitrator coming to an overall conclusion was correct. The test is not process based. The test is rather outcome based. In other words, the question in final analysis was whether the overall outcome, in this case the conclusion that dismissal was an appropriate penalty, was one which a reasonable arbitrator could not have reached. The question was also not whether the arbitrator made factual errors. Even an error or errors along the way can on an overall conspectus result in a substantive outcome which is not unreasonable. It was submitted that the overall conclusion in this case, that the Applicant committed misconduct which was serious enough to justify dismissal, is not one which a reasonable arbitrator could not have reached.

[15] Individual submissions to answer to the issues raised by the applicant were then made.

#### Evidence

[16] It behoved the first respondent to prove the fairness of the applicant's dismissal. The Operations Manager Mr Maphumulo testified that the

employer relied almost entirely on referrals which came from hotels, and that if staff were allowed to threaten hotel staff it would be very difficult for the employer to get future jobs. He said that a professional driver of tourists while holding a public permit should not be threatening the public.

[17] The chairperson of internal hearing, Mr Royeppen said that the applicant had put the company's name into disrepute and that the employer's reputation was placed at risk. Mr Royeppen also admitted that Sally had been described as a headache and a difficult person to work with. Mr Nel, Manager of the first respondent, who also assisted with marketing, the operations side and dealt with clients, immediately reacted on the report of what the applicant had done, because he held the view that the company's name had been put in a very bad light and the situation had to be corrected urgently. When the general manager of the hotel telephoned Mr Nel, the Manager came across to Mr Nel as very upset. Mr Nel said that two of his drivers had problems with Sally, that the applicant did not resolve his issues with Sally, further that the employer addressed the issue with the hotel but that the hotel's policy was clear that it could decide who stayed overnight, and consequently drivers were booked in across the road. He said that efforts to reconcile the applicant and Sally were unsuccessful, and the applicant stayed elsewhere. Mr Nel said that the applicant threatened someone, a lady, in the work situation before, although the employer did not take formal action against the applicant at the time.

[18] The first respondent's version was that when the applicant uttered the threat, he was busy working as a bus driver, he was in the employer's bus, and was wearing the employer's uniform. There was evidence of a 3-way relationship between the employer, the hotel, and the tour operator. That money may not have been flowing directly between bus operator and hotel was irrelevant. The conduct was sufficiently work related, because as part of his work the applicant had to stop at that



particular hotel for the passengers to sleep over. Had it not been for the applicant's job, he would not have had any contact with Sally.

[19] The applicant admitted making the threatening remarks though of a different flavour and justified doing so, *inter alia*, by saying that:

- He never intended to carry such threat to fruition;
- He made the utterances out of frustration due to Sally's attitude towards him;
- Such utterances were not made direct to and there was no confrontation with Sally;
- He was not at the premises of the Hotel when he uttered them;
- While the first respondent knew out the negative attitude Sally had against him, it did nothing to resolve the issue;
- His conduct did not affect the relationship between the first respondent and the Tour Operator;
- The Pine Lake Inn was only a service provider and could not pull away any business. Instead it received business from the Tour Operator;
- There were strong mitigating factors justifying progressive discipline.

[20] The applicant admitted though that the employer would be affected should tour operators stop using its buses because of conduct of drivers.

### Evaluation

- [21] In these proceedings it needs to be determined whether the arbitration award of the third respondent is one that a reasonable decision maker could not issue<sup>2</sup>, in which case the review application would succeed.
- [22] The submission by the first respondent that a piecemeal or a fragmented analysis of an arbitrator's award as done by the applicant was inappropriate finds its base from the decision in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others*<sup>3</sup>. The question was not whether each and every step along the way of the arbitrator coming to an overall conclusion was correct. The test is not process based. The test is rather outcome based. In terms of the Gold Field Mining decision the Court should not dissect and investigate each step or statement or finding made in the arbitrator's award, but rather consider whether the final outcome was unreasonable.
- [23] At the arbitration hearing it remained common cause that the applicant made the threatening utterances. Sometime was spent on the exact words he used but it was never in dispute that whatever form they took, they were a threat. The applicant's version suggested that the threat was not as horrific as it was taken to be, thus mitigating the seriousness of the misconduct. The Commissioner had to and did make a finding on this issue. She found that the acceptance of either version did not change the threatening nature of the utterances. She was entitled to make this finding. This being a review application and not an appeal, the enquiry into the issue ends.
- [24] There never was evidence that the applicant made the utterances in a joke. In fact, the applicant admits that he was serious when he made these utterances. He said that he spoke out of frustration and he complained that the gripe between him and Sally was never properly dealt with officials of the first respondent or those of Pine Lake Inn. It

