IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C822/05

In the matter between:

A P L CARTONS (PTY) LIMITED Applicant

and

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION 1st Respondent

THE COMMISSIONER 2nd Respondent

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**JUDGMENT**

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**NEL, AJ**

This is an application to review and have set aside the award of the second respondent, the Commissioner, who operated under the auspices of the first respondent, the CCMA. The award was given under case number WE3722/05.

It would appear that apart from the fact that there were attacks by the employee at the time on the procedural fairness of the employer's conduct, the Commissioner dealt with all these including also a proposition that the employer had acted inconsistently as well as that there was bias on the side of

management. The conclusion of the Commissioner was to the contrary, namely that there was not any procedural deficiency or defect in the dismissal of the employee.

What was in issue herein was the employee had been charged with being drunk or under the influence of alcohol on 3 December 2004, and for displaying insulting behaviour. It would appear that he pleaded guilty on both these offences at the disciplinary enquiry and that he sanction that was imposed by the employer was that a final written warning was issued for the two charges, effective for six months, on condition that the employee apologised to the staff at the first floor meeting and also was to give a written apology to the staff who could not attend the first floor meeting. It was a further condition that he should offer Mr Greeff a personal apology. Mr Greeff is the employer's Managing Director.

The Commissioner in essence came to the conclusion that this aforementioned sanction was too harsh, and it is in fact so headed in her award, that she commences with the reasoning towards this conclusion, as I said with the heading: "The sanction was too harsh."

In the matter of Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA and Others [2006] 11 BLLR 1021 (SCA), his lordship, Mr Justice Cameron has again dealt with the approach

which Commissioners and this Court should adopt in dealing with sanctions imposed by employers. It is quite clear from this judgment that in the first instance Commissioners should treat the sanctions imposed by an employer with a degree of deference. It is further clear that such deference is subject to the requirement that the sanction imposed by the employer must be fair.

In dealing with this aspect, a further guidance one finds is contained at paragraph 42 of the Rustenburg Platinum Mine judgment where at E his lordship Cameron JA quoted clearly, with approval, from the judgment of Ngcobo AJP, as he then was, from County Fair Foods (Pty) Limited v CCMA (1999) 20 ILJ 1710 (LAC):

> "In my view, interference with a sanction imposed by the employer is only justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. This would be the case for example where the sanction is so excessive as to shock one's sense of fairness. In such a case the Commissioner has a duty to interfere."

Of course what is further made clear in Rustenburg Platinum Mines case (supra) is that a Commissioner is to consider whether the dismissal was an appropriate sanction as opposed to whether it was the appropriate sanction. It was further made clear that

appropriateness of the sanction necessarily implied a range of responses, and then one sees that Cameron JA made it clear (at para [46]):

> "....The use of 'fairness' in everyday language reflects this. We may describe a decision as 'very fair' (when we mean that it was generous to the offender); or
> 'More than fair' (when we mean that it was lenient);
> or we may say that it was 'tough but fair', or even 'severe, but fair' (meaning that while one's own decisional response might have been different, it is not possible to brand the actual response unfair). It is in this latter category, particularly, that the CCMA Commissioners must exercise great caution in evaluating decisions to dismiss. The mere fact that a CCMA Commissioner may have imposed a different sanction does not justify concluding that the sanction was unfair. Commissioners must bear in mind that fairness is a relative concept and that employer's should be permitted leeway in determining a fair sanction."

Clearly Commissioners are still entitled to interfere with the sanction imposed by an employer, but it is equally clear that this must happen on the clear evidence that the sanction was so disproportionate, so harsh, that it induced a sense of shock. It is

not simply a matter of a Commissioner assessing whether he or she would have imposed a different sanction.

In the present matter the Commissioner reasoned her way through to her end conclusion. In this process of the Commissioner's reasoning, a number of disturbing reasons are put forward by the Commissioner. I will deal with what I found to have been disturbing about it, but perhaps of more relevance is the fact that it is very clear to the reader of the Commissioner's judgment that this is par excellence an example of a Commissioner imposing his or her own sense of what may be fair instead of having approached the matter in the proper manner of assessing whether the sanction fell within the range of permissible sanctions.

In the first instance I refer to the fact that the Commissioner, on her way to reasoning, and this is as I have stated in the beginning under the heading "The sanction was too fair" and one finds the following included in the reasoning of the Commissioner, and this is now obviously with reference to the fact that this was a prize giving end of year function and the Commissioner states the following about this event:

> "It can be expected on these occasions, given that it is an end of year function, a Friday, and that some staff working night duty only have to report for duty again the

following Monday, that some of the employees would attend the event whilst under the influence of alcohol. The offence of being under the influence cannot be considered with the same seriousness as when an employee reports for duty whilst under the influence."

One sees just preceding this comment of the Commissioner that she was alert to the fact that the event was meant to be a social occasion, and I quote again from the award:

"Where staff would receive prizes, eat and drink non-alcoholic drinks."

