**IN THE LABOUR COURT OF SOUTH AFRICA**

**HELD ATJOHANNESBURG** CASE NO. J2544/00

In the matter between:-

**OERLIKON ELECTODES SOUTH AFRICA** Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** First Respondent

**PHALA, NO** Second Respondent

**NATIONAL UNION OF METAL WORKERS OF SA** Third Respondent

**THAVER, P**Fourth Respondent

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**JUDGMENT**

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MODISE A J

**Introduction**

1. This is an application brought in terms of section 145 of the Labour Relations Act 66 of 1995 ("the Act") for the review of an award made by the second Respondent ("the commissioner") under the auspices of the first respondent ("the CCMA").

2. The commissioner found that although he agreed with the applicant that the "infraction" committed by the fourth respondent had racial overtones the applicant's dismissal of the fourth respondent did not fit the offence and therefore the fourth respondent's dismissal was substantively unfair. He accordingly ordered the retrospective reinstatement of the fourth respondent from the date of his dismissal, being 9 February 1999.

3. The review application is opposed by the third and fourth respondents.

**The facts**

4. Prior to the fourth respondent's dismissal he was employed by the applicant as a laboratory technician for a period of ten years.

5. On or about 2 February 1999, the applicant's production superintendent, Mr Du Plessis, telephoned an independent electrician, Mr Hayden Heilman, to collect a hot plate from the applicant's laboratory for repairs. Mr Heilman duly collected the hot plate from the applicant's premises on the same day.

6. On 4 February 1999 Mr Heilman returned the repaired hot plate to the applicant's laboratory. When Mr Heilman arrived at the applicant's premises Mr Du Plessis accompanied him to the laboratory. As he and the fourth respondent were about to enter the laboratory, the baking operator, Lesley, called Mr Du Plessis to attend to a query. At that stage, Mr Du Plessis told Mr Heilman to proceed to the laboratory as he already knew where to find the stove. After attending to the query, Mr Du Plessis went to the laboratory and thereafter showed to the fourth respondent the

element and the wires. He told him that they had been repaired. Mr Heilman then asked the fourth respondent to remove the vials which were lying on the oven. Instead of removing the vials, the fourth respondent snatched the hot plate from Mr Heilman's hands and said "**the repair was a s_ _ _t job**". He continued to be abusive to Mr Heilman by saying **"f_ _ _dutchmen you f _ _ _d up the country"** He also said, **"there f_ _ _ ing whites think they can do anything they want in the company. This government has had enough of apartheid."**

7. At that stage, Mr Du Plesssis telephoned the technical manager, Mr Gould, to come to the laboratory. Mr Gould obliged. As he entered the laboratory he found Mr Heilman and the fourth respondent involved in a heated argument. Out of the blue the fourth respondent said, **"dutchmen" who think they could do as they please".** These words were said in Mr Gould's presence.

8. The fourth respondent testified that Mr Heilman racially abused him by calling him a "koelie".

9. After this incident the fourth respondent was charged with the use of abusive language.

10. A disciplinary enquiry was held on 5 February 1999. The fourth respondent was found guilty and dismissed

11. The fourth respondent appealed against the decision of the chairperson of the disciplinary enquiry. The appeal was dismissed.

12. Subsequent to the fourth respondent's dismissal, he invoked the statutory dispute resolution procedures. An arbitration hearing was

convened before the commissioner on 25 February 2000.

13. During the arbitration hearing, the applicant called three witnesses being Messrs Gould, Du Plessis and Heilman. The fourth respondent testified in his defence.

14. The applicant now seeks to review the commissioner's award against the retrospective reinstatement of the fourth respondent.

**Analysis of the evidence**

15. During cross-examination the fourth respondent conceded that he used the words attributed to him by Mr Du Plessis and Mr Heilman. However, he explained that he used the words attributed to him because he was extremely provoked by Mr Heilman. He first called Mr Heilman a "dutchmen" because he stormed into the laboratory and ordered him around without greeting him. He said that he was also provoked when Mr Heilman called him a "koelie".

16. During further cross-examination the fourth respondent explained that by "dutchmen" he meant that Mr Heilman was like all other white people in this country. He also conceded that the word "dutchmen" is indeed derogatory.