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<sup>2</sup> See *Sidumo and Another v Rustenburg Platinum Mines Limited and Others* [2007] 12 BLLR 1097 (CC); (2007) 28 ILJ 2405 (CC).

<sup>3</sup> (2014) 35 ILJ 943 (LAC) at paragraphs 14 to 21. See also *Herholdt v Nedbank* (2013) 34 ILJ 2795 (SCA) par 25.

could therefore not be an exaggeration for the staff at Pine Lake Inn and those of the first respondent to accord seriousness in his utterances. Accordingly he made a serious threat to Sally. The threat suggested nothing else other than that he would harm her physically. On arrival at the Inn two security guards were already waiting for him, in the event he wanted to carry the threat to fruition. When the Tour Guide told the applicant that Sally had declined accommodation for him there was nothing new which he was told of. He had no reason on that occasion to expect that he would sleep over at the Inn. He had an alternative accommodation waiting for him. He objectively had no reason to be frustrated. The threat was therefore unlawful for lack of justification, notwithstanding prevailing circumstances. The company disciplinary code provided dismissal for an unlawful threat.

[25] Alex, the Tour Guide, was around when the applicant made the threat. The applicant would have come across as a violent person to those he did not agree with. He therefore did not portray a positive image that an employee of the first respondent ought to have displayed to those the company was trading with. Alex could very easily suggest to his employer not to use the buses of the first respondent henceforth, so as to avoid exposing the tourists, on whom they also depended for their business, to violence. It is true that employees of the first respondent, such as Drivers, were hotel guests at Pine Lake Inn. For that reason, it remained the prerogative of the Hotel to decide who to give accommodation to, bearing in mind the interests of its other hotel guests.

[26] The result is simply that the conduct of the applicant could bring the first respondent's name into disrepute, a fact the applicant denied. A swift action by Mr Nel indeed minimised the seriousness of the misconduct from the eyes of its business clients. Any such clients would know that the first respondent does not tolerate violence and is swift in taking disciplinary measures to eradicate it. The applicant was

however not entitled to the benefit of the swift action by the first respondent. He was the very cause of it.

[27] The evidence of the first respondent is worthy of further consideration. Mr Nel said that two of his drivers had problems with Sally. Further that while the applicant's issue with Sally was not resolved, the employer addressed the issue with the hotel but that the hotel's policy was clear that it could decide who stayed overnight, and consequently drivers were booked in across the road. He said that because efforts to reconcile the applicant and Sally were unsuccessful, the applicant stayed elsewhere. Therefore the applicant was not the only employee of the first respondent at odds with Sally and there was a solution to address the drivers' accommodation.

[28] In the arbitration award, there is reference to the previous incident involving the applicant with a Tour Guide. The applicant was not disciplined for this incident as his version of events was upheld. This incident ought therefore not to have been a factor in aggravation of the sanction. However, the employer's disciplinary code and procedure allowed for dismissal for a first offence of threatening behaviour. His behaviour went beyond being a mere threat. It had the potential to cause disrepute to the company's name. The applicant continued denying that his utterances were serious, meaning he could repeat a similar misconduct. There appears to have been little sign of remorse during the arbitration.

[29] Bearing in mind all the foregoing considerations, I am unable to find that the third respondent's decision is one that a reasonable decision maker could not have arrived at, as contended by the applicant. Consequently, the following order stands to be issued:

1. The review application in this matter is dismissed.
2. No costs order is made.

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Cele J.  
Judge of Labour Court of South Africa.

Appearances

1. For the applicant: Advocate T V O Chetty.  
Instructed by Gerhard Grobbelaar Inc. Durban
2. For the first respondent: Advocate F van der Merwe.  
Instructed by Hana Geldmacher Attorneys, Bryanston.