THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

Not Reportable

Case no: P99/14

ENVIROSERVE WASTE MANAGEMENT (PTY) LTD **Applicant**

And

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

RAYMOND JONATHAN N. O **Second Respondent**

LEE ANN KRUGER **Third Respondent**

Heard: **02 March 2016**

Delivered: **15 November 2016**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] The applicant seeks an order reviewing, setting aside, and/or correcting the arbitration award issued by the Second Respondent (Commissioner) on 1 April 2014. In the award, it was found that the dismissal of the Third Respondent, (Kruger) by the Applicant was substantively unfair, and that the sanction of dismissal ought to be replaced with that of a Final Written

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Warning valid for 12 months from the date of the dismissal. The Commissioner had also ordered the Applicant to reinstate Kruger with back-pay in the amount of R169 421.45.

Background:

[2] Kruger was employed as a key Accounts Consultant having commenced her employment on 1 November 1999. She was dismissed from the Applicant's employ on 25 July 2013 following upon a disciplinary enquiry into allegations of misconduct. The allegation was that on 10 July 2013, she had made herself guilty of gross insolence in that she had hurled abusive language towards a line manager, which conduct amounted to gross insubordination in terms of the Applicant's disciplinary code of conduct.

[3] An alleged unfair dismissal dispute having been referred to the CCMA, it subsequently came before the Commissioner for arbitration. At those proceedings, Kruger contended that her conduct was not gross for it to be met with a sanction of dismissal. She had also challenged her dismissal on the basis that the Applicant had applied its discipline inconsistently, in that similar conduct by another employee, Moses Jalmeni was not met with similar disciplinary measures. The Commissioner's findings in regards to this issue were to the effect that there was no basis for a conclusion to be reached that the Applicant had acted inconsistently, and it does not require any further determination for the purposes of these review proceedings.

The arbitration proceedings:

[4] The Commissioner had recorded that Kruger had conceded that she was guilty of insolence in that she had used foul language during her interaction with the Regional Manager, Pienaar, but that such language was used more as a 'descriptive language', which did not undermine Pienaar's authority. The testimony of various witnesses as summarised by the Commissioner is as follows;

4.1 Theodorus Pienaar was the Applicant's Regional Manager for the Eastern Cape. He had worked with Kruger for 12 years as she was based in the East London depot. Pienaar had received an e-mail from Lilly Janse Van Rensburg in which she complained about Kruger not assisting with enquiries relating to the latter's client. Pienaar sent an e-mail to Kruger requesting that she should assist where required and requested, and further informed her that she should *'get out of her silo'* as she needed to be part of the team.

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4.2 Prior to having an opportunity to read Kruger's response, Pienaar had received a call call from her, and the conversation had commenced with expletives such as; *'I am f….ng cross with you, what do you mean by 'getting out of my silo'?'* she further added that; '*You do not give a f….ng sh..t for us in East London'.* As a parting shot, Kruger also said to him *'F…k you'* and dropped the phone on him.

4.3 Pienaar's evidence was further that given the robust nature of the environment within which the Applicant operated, employees regularly used foul language, and that he had also on occasion used such language, *albeit* not directed to any particular individual. He however contended that the Kruger's conduct and abuse was directed at him; that it had broken the trust relationship with him since it was unacceptable; that Kruger had not shown any remorse, and that such conduct had taken place in the presence of other employees. At the time he received the call from her, he was having a lunch meeting with another employee from the Applicant's head office.

4.4 Bianca Smith's evidence was essentially that she sat opposite Kruger in their office. Kruger had made her aware that she was going to call Pienaar after being upset about something. Smith had asked Kruger to calm down before calling Pienaar, but to no avail. Kruger made a call to Pienaar and Smith did not hear the rest of their conversation as she had to attend to her own call from a client. All she heard was that Kruger said something to the effect that; '*I am f….ng cross with you'*, and '*You'* at the end of her conversation.

4.5 Kruger had proceeded to call Van Rensburg who was the book-keeper in the Port Elizabeth office. Smith overheard Kruger saying to Van Rensburg; *'I am f…ng cross with you, you always got a problem with East London staff'*. Van Rensburg had said something in return, and Kruger ended the conversation by saying *'F…k you'* to her. Kruger thereafter stood up from her chair, threw her work issued mobile phone against the door, and informed another employee, Eloff, that she was *'sick of this place'*. Kruger further said that she would return her mobile phone and laptop the following day, and promptly left the workplace.