17. In argument, Mr Orr on behalf of the applicant submitted that during the fourth respondent's disciplinary enquiry at no stage did he testify that Mr Heilman called him a "koelie". Mr Cartwright on behalf of the fourth respondent referred me to the relevant portions of the record reflecting that the fourth respondent testified that Mr Heilman called him a "koelie".

18. It is not very clear from the fourth respondent's evidence why he called Mr Heilman and Mr Du Plessis "dutchmen" and white supremacist. His evidence appears to be contradictory in this regard.

19. On page 225 of the record, the applicant's representative during the disciplinary hearing, Mr Harris, put certain questions to the fourth respondent.

20. On page 18 of the record from paragraphs 10 to 15, the following questions and answers are recorded:

20.1 "And the only provocation that you can tell us about is that he did not greet you when he walked into the laboratory _ _ _. No, _ _ _ (inaudible) no he used the words fucking, remove the _ _ _ (inaudible) and then later on he said … (inaudible) fucking "koelie", you are labourers in this country. But not when he first walked in? _ _ _ No."

20.2 "So the thing that provoked you really was that he did not greet you _ _ _ Yes, that was _ _ _ (inaudible)."

20.3 On page 228 of the record from paragraphs 5 to 10, the following is stated:

"At what stage was "koelie" put to you _ _ _ Mr Heilman's first sentence to me _ _ _ (inaudible) to me was you fucking "koelies" were labourers?"

20.4 On page 231 of the record from paragraphs 5 to 10, the following is apparent:

"**You had a problem with the gentlemen because he did not greet you _ _ _ . That is right**".

21. It is also apparent from the transcript of the disciplinary hearing that the alleged use of the word "koelie" directed at the fourth respondent was used after the fourth respondent had called Mr Heilman and Mr Du Plessis "dutchmen" and white supremacists. However, during the arbitration hearing the fourth respondent testified that he used the words "dutchmen" and white supremacist in reaction to him being called a "koelie" by Mr Heilman.

22. It is common cause that during the disciplinary hearing the fourth respondent's representative did not put to any of the applicant's witnesses that the fourth respondent would testify that Mr Heilman called him a "koelie". In argument, Mr Cartwright submitted that it was unfair to expect a shop steward when representing employees at the CCMA to conduct himself as if he was counsel. Mr Cartwright also argued that the fact that the fourth respondent's representative did not put to the applicant's witnesses that he was called a "koelie" was of no consequence and that I should not place any weight on the shop stewards failure to put what the fourth respondent's version would be to the applicant's witnesses.

23. For the purposes of this judgment, I do not think it is necessary for

me to decide on Mr Cartwrights's submission referred to above. However, I find it very strange that if indeed Mr Hayden called the fourth respondent a "koelie", the shop steward representing him did not at any stage during the disciplinary hearing point out that Hayden called him a "koelie". One does not have to be a seasoned counsel or have a legal qualification to mention something which on the facts of this case could have possibly tilted the outcome of the dispute in the fourth respondent's favour. My view in this regard is further reinforced by the contradictions made by the fourth respondent regarding the use of the words "koelie" by Mr Hayden alluded to earlier in this judgment.

24. Mr Orr argued that if I were to find that Mr Heilman provoked the fourth respondent by calling him a "koelie" it was not open for me to find that Mr Du Plessis similarly provoked the fourth respondent because the fourth respondent did not accuse Mr Du Plessis of having called him a "koelie" and

that there was therefore no basis whatsoever on the part of the fourth respondent to have called Mr Du Plessis a white supremacist and a "dutchmen". I am of the view that there is merit in Mr Orr's submission in this regard. Although the words uttered by the fourth respondent would possibly not be regarded by some to be racist and offensive they are, when viewed holistically, abusive as contemplated by the applicant's disciplinary code and procedure discussed later in this judgment.

**Award**

25. In ordering the fourth respondent's retrospective reinstatement the commissioner found that the applicant acted in violation of its

disciplinary code and procedure and the Act and that he could not condone such conduct on the part of the applicant. He found that the penalty of dismissal as meted out by the applicant to the fourth respondent did not fit the offence.

26. In reaching this conclusion, the second respondent relied on a category of offences listed in the applicant's disciplinary code and procedure under "**attitudinal offences**". The applicant's disciplinary code and procedure provides for a written warning for a first offender in respect of "**the use of abusive and/or derogatory and/ or offensive language or signs**". In terms of the disciplinary code and procedure, a dismissal only kicks in after an employee has committed a third offence. In his award, the second respondent made much of the fact that the fourth respondent was a first offender and that the code of good practice reinforced the view adopted by this court that "**a dismissal should be reserved only for the gravest infractions and should be action of last resort**".

