IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN

OF INTEREST

CASE NO **D114/02**

DATE 2003/03/12

In the matter between:

ROBERT STEPHEN CUSTANCE Applicant

and

S A LOCAL GOVERNMENT BARGAINING COUNCIL & others Respondents

JUDGMENT DELIVERED BY THE HONOURABLE MS JUSTICE PILLAY

ON 12 MARCH 2003

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JUDGMENT 12 MARCH 2003

PILLAY J

[1] The third respondent in this review raised *in limine* the jurisdiction of the Court. The objection was founded on the following clause in the arbitration agreement:

"7. The Arbitrator's decision shall be final and binding on the parties and there shall be no recourse to any other tribunal, including the Commission for Conciliation, Mediation and Arbitration, or the Labour Court."

[2] Mr Chetty, for the applicant, misfocused his argument by contending, firstly, that the arbitration was not a private arbitration. In my view, the power of registered bargaining councils to provide dispute resolution services is derived from the Labour Relations Act No 66 of 1995 ("the LRA"). The conduct of the dispute resolution process is by agreement. Dispute resolution under the auspices of the bargaining council is therefore often referred to as semi-private processes.

[3] In this case Mr Chetty acknowledged that the bargaining council rules specifically provided for the application of the Arbitration Act No 42 of 1965. I find therefore that the Arbitration Act applied to this arbitration under consideration in this review and that it was a private arbitration.

[4] Secondly, Mr Chetty focused extensively on the wording and interpretation of clause 7 of the arbitration agreement. None of his submissions have any merit, and they therefore do not warrant repeating here.

[5] Thirdly, he submitted that clause 7 was in conflict with the bargaining council's rules which provided for the application of the Arbitration Act, which provides in turn for the review of arbitrations. It could therefore not have been the intention of the parties to oust the jurisdiction of the Labour Court, he submitted.

[6] Mr Chadwick for the third respondent conceded, when this matter resumed after a postponement to enable Mr Chetty to file heads of argument on the point *in limine,* that the agreement did not oust the jurisdiction of the Court altogether. However, the applicant would have to establish one or other ground of review set out in section 33(1) of the Arbitration Act. (*Amalgamated Clothing & Textile Workers Union of South Africa v Veldspun (Pty) Limited* 1994 (1) SA 162 (A); *PPC Cement, Beestekraal v Khunou & Others* (2000)

2 BLLR 153 (LAC); *Dickinson & Brown v Fishers Executors* 1915 (AD) 166 and *Donner v Ehrlich* 1928 (WLD) 159.)

[7] It is quite clear to me from the language of clause 7 that the parties intended to oust the jurisdiction of the Labour Court in all circumstances but those disallowed by law. It could not have been the intention of the parties to oust the jurisdiction of the Labour Court if the law did not permit it as that would have resulted in a nullity. The case law is firmly against giving effect to ouster clauses. (*Veldspun* and *PPC Cement* above.)

[8] In *Brisley v Drotsky* (2000) 12 BCLR 1229 (SCA), the Supreme Court of Appeal pointed out that the freedom to contract is limited by the requirement that contracts must be in accordance with public policy, which is determined by reference to the Constitution of the Republic of South Africa Act No 108 of 1996, ("the Constitution"). The Learned CAMERON J added that the concepts of *boni mores* and the Judges' notions of unjustness must yield to the objective values espoused in the Constitution.

[9] In exercising its equity jurisdiction in this case, the Court must also defer to the standards set in the Constitution. It would be against public policy to enforce an arbitration award that is reviewable on one or other grounds listed in the Arbitration Act. To deny a party jurisdiction in the Labour Court in those circumstances would be to deny it access to a forum, which is a fundamental constitutional right. It could perpetuate an unfair labour practice against which there is also a constitutional guarantee. As the party would have good cause to exercise the right of access, the denial of jurisdiction would be an unreasonable and unlawful limitation on the exercise of that right.

[10] The supremacy of the Constitution is further endorsed in the matter of *George v Western Cape Education Department* (1996) 2 BLLR 166 (IC), a case to which Mr Chetty referred.

[11] Whether the applicant has good cause to enjoy access to the Labour Court depends on the merits of the review. If the applicant does not succeed, then the award would be valid and enforceable. In that event, clause 7 would constitute a valid limitation of the Court's jurisdiction.

[12] I turn to consider whether the award is indeed reviewable in terms of the Arbitration Act which sets the standard agreed to by the parties for this review.

[13] The applicant was dismissed for assaulting a fellow employee and verbally abusing him by calling him a "kaffir". At the arbitration the applicant disputed *in limine* the third respondent's jurisdiction to conduct the inquiry as the incident occurred when the applicant was off duty.

