

IN THE LABOUR COURT OF SOUTH AFRICAHELD AT DURBANCASE NO : D369/07

In the matter between:

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**SWARTLAND BOUDIENSTE (PTY) LTD**APPLICANT

and

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**THE COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION**FIRST RESPONDENT**LOUIS EPSTEEN N.O**SECOND RESPONDENT

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**DEUANLALL RAMBRIDGE**THIRD RESPONDENT

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JUDGMENT1 July 2008

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PILLEMER, AJ This matter comes on review from the CCMA. The applicant is the employer, the third respondent the employee and the second respondent the CCMA Commissioner whose award is being challenged. The employee challenged the fairness of his dismissal and the matter was referred for arbitration before the second respondent. Second Respondent found the dismissal to be substantively and procedurally unfair and awarded

25 reinstatement.

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The evidence in the CCMA ran some two days and has been transcribed. I have studied the transcript. In essence the dispute concerned allegations that the third respondent had behaved improperly on the factory floor and in particular had been racist and abusive in his dealings with employees that were subservient to him within the hierarchy of the business operation. The third respondent had a chequered history, there had been

allegations of misconduct on his part in the past. There was evidence, even from a witness that he himself had called, that he apparently did not speak in a way that was regarded generally as being acceptable to that particular witness. He said on two occasions he had spoken to him in a way that was unacceptable and not in a way that he would speak to anyone else.

The thrust of the complaint really is the derogatory language and that he referred to people in racist and derogatory terms. There was certainly evidence of this in the evidence led by the main complainant and the protagonist in the case, a Mr Mtshali.

The third respondent disputed the contentions against him and he led evidence from others who worked on the factory floor to say that they had never seen anything of the kind that was alleged to be occurring all the time.

The main protagonists namely Mtshali and another witness who testified, by the name of Jali, both had in the past had difficulties with the third respondent. The evidence established that they may well have been antagonistic towards him because of the manner in which he had dealt with their family members who had been employed. In the one case he had been responsible for the dismissal of Mtshali's brother who was dismissed for theft. In another instance Third Respondent had apparently been found guilty of sexual harassment, but was then found not guilty on an internal appeal. There were reasonable grounds for suspecting that the two witnesses who were related to the complainant in that case may have had issues arising out of the ultimate outcome and in relation to him.

The Commissioner was also faced with evidence dealing with how the disciplinary inquiry was handled. He dealt in his award with procedural

matters that troubled him. He found that the chairperson was not sufficiently independent to chair the hearing. He had been consulted by the person who was prosecuting in regard to the charges and the chairperson had in fact drawn the charge sheet up himself. There were other procedural features  
5 such as the time given to prepare and the vagueness of the charges which the Commissioner found did not afford him the sufficient opportunity to prepare properly for the hearing.

In arguing the matter today, Mr Conradie referred me to passages in the record which indicated that an internal appeal had been heard, that  
10 witnesses had testified at that internal appeal and that that the third respondent begrudgingly conceded that that appeal process had been fair. This according to the argument presented by Mr Conradie went some considerable way towards ameliorating any unfairness that had arisen at the original disciplinary hearing and it was contended that the arbitrator had  
15 misdirected himself in not taking these factors into account when he made his finding that the dismissal was procedurally unfair.

In relation to the substantive fairness of the dismissal Mr Conradie argued that the arbitrator had adopted an approach that did not properly deal with the evidence of Mtshali and Jali who had indicated that there were  
20 occasions when the third respondent had been abusive towards them and uttered, in the case of Mtshali, racially offensive epithets. It was argued that the Commissioner misdirected himself when he dealt with the matter in paragraph 40 of his award. This is what he said,

“Dealing with the substantive fairness of the dismissal I  
25 believe that the evidence against the applicant was

anecdotal and was too general in nature to substantiate his dismissal, no reference was made to any specific incidents. Indicative of this is the evidence of Mtshali who claimed that the applicant addressed workers in a derogatory manner without citing any specific instances in which this took place. The same applies to the evidence of Jali which was also very generalised and unspecific. It is possible that both Mtshali and Jali were antagonistic towards the applicant because of the incidents involving their relations [I assume he means relatives] and this may have influenced them in lodging complaints against the applicant.”

It was argued by Mr Conradie that this approach constituted a serious enough misdirection to enable him to satisfy the stringent the test set out in the Constitutional Court case of *Sidumo v Rustenburg Platinum Mines* [2008] 2 BCLR 159 (CC). The test is set out in paragraph [110] of the judgment and is expressed in this question,

“Is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?”

The effect of Mr Conradie’s argument was that the decision could not have been reached by a reasonable Commissioner because the evidence that was given did not support that conclusion as there was sufficient evidence of detail for it not to be termed anecdotal.

As I read the award, what the Commissioner was saying was that the manner in which the allegations were presented in evidence was very

general. In my assessment the record bears him out. On top of that the persons making the allegations potentially had an axe to grind and he therefore had to take that into account when assessing the evidence as a whole. The Commissioner points this out in paragraph 42 of his award  
5 where he says this,

“On the other hand three witnesses gave evidence on behalf of the applicant to the effect they have never witnessed him behaving badly towards other workers and this included Kasavlu Naidoo who was clearly a  
10 reluctant witness having been subpoenaed by the applicant. Deena Naidoo who gave evidence on behalf of the respondent also testified he had never witnessed bad behaviour on the part of the applicant towards other workers.”

15 In essence the Commissioner found that the evidence against the applicant was unreliable and, seen in context, could not be accepted as discharging the *onus* of proving that he was guilty of the misconduct alleged. And on that basis he came to the conclusion that the dismissal was substantively unfair.

It seems to me that the approach he adopted is an approach that  
20 could properly be adopted by an arbitrator and he has provided his reasoning in his award. It was reasoning based on the material before him and in my assessment it cannot be said that his conclusion was one that a reasonable decision-maker could not reach.

In those circumstances the test laid down by *Sidumo* has in my view  
25 not been met in relation to the question of substantive fairness in this review. That is the decisive issue because it is on that basis that the reinstatement

order that is challenged was granted. The review therefore cannot succeed and the application is in consequence dismissed with costs.

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**M PILLEMER**

ACTING JUDGE OF THE LABOUR COURT

Date:

APPEARANCES

For the Applicant: Bradley Conradie-Edward Nathan Sonnenbergs

For the Respondent: Kevin Dass-Farrell and Associates

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

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CASE NO : **D369/07**

DATE : 1 JULY 2008

In the matter between

**SWARTLAND BOUDIENSTE PTY LTD** APPLICANT

and

**CCMA** 1<sup>st</sup> RESPONDENT

**LOUIS EPSTEEN NO** 2<sup>ND</sup> RESPONDENT

**DEUANLALL RAMBRIDGE** 3<sup>RD</sup> RESPONDENT

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**BEFORE THE HONOURABLE MR JUSTICE PILLEMER**

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ON BEHALF OF APPLICANT : [?]

ON BEHALF OF RESPONDENT : [?]

**EXTRACT**

JUDGMENT DELIVERED ON 1 JULY 2008

**CONTRACTOR**

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## **CERTIFICATE OF VERACITY**

This is, to the best abilities of the transcriber, a true and correct transcript of the proceedings, **where audible**, recorded by means of a mechanical recorder in the matter:

### **SWARTLAND BOUDIENSTE PTY LTD v CCMA LOUIS EPSTEEN AND DEUANLALL RAMBRIDGE**

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CASE NO : **D369/07**

COURT OF ORIGIN : **DURBAN**

TRANSCRIBER : **MRS S M BOYCE**

DATE COMPLETED : **31 JULY 2008**

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