**IN THE LABOUR COURT OF SOUTH AFRICA**

**(CAPE TOWN)**

CASE NUMBER: C359/2014

DATE: 28 OCTOBER 2014

In the matter between:

**DISTELL LIMITED** Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION** 1st Respondent

**SH CHRISTIE N.O.** 2nd Respondent

**JEFFERSON BAILEY** 3rd Respondent

**CANDICE MALLOY** 4th Respondent

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**J U D G M E N T**

**STEENKAMP, J**:

This is an application for review arising from the arbitration award of Commissioner Sarah Christie of 17 April 2013. The two employees involved, Mr Bailey and Ms Malloy, were dismissed after a regrettable and serious incident where an email between them was inadvertently copied to a line manager, Mr Pape, with vulgar content referring to him sucking

a fellow employee's dick. An investigation was instituted by the company, Distell, and further offensive emails were uncovered, including one where Malloy made reference to a fellow employee as a "darkie".

It is common cause that that email was not sent to the employee in question. In fact, it appears that the employee, who is unnamed, was not aware of it. Both employees, ie Malloy and Bailey, were dismissed after a disciplinary hearing where Malloy 'pleaded guilty' to misconduct but not gross misconduct. They referred an unfair dismissal dispute to the CCMA. The arbitrator agreed that the two employees did commit misconduct. However, she found that the sanction of dismissal was too harsh. She substituted that sanction with one of a final written warning valid for 12 months.

The review therefore goes squarely to the question of whether that conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have reached the same conclusion, i.e. the test set out in Sidumo v Rustenburg Platinum Mines 2008 (2) SA 24 (CC). The applicant's legal representative initially in his heads of argument relied on Southern Sun Hotel Interests v CCMA [2009] 11 BLLR 1128 (LC) and a number of other judgments that referred to so-called 'process related irregularities' or 'dialectical

unreasonableness.' Mr *Ellis* quite properly conceded in his oral argument today that that is no longer good law, following the judgments of the higher courts in *Herholdt* and *Goldfields*. In *Herholdt v Nedbank* 2013 (6) SA 224 (SCA) that Court summarised the current position as follows:

> "In summary, the position regarding the review of CCMA awards is this: a review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in section 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact as well as the weight and relevance to be attached to particular facts are not in and of themselves sufficient for an award to be set aside but are only of any consequence if their effect is to render the outcome unreasonable."

Although a number of grounds of review are raised, Mr *Ellis* confined his argument today to two broad themes. The first is that the commissioner acted unreasonably in reinstating the two employees in circumstances where, on his argument, there had been a breakdown of trust; and the second goes to her distinguishing the case law relating to racially offensive epithets to the facts of this case.

As to the first argument, the arbitrator deals with it in these terms after having found that a lesser sanction of a final written warning ought to have been imposed. She says:

> "Their behaviour was inappropriate but there is insufficient basis for concluding that continued employment would be intolerable. I think that some firm disciplinary measure would have ensured that this behaviour would never be repeated. I do not think the behaviour warranted dismissal let alone summary dismissal and I conclude the dismissals were substantively unfair.
>
> They seek reinstatement, the primary remedy for unfair dismissal. An arbitrator must direct the employer to reinstate or re-employ, unless 'a continued employment relationship would be

> intolerable or it is not reasonably practicable'.
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> The employer argues that reinstatement would be intolerable and bases this on the view of the managers Pape and Venter. An employer who resists an order of reinstatement must show on a balance of probabilities that there are no reasonable prospects of a good working relationship being restored. It has not done so. I would have concluded otherwise if this were, say, a small family-owned business or the applicants were senior employees. I do not think there is a basis for concluding that reinstatement would cause significant disruption in the workplace. I accept that it is reasonable for Pape and Venter to subjectively conclude that they would not be able to work with either of the applicants and the respondent [i.e. Distell] should accommodate their legitimate concerns, but I am not persuaded that reinstatement would be intolerable for the respondent [i.e. Distell].".

As Mr *Brink* pointed out in his oral argument, that conclusion is related to the question of onus. The arbitrator not only reasonably, but correctly, finds that the employer had the onus to show that a continued employment relationship would be

intolerable. In this case, commendably, the parties agreed to a stated case rather than leading lengthy evidence on facts that were common cause. In that context, where both parties were very competently legally represented, Mr *Ellis,* for the employer, stated the following:

> "That left me with fairly obvious pieces of evidence that had to be led, specifically from the line managers involved. If I understand Mr Brink correctly he is prepared to accept that those witnesses will come and testify that having seen these statements and what has been written in respect of [the line managers], that they were shocked and they would not be able to work with these individuals going forward."

The employees' counsel then clarified that they would argue that whatever the line managers' subjective feelings may have been, they were not objectively reasonable in the circumstances.

On the evidence properly presented to her by the legal representatives of both parties, the arbitrator then came to the conclusion that the two line managers subjectively concluded that they would not be able to work with either of the

employees and she finds that that was reasonable. However, her further finding is that the company, Distell, had not shown that it would be intolerable to reinstate the two employees. That is not, on the evidence before her, such an unreasonable finding that no other arbitrator could have reached it. It is at the very least within a range of reasonable outcomes and therefore not reviewable.

I turn then to the more difficult and contentious question of the use of racial epithets. It need hardly be said that in our country with its racist apartheid history the use of derogatory racial epithets in the workplace or anywhere else is entirely unacceptable.