27. The head note in the case of SA Yster, Staal – & Verwante Nywerhede Unie & 'n Ander v Asea Electric SA (Pty) Ltd (1988) 9 ILJ 463 states the following:

"**The court found that, given De Beers' role in initiating the incident in question, the defence of provocation could not be sustained. With respect to the absence of a warning, the court concluded after an examination of the employer's code that the penalties set out therein were not inflexible and that the right to dismiss summarily in appropriate circumstances had been preserved by the employer. Given the racial context of the incident and certain other aggravating features, the court**

**decided that the decision to dismiss was reasonable and hence not an unfair labour practice."**

28. In County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (1999) 20 ILJ 1701 (LAC) at 1709 A – D Kroon JA said the following

"**The basis on which the arbitrator considered that the appellant had apparently felt itself constrained by the terms of its disciplinary code (which was in fact not produced at any stage) was, it would seem, founded on the evidence on behalf of the appellant that the third respondent was aware of the provisions of a disciplinary code negotiated by the appellant with a rival union, that in terms thereof a dismissal could follow after a first offence of assault and that the other employees found guilty of assault had been visited with the sanction of dismissal. Be that as it may, Mr Sutherland, correctly, did not seek to join issue with the approach of the arbitrator that the provisions of a disciplinary code are no more than a guide; each case would be governed by its own merits. Implicit in counsel's argument, however, was the contention that the comment that the appellant had apparently felt itself constrained by the terms of its disciplinary code was not justifiable.** …."

29. It was submitted on behalf of the applicant that the suggested penalties contained in the third respondent's disciplinary code and procedures are guidelines and nothing more. This submission seems to find support in the third respondent's disciplinary code and procedure.

30. The applicant's disciplinary code and procedure under the heading disciplinary action provides the following:

"**As a general rule the offences as set out will normally incur a verbal or written warning but in certain circumstances and depending upon the gravity of the offense this may lead to summary dismissal in terms of level four of the disciplinary procedure.**"

31. In my view, a disciplinary code and procedure was never intended to be applied and followed slavishly by an employer. Each case has to be decided on its facts and circumstances regarding the imposition of the appropriate sanction.

**Racism**

32. Mr Orr argued that the applicant dismissed the fourth respondent for the use of abusive, racist and derogatory language directed at Mr Du Plessis and Mr Heilman in the presence of a superior, Mr Gould. He also pointed out that the fourth respondent conceded having repeatedly used the following words:

"**S_ _ _t job", "dutchmen" and that the days of white supremacy are over and that we live in a new South Africa**."

33. During cross-examination the fourth respondent explained that by "dutchmen" he meant that Mr Heilman was like all other white people in South Africa and that he used these words notwithstanding the fact that they are derogatory.

34. Mr Cartwright submitted that the words white supremacist do not have the same historical significance as the word "kaffir". He further

submitted that although a white person may be offended when called a white supremacist the "emotional and psychological effect" evoked by such words would not have the same impact of calling a black person a "kaffir". Although there is an element of truth in Mr Cartwright's submission in this regard. However, I am unable to dismiss Mr Orr's submission that Mr Cartwright's submission amounts to urging me to enter into some "_ _ _ sociological enquiry" which I believe to be unnecessary for the purposes of this judgment.

35. In Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others (2002) 6 BLLR 493 (LAC) the court had occasion to pronounce on racism in the work place. At pages 504-505 A-B Zondo JP said:

**"The attitude of those who refer to, or call, African "Kaffirs" is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country – black and white – who are committed to the values of human dignity, equality, and freedom that now form the foundation of our society. In this regard the courts must play their proper role and play it with conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will "give expression to the legitimate feelings of outrage" and revulsion that reasonable members of our society – black and white – should have when acts of racism are perpetrated**".

36. At page 509 E – F the Crown Chickens judgment Nicholson JA endorsed the sentiments expressed by Zondo JP when he said:

"**It was never contended that the use of racist epithets in question should not be visited by the sanction of dismissal. Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question. _ _ _".**

37. The Labour Appeal Court came out very strongly and unambiguously that any use of racist epithets in the new South Africa should lead to the dismissal of employees who are found to be guilty of such conduct. I respectfully agree with and adopt, what Zondo J P and Nicholson J A said in this regard in the Crown Chicken case.