4.6 Lilly Van Rensburg's testimony was to the effect that she had sent the e-mail to Pienaar which she had copied to Kruger wherein the complaint was raised. Inasmuch as Kruger was entitled to be upset, Van Rensburg's view was that she could have handled the situation differently. She confirmed that when Kruger called her over the phone, she had uttered the words as described by Smith, and had sent

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her an e-mail to inform her that she had no right to talk to her in that manner. She had also complained to Pienaar about Kruger's abusive language towards her.

4.7 Vanessa Bungay testified on behalf of Kruger. Her testimony was essentially that having worked with her for 5 years, she was used to her use of inappropriate language at work. Her testimony did not add much value to the nature of Kruger's conversation with Pienaar.

4.8 Moses Jalmeni also testified on behalf of Kruger. He confirmed having been dismissed by the Applicant. His testimony was mainly in regards to Pienaar whom he contended was equally guilty of using inappropriate language when he was upset about something. At one stage, there was a verbal altercation between the two which had resulted in Pienaar telling him to '*F…k off*', and Jalmeni had returned the favour with the same bomb. Pienaar had nevertheless apologised to him at a later, and the matter was sorted between them, hence he did not lodge a grievance against him.

4.9 Kruger in her testimony expressed her embarrassment at the fact that she swore a lot, but however contended that Van Rensburg and Pienaar were well aware of that. Having received Van Rensburg's complaint which was copied to her by Pienaar, she had duly responded but had felt the need to telephonically contact Pienaar in order to find out what the real problem was.

4.10 Upon calling Pienaar and enquiring from him about what the problem was, an impression was created that she was not willing to help her colleagues at which she got upset and said; *'Ernst, you are pissing me off now, why do you automatically believe Lily, I don't understand the reference, 'get out of your silo', I always helped where I can but cannot give a sh…t about what is happening in East London. All you f…ng care of is people in Port Elizabeth and I am f…ng sick of it.* She had ended the conversation by saying *'Thank you'* to him. She thereafter put down the phone without affording Pienaar an opportunity to respond. She subsequently called Van Rensburg and berated her for lying to Pienaar. She had conceded that she was insolent towards Pienaar.

The award:

[5] The Commissioner's starting point was to accept that it was common practice within the workplace to use foul language, as long as it was not directed at anyone in particular. This was despite the fact that the use of such language was contrary to the Applicant's disciplinary code.

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Central to the Commissioner's enquiry was whether Kruger's use of abusive language, included the utterance; *'F…k you',* and was directed to Pienaar. This enquiry arose out of a dispute of fact pertaining to whether Kruger had uttered those words or had merely said *'Thank you'* at the end of her conversation.

[6] The Commissioner had concluded that the Applicant in this case had failed to establish that Kruger had directed the utterances towards Pienaar. The basis of the Commissioner's conclusion was that Pienaar had little recollection of the telephonic conversation despite his assertion that Kruger had indeed uttered the words; that Kruger appeared to have had a *'monolog'* (Sic) and that Pienaar had not participated in the conversation. The Commissioner further pointed out that the Applicant had not brought witnesses to corroborate Pienaar's version as he had indicated that the words were said in front of other employees; that Pienaar had been evasive when questioned about the incident whilst Kruger had been forthright, and had conceded from the onset that she was insolent towards Pienaar.

[7] Equally so, the Commissioner had also made a finding that the Applicant had failed to establish that Kruger's conduct was gross based on the initial conclusions that it was acceptable within the workplace to use foul language. The Commissioner concluded that it had not been established that any foul utterances were specifically directed towards Pienaar.

[8] The Commissioner in determining the appropriateness of sanction was not convinced that a trust relationship had been broken between Kruger and the Applicant. This was despite Pienaar's contention that there was such a breakdown. The Commissioner concluded that a final written warning should be imposed in the light of the evidence that; (a) Kruger had not been suspended prior to the disciplinary enquiry; (b) that no precautionary measures were put in place after the incident; (c) that Pienaar had also testified that it was business as usual after the incident until Kruger's dismissal; (d) that Kruger had a clean disciplinary record after 13 years of service; and (e) that the Applicant's own disciplinary code provided for a Final written warning for disrespect or impudence.

The grounds for review:

[9] In seeking to have the award reviewed and set aside, the Applicant's main contentions were that its outcome and in particular, the relief granted, was unreasonable; that the Commissioner's findings that the level of misconduct was not gross was unreasonable; that the Commissioner unreasonably concluded that the trust relationship had not broken down irretrievably, and that this finding was grossly unreasonable and premised on an irrational and erroneous understanding of the law and the facts relating to the issues before him.