That much has been held in a number of cases, some of which has been cited in this Court and before the arbitrator. The arbitrator distinguishes those cases in the context of the facts of this case. It is common cause that only one of the employees, that is Malloy, used the word “darkie” and that that term was not aimed directly at another employee and did not come to the attention of that employee. The arbitrator concludes that it is distinguishable from Finca v Old Mutual (2006) 27 *ILJ* 1204 (LC) and Crown Chickens (Pty) Limited t/a Rocklands Poultry v Kapp (2002) 23 *ILJ* 863 (LAC) on which the employer placed reliance.

As the arbitrator points out, in Finca an employee of Old Mutual uttered the words, "*hoekom sit jy my langsaan die kaffers*?" This was later communicated to Finca by a black colleague. In Crown Chickens the facts were even more egregious. The employee was injured at work and a supervisor uttered the deploringly offensive words, "*los die kaffer, laat hom vrek*" -- thus not only using the racist term but equating the person with an animal.

In Crown Chickens Zondo JP, as he then was, dealt at length with the history of racial abuse in South Africa, citing a number of cases where people had been abused because of their race and in each of those cases he expressly referred to the use of that offensive term, i.e. the "K" word, and he says at paragraph [36]:

> "The attitude that manifests itself in certain whites calling or referring to Africans as "*kaffers*" is a disgracefully racist attitude that comes from those who think that they or whites or better human beings than black people".

And in paragraph [37]:

> "The attitude of those we refer to or call Africans "*kaffers*" 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 a foundation of our society."

As the arbitrator points out, those cases dealt specifically with the use of that term, probably the most offensive racist term in the history of our country. She comes to the conclusion that that word is more offensive than the word "darkie", even though it constitutes a racial slur. However, that is not where it ends. More significant, she points out, is the fact that none of the offensive language was intended to be communicated. She also took into account the employees' remorse and their willingness to submit to a lesser sanction of a final written warning, as well as the principle that our law promotes progressive discipline. It is in that context that she finds that dismissal was too harsh a sanction.

Is that conclusion so unreasonable that no arbitrator could have come to the same conclusion? The answer to that must be no. This Court may have found otherwise. Sitting as an

arbitrator I may well have found that dismissal was a fair sanction. Another arbitrator could also have found that, but that does not mean that this finding is so unreasonable that no other arbitrator could have come to the same conclusion.

Before I deal with the test in Goldfields, I will just deal with the criticism that the arbitrator referred to the IT policy instead of the disciplinary policy. Although Mr *Ellis* did not argue it orally it is still in his heads of argument, and I will not presume that he has abandoned it. Of course, in finding that the employees had breached the IT policy, the arbitrator then had to decide whether progressive discipline was appropriate, and she found that it was. That does not make the award reviewable. In fact, that approach to review applications – in finely picking apart the reference to the "IT policy" instead of the "disciplinary policy" -- is exactly what the Labour Appeal Court per Davis, JA has warned against in *Ellerine Holdings Ltd v CCMA & others*[1]*:*

> "[A] court must be careful to parse an award by [an arbitrator] in the same fashion as one would an elegant judgment of the Supreme Court of Appeal or the Constitutional Court. These awards must be read for what they are, awards made by arbitrators who are not judges. When all of the evidence is taken into account, when there is no irregularity of a material kind in that evidence was ignored, or improperly rejected, or where there was not a full opportunity for an examination of all aspects of the case, then there is no gross irregularity..."

[1] [2008] JOL 2287 (LAC) p 13.

In fact, as the SCA said in Herholdt, the aim is to look at the award in the round and then to decide whether the conclusion was one that a reasonable arbitrator could reach.

The test on review was summed up by the Labour Appeal Court in *Goldfields*. The questions that this Court must ask are the following:

> (1) "In terms of her duty to deal with the matter with the minimum of formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute?"

In this case, that is exactly what the arbitrator did. The parties, both of them represented by competent and experienced legal practitioners, decided to present evidence and submissions in writing and she used that process as she was requested to do.

The second question is:

> "(2) Did the arbitrator identify the dispute she was required to arbitrate?"

Again the answer is yes.

> "(3) Did the arbitrator understand the nature of the dispute she was required to arbitrate?"

The answer is yes; and she discussed and carefully went through all aspects of this dispute.

> "(4) Did she deal with the substantial merits of the dispute?"

The answer is again yes. She dealt with the substantial merits of the dispute carefully. She looked at the facts that were presented to her, she carefully considered the case law that was presented by the employer and she set out full reasons why the facts of this case were distinguishable. In fact, the award is a model of careful and lucid reasoning.

> "(5) Is the arbitrator's decision one that another decision maker could reach and therefore arrived at based on the evidence?"

This is invariably the catch-all phrase that encompasses the final question, having looked at the evidence in the round. As I have said, although another arbitrator may conceivably have

come to a different conclusion, the conclusion that this arbitrator arrived at based on the evidence before her that she considered carefully; based on the case law before her that she considered carefully; and the circumstances of the case, is a conclusion that she could reasonably have arrived at.

That leaves the question of costs. The two employees, with an arbitration award in their favour, have been brought to court at the instance of the employer. They have had to incur costs in instructing legal representatives. This is one of those applications that should not have been brought. It makes the mistake of blurring the lines between appeal and review. It should have been clear from the outset that although the award, had it been a matter that could have gone on appeal, may have had prospects of success on appeal, on review the converse is the case. There is no reason why the employees should be out of pocket.

**THE APPLICATION IS DISMISSED WITH COSTS**.

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**STEENKAMP, J**

APPEARANCES:

APPLICANT: E Ellis

of Edward Nathan Sonnenbergs.

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THIRD AND FOURTH RESPONDENTS: A A Brink

Instructed by: Anton Buirski.