**Sanction**

38. The second respondent found the fourth respondent's dismissal to be substantively unfair and ordered that he be reinstated with retrospective effect. Mr Orr attacked the reinstatement of the fourth respondent on the basis that the second applicant could not have ordered such reinstatement without having considered what unique circumstances if any were present to warrant a sanction other than a dismissal and that he instead irrationally and inexplicably proceeded to set aside the fourth respondent's dismissal. He also argued that it was clear from the Crown Chickens' case that it was only in the most exceptional circumstances that acts of racism may not be visited with a sanction of dismissal.

39. Our Courts have had occasion to consider circumstances upon

which the commissioners would be entitled to interfere with a sanction of dismissal imposed by an employer. Generally, the Labour Appeal Court has found that a commissioner should show deference to the disciplinary sanction imposed by an employer.

40. In County Fair Foods (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration (1999) 20 ILJ 1701 (LAC) at 1712-1713 A-B Ngcobo AJP said the following:

"**Given the finality of the awards and the limited power of the Labour Court to interfere with the awards, commissioners must approach their function with caution. They must bear in mind that their awards are final. There is no appeal against their awards. In particular, commissioners must exercise greater caution when they consider the fairness of the sanction imposed by an employer. They should not interfere with the sanction merely because they do not like it. There must be a measure of deference to the sanction imposed by the employer subject to the requirement that the sanction imposed by the employer must be fair. Rationale for this is that it is primarily the function of the employer to decide upon the proper sanction**."

41. At 1712 D – E in the same judgment, Ngcobo AJP continued to say:

"**In my view there is no reason, both in principle and logic, why the approach set out above should not be applicable to commissioners, who are called upon to consider the fairness of the sanction imposed by employers. The fact that the**

**proceedings before the commissioner take the form of a hearing de novo, matters not. Where an employer, upon investigation, has acted fairly in imposing the sanction, the commissioner should not disturb it. The mere fact that the commissioner may have imposed a somewhat different sanction or a somewhat more severe sanction that the employer would have, is no justification for interference by the commissioner. The minds of equally reasonable people differ**".

42. Mr Orr further submitted that the second respondent's award was not rational in the sense of him not having applied his mind seriously to the case and his reasoning was flawed in arriving at the conclusion that the fourth respondent's dismissal was substantively unfair. It was also argued that the second respondent's finding that the applicant's disciplinary code and procedure did not comply with the code of good practice was without substance.

43. I agree with the submissions made by Mr Orr that the second respondent did not properly reason his way out by arriving at the conclusion that the applicant's dismissal of the fourth respondent was substantively unfair. I do so for the following reasons:

43.1 By failing to appreciate the fact that the proposed penalties set out in the applicant's disciplinary code and procedure and in particular, the penalty relating to the use of abusive language is only a guideline and that in appropriate circumstances such as in this case even though the fourth respondent was a first offender the sanction of dismissal imposed by the applicant was not unfair;

43.2 Notwithstanding the second respondent's finding as well as Mr Cartwright concession that the words used by the fourth respondent were abusive and had racial overtones, the second applicant found the fourth respondent's dismissal to have been substantively fair because of the "**cavalier fashion**" with which the applicant applied discipline.

43.3 The second respondent improperly and unjustifiably interfered with the sanction of dismissal imposed by the applicant when it was not open for him to do so on the facts of this case;

44. In my view, no purpose would be served in remitting the matter to the first respondent to be considered by another commissioner. The second respondent should have upheld the dismissal on the grounds that there was good reason to terminate the fourth respondent's employment.

45. In the result I make the following order:

45.1 The award of the second respondent is set aside.

45.1.1 The dispute between the applicant and the third respondent is to be determined as follows:

(a) The dismissal of the fourth respondent by the applicant is declared to have been for a fair reason;

(b) The third and fourth respondents are ordered to pay the applicant costs jointly and severally the one paying the

other to be absolved.

**L MODISE**

ON BEHALF OF THE APPLICANT MR C ORR

INSTRUCTED BY
WEBBER WENTZEL
BOWENS

ON BEHALF OF THE THIRD AND FOURTH
RESPONDENTS NUMSA

MR D O CARTWRIGHT

DATE OF HEARING 21ST NOVEMBER 2002

DATE OF JUDGMENT JULY 2003