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[10] In opposing the application, Kruger's contentions were that; the decision of the Commissioner was one which could reasonably and rationally have been arrived at in consideration of the totality of the evidence before him; that without admitting that her dismissal was an appropriate sanction, it could not be said that a finding that she ought to have been dismissed for the infraction complained of was the only appropriate sanction which could have been imposed; that the Commissioner had correctly identified the principles involved in the determination of the dispute; correctly examined and considered all the evidence before him relevant to the issues, and that the award cannot be found to be one that could not have been made on the evidence before the Commissioner. It was contended that there was no basis upon which the court should review and set aside that award.

The review test:

[11] The review test flowing from *Sidumo*[1] and other authorities can be said to be fairly trite. The question the review court asks itself is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion. Thus to be unassailable, the Commissioner's conclusions must fall within a range of decisions that a reasonable decision maker would make in the light of the material before him or her.

[12] In determining whether the decision of the Commissioner is unreasonable, this Court must broadly evaluate the merits of the dispute and consider whether, if the Commissioner's reasoning is found to be unreasonable, the result is, nevertheless, capable of justification for reasons other than those given by the commissioner. The result will, however, be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator[2]. As it was reiterated by the Labour Appeal Court in in *Palluci Home Depot (Pty) Ltd v Herskowitz and Others*[3]*;*

> *"Significantly, as was held by the SCA in Herholdt and endorsed recently by this Court in Head of the Department of Education v Jonas Mohale Mofokeng and Others, "for a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii) of the LRA, the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result". Thus, as recognised in Mofokeng, it is not only the unreasonableness of the outcome of an arbitrator's award which is subject to scrutiny, the arbitrator "must not misconceive the inquiry or*

[1] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC) at para 110. See also Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae) [2013] 11 BLLR 1074] (SCA); Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others [2014] 1 BLLR 20 (LAC); and Head of the Department of Education v Mofokeng [2015] 1 BLLR 50 (LAC).

[2] See Herholdt at paras [12] and [13] as referred to with approval in Quest Flexible Staffing Solutions (Pty) Ltd (a division of ADCORP Fulfilment Services (Pty) Ltd) v Lebogate [2015] 2 BLLR 105 (LAC) at para [12]

[3] 2003 (1) SA 11 (SCA) at para [16]

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undertake the inquiry in a misconceived manner", as this would not lead to a fair trial of the issues. In further approval of Herholdt, this Court in Mofokeng stated that:

> *"Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidence in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong inquiry, undertaken the inquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her. [Footnotes omitted]"*

Evaluation:

[13] In this case, the issue before the Commissioner was whether the dismissal was substantively fair, i.e., whether the misconduct in question was gross to warrant a sanction of dismissal. The Commissioner had acknowledged Kruger's concession that she was predisposed to using foul language, and further that she had been insolent towards Pienaar. The Commissioner also accepted that the use of foul language in the workplace appeared to be the norm and was not frowned upon, as long as it was not directed at anyone in particular. The starting point however for the Commissioner was whether Kruger had said *'F…k you'* or *'Thank you'* at the end of her conversation with Pienaar. To the extent that this was the Commissioner's starting point, the issue before him was whether if it was established that the foul language was indeed used and directed towards Pienaar, this constituted gross insolence to warrant a sanction of dismissal.

[14] The offence of insolence is generally equated with conduct which is offensive, disrespectful, impudent, cheeky, rude, or insulting[4]. Such conduct may be verbal, in writing or through demeanour, and invariably has the consequences of demeaning the person it is directed at or his or her authority. At worst, it has an element of contempt attached to it. Conduct commonly associated with insolence varies in degrees and extremes, and may include talking back; talking over; shouting at; aggressively arguing; talking in a disrespectful, demeaning or contemptuous manner; body language such as eye rolling, direct finger pointing, looking or walking away whilst the superior is talking, or worst, gesturing disrespectfully towards a superior, including showing him/her the proverbial middle finger.

[4] Commercial Catering & Allied Workers Union of SA & Another v Wooltru Ltd t/a Woolworths (Randburg) (1989) 10 ILJ 311 (IC) at 314-315 A-B.

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[15] It is accepted that the offence of mere insolence is not in itself sufficient to result in a dismissal. What is defined as 'mere insolence' will obviously depend on the circumstances and the conduct in question, and its effects. However, for insolence to justify a dismissal, it must by all accounts be wilful and serious, with the result that the employment relationship irretrievably breaks down. Examples of gross insolence include some as already indicated above, and may extent to *inter alia*, verbal abuse and/or tirades which may be laced with crass profanities, making personal or crude insults or gestures toward a superior, coupled with violent conduct in some instances, or even making physical or other threats.