It is rather disturbing that the yardstick applied by the Commissioner herein is that one can expect that on occasions such as these that employees may arrive whilst under the influence of alcohol. The Commissioner then proceeds to indicate:

"The applicant behaved, even by his own admission, in an insolent and unruly fashion. His comments whilst Mr Greeff was making a speech was unbecoming and disruptive. It was obviously also embarrassing and undermining the authority of the management."

From this what I believe to be a correct summation of how serious the misconduct of which the employee was found guilty, in fact on which he had pleaded guilty, one sees the further reasoning in support of the conclusion that the sanction was too harsh, and I again quote:

> "However, the respondent could not have considered it so serious since the applicant was given a final written warning for his insolence subject to an apology. The effect of the applicant's insolent behaviour can also not be regarded as sabotaging the management authority, thereby causing an irretrievable breakdown of the employment relationship or substantially harming management control in the eyes of other employees. The applicant misbehaved at a function where such behaviour was not unknown to ordinary people in general. He reformed himself immediately by ceasing his disorderly behaviour when requested by Mr Greeff to do so. He rejoined the celebrations inside when requested by management, participated fully in the events following such as receiving a prize himself, seated himself as expected by all the other staff members and enjoyed the meal the respondent provided."

Again one sees that part of the reasoning of the Commissioner is, and I quote again:

> "The applicant misbehaved at a function where such behaviour was not unknown to ordinary people in general."

Obviously a picture is unfolding of the standard which the Commissioner subjectively set herein. Again, as I indicated, more of relevance is that it is patently clear that the Commissioner approached this matter on a basis exactly as she in the end concluded, that in her view, and her view must be now seen against the background of what she believes it would appear to be quite accepted conduct at occasions such as this, and mainly I must therefore accept that the Commissioner was of the view that for employees to arrive and, to put it blatantly, drunk at an occasion such as this, it would appear is quite okay. It would appear that the Commissioner further is of the view that if people misbehaved at a function where ordinary people in general are, that also would appear to be okay. I tend to disagree in the strongest terms possible. It is possibly because of this kind of lackadaisical attitude that our country is where it is relating to crime, because we need to perhaps revert to a minimum, in fact a zero level of tolerance of this kind of conduct. But anyway, as I said, let us

continue to see how the Commissioner reasons herself through to her conclusion.

Then the Commissioner says the following, in support of her conclusion that it was too harsh:

> "The apology the applicant had to offer was a sanction completely out of proportion to the offence committed. The apology to Mr Greeff was certainly due, but an apology to 300 people, both orally and in writing, was inappropriate and unbecoming, smacking of harshness and intentional violation of the applicant's dignity and integrity. The sanction would not have been corrective but rather excessively punitive. It would not have served the purpose of reforming the applicant, nor of restoring the employment relationship."

This again is, I believe, the kind of reasoning which employers justifiably can then conclude that they are damned if they do and they are damned if they do not. In this instance the employer, clearly believing and unquestionably stating so, that the misconduct was of a very serious nature, felt that the suspensive condition that the dismissal will not take effect under these stated conditions was fair. The Commissioner however believed, as I have just said, that the imposition of getting the employee to

apologise, that it would have been fine if he did so to Mr Greeff, but it was completely excessive if he must do so to the 300 people.

Now of course one sees that the Commissioner was perfectly alive to the fact that most of these employees, making up the 300 people, attended the prize giving. It was in front of those people that the employee conducted himself in what was clearly confirmed by the Commissioner to have been very serious misconduct. And then in the last instance the Commissioner dealt with the circumstances surrounding the explanation given by the employee why he could not apologise at the first floor meeting and the reasoning that one finds there from the Commissioner. This unfortunately I am not in a position to assess by reason of the fact that the record before me is incomplete.

However, it is certainly apparent what the reasons were which formed part of the Commissioner's conclusion as to why she therefore in the end found:

> "That the dismissal was such an inappropriate sanction that it was considered excessive, unfair, unreasonable and induced a sense of shock."

I am of the view that her reasoning is so flawed in driving her to this conclusion that it renders the conclusion which she reached reviewable.

I believe that the Commissioner applied a subjective mind to the sanction before her. I believe that in doing so not only did she approach the matter in the wrong manner, but as I have indicated a moment ago, her reasoning is faulty to such an extent that it renders the conclusion to which she was driven not justifiable and in fact, I believe, rather irrational. I am satisfied that the applicant has made out a case to review and set aside the award.

Mr Steltzner has correctly suggested to me that the matter should be referred back, particularly in light of the fact that there is too much uncertainty surrounding the explanation tendered by the employee for not having given the apology as I said at the first floor meeting. I do believe that that is a sufficiently important aspect to first be clarified and a decision to be arrived on that aspect for another Commissioner to apply his or her mind to this matter and come to a fresh decision.

The application was not opposed and accordingly the applicant does not seek an order for costs. The order that the Court accordingly makes is the following:

1) The award of the second respondent under first respondent's case number WE3722/05 is reviewed and set aside.

2) The matter is referred back to the first respondent to be heard afresh by a Commissioner other than the second respondent.

3) No order is made as to costs.

DEON NEL

ACTING JUDGE OF THE LABOUR COURT