[14] The Arbitrator found, after a detailed analysis of the facts, pages 132 to 135 of the record, that he had jurisdiction as,

> "The conduct of the applicant did impact materially on the employment relationship."

(*Hoechst (Pty) Limited v Chemical Workers Industrial Union & Another* (1993) 14 ILJ 1449 (LAC).)

[15] After this finding was made, the parties settled the dispute, and agreed that the terms of the settlement would become the award.

[16] The applicant was represented by his trade union, the Independent Municipal & Allied Trade Union ("IMATU") throughout the inquiry, the appeal and up to the stage of the arbitration. He refused to abide by the settlement and, through his attorney of record, requested that the procedural and substantive fairness of the dismissal be arbitrated.

[17] One of the grounds of review is that the Arbitrator committed an irregularity by issuing two awards. The submission is quite disingenuous since the applicant agreed, through his trade union, to the first award being issued, and specifically requested, through his attorney, for arbitration on the merits.

[18] Another ground of review was that the Arbitrator erred in finding that the disciplinary inquiry was procedurally fair, despite the fact that the presiding officer had advised the applicant's representative that there would be no need for evidence.

[19] The determination of the procedural fairness of the dismissal was not part of the arbitrator’s terms of reference.

Nevertheless, the Arbitrator found that the applicant had been given ample time to prepare a defence and be represented at the disciplinary hearing and an appeal which was substantial. Pages 20 and 21 of the transcript of the disciplinary inquiry to which the applicant referred in this review do not clearly evidence support for his submissions. Mr Chetty, in any event, conceded during argument that the applicant was not prevented from presenting any evidence that he wanted to at the disciplinary inquiry.

[20] He rejected the applicant's submission at the arbitration that the presiding officer did not consider the issue of jurisdiction. He found that the presiding officer was of the view that he had jurisdiction and continued with the case.

[21] The Arbitrator, in the circumstances, did not commit any irregularity in finding that the disciplinary inquiry was procedurally fair.

[22] The other grounds of procedural unfairness relate to the point *in limine* about jurisdiction of the third respondent to discipline the applicant (discussed above) and the sanction.

The latter is clearly a substantive issue and I will return to that later.

[22] The remaining grounds on which the applicant challenged the procedural fairness of the inquiry are entirely without merit. The award is also challenged on the basis that the Arbitrator found as a fact that the applicant mentioned at the appeal hearing that he had tapped the complainant and sworn at him. On the applicant's own version, this was an admission made by his representative on his behalf. The applicant's expectation that the making of the admission might earn him a lesser penalty was irrelevant to the Arbitrator's conclusion of fact.

[23] Nevertheless, the Arbitrator did not rely on the admissions exclusively. He examined in detail the evidence of the third respondent's witnesses and the applicant's own witness and concluded that the applicant committed the assault (pages 87 to 88 of the record) and did swear at the complainant, as alleged (pages 90 to 92 of the record). It was a credibility finding which the Arbitrator was better placed than this Court to make.

[24] At best, the applicant's admissions, if accepted, establish no more than that the Arbitrator erred in his conclusions of fact or inferences from facts. Such a mistake is not so gross as to amount to *mala fides* and warrant the setting aside of the award. (*Veldspun*.)

[25] Finally, the applicant contends that the penalty of dismissal was harsh. He accepted at the arbitration, however, that the assault of a cleaner by an off-duty lifeguard is unacceptable behaviour and that the employment relationship would be strained.

[26] Despite this concession, the Arbitrator nevertheless also considered the appropriateness of the penalty at length (pages 92 to 97 of the record), and concluded that there was a "complete break-down in the trust and employment relationship", and confirmed the dismissal.

[27] It is now trite that arbitrators should not interfere in the sanction imposed by an employer unless it is unreasonable. (*Toyota South Africa Motors (Pty) Limited v Radebe* (2000) 3

BLLR 243 (LAC).)

[28] In *Crown Chickens (Pty) Limited trading as Rocklands Poultry v Kapp & Others* (2002) 6 BLLR 493 (LAC), the Court found that calling a person "kaffir" was a dismissable offence. Mr Chetty submitted that the circumstances are distinguishable in this case. I accept that Kapp's conduct was more gross. However, in both cases the derogatory terms used manifest a deep-rooted racism which has no place in a democratic society. Whether the word was uttered on or off duty was immaterial as it is the attitude that persists which, when on duty, affects the employment relationship.

[29] Accordingly, I find that the award is not reviewable and the Court has no jurisdiction.

[30] The order I make is as follows:
The application is dismissed with costs.

Pillay D, J
Date: 16 May 2003

FOR APPLICANT: ATTORNEY THEYAGARAJ CHETTY,

THEYAGARAJ CHETTY ATTORNEYS

FOR RESPONDENT: ATTORNEY CHADWICK,
SHEPSTONE AND WYLIE