[16] Insolence as directed towards persons in managerial or supervisory positions, especially in the presence of other junior employees, invariably results in the manager's or supervisor's authority being undermined, and has the effect of either belittling or humiliating that manager or supervisor. As a general rule therefore, employees are expected to show professionalism, courtesy and respect towards their managers and supervisors. If junior employees fall short of that expectation, ill-discipline and other unintended consequences may be the order of the day, which may have a negative effect on productivity and general harmony in the workplace.

[17] In *Palluci Home Depot (Pty) Ltd,* the Labour Appeal Court, also held that the sanction of dismissal should be reserved for instances of gross insolence and gross insubordination. To this end, the LAC accepted that respect and obedience are implied duties of an employee under contract law, and any repudiation thereof will constitute a fundamental and calculated breach by the employee to obey and respect the employer's lawful authority over him or her. The LAC further held that unless the insolence was of a particularly gross nature, an employer must issue a prior warning before having recourse to the final act of dismissal[5].

[18] In this case, and as accepted by the Commissioner, it was common cause that Kruger had been insolent towards Pienaar. The Commissioner nevertheless based his decision on the fairness of the sanction on the question whether at the end of the telephonic conversation between Kruger and Pienaar, the former had ended it by saying *'F…k You!*' or '*Thank You!'.* It was however submitted during argument on behalf of the Applicant that nothing turns on the swear words, as the Commissioner should have had regard to the context of the conversation between Pienaar and Kruger, and everything that the latter had uttered towards Pienaar and her subsequent conduct.

[19] I am in agreement with the submissions made on behalf of the Applicant that an examination of whether the insolence in question was gross or not should have been

[5] [2015] 5 BLLR 484 (LAC) at para [22]

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considered within the context of the entire conversation, and that by cherry-picking in regards to what was or was not uttered, the Commissioner undertook the inquiry in a misconceived manner. This is so in that in line with the factors to be considered in determining whether a dismissal was fair, the general effect or consequences of the misconduct in question as a whole should be looked at.

[20] Further to the extent that the Commissioner had placed emphasis on what was or was not uttered at the end of the conversation, and in resolving the disputed versions in that regard, he also undertook the wrong inquiry, or undertook the inquiry in the wrong manner. To the extent that this is so, the invariable conclusion to be reached is that the Commissioner could not possibly have come to a reasonable outcome. These conclusions are further fortified by the following;

20.1 It is trite that in circumstances where a commissioner is confronted with conflicting versions, the principles set out in *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Kie SA and Others*[6] should find application. Thus it would be expected of the Commissioner to make a finding on the credibility of witnesses; the reliability of the evidence proffered; and to analyse and evaluate the probabilities or improbabilities of each party's version on each of the disputed issues, with the aim of determining where the truth lies[7]. The question that should be answered is whether the probabilities favour the party that bears the onus of proof. This exercise is part of the functions of the Commissioner as confirmed in *Edcon Ltd v Pillemer NO & others*[8], which is to weigh all the relevant factors and circumstances of each case in order to come up with a reasonable decision.

20.2 In this case, the undisputed evidence before the Commissioner was that Kruger, and even by her own admission, had a propensity to use foul language. Pienaar, as a

[6] At para [5] where it was held that;

"*The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities.*"

[7] Sasol Mining (Pty) Ltd v Ngqeleni NO & Others (2011) 32 ILJ (LC) at para [9] where Van Niekerk J held that;

"One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. As I have noted, this much the commissioner appears to have appreciated. What he manifestly lacked was any sense of how to accomplish the task, or which tools were at his disposal to do so. The commissioner was obliged at least to make some attempt to assess the credibility of each witness and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability and improbability of each party's version. The commissioner manifestly failed to resolve the factual dispute before him on this basis."

[8] (2008) 29 ILJ 614 (LAC) para 21.

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Regional Manager, rather than setting an example, was equally guilty of using foul language. In my view, for the Commissioner to simply have accepted that the use of foul language in the workplace was the norm and thus acceptable, cannot by all accounts be a mitigating factor in the bigger scheme of things. The Applicant's disciplinary code prohibited the use of such language, and the fact that employees, including senior people such as Pienaar liberally used such language cannot make it acceptable.

20.3 Even if it could be said that the Applicant had generally tolerated the use of such language, and to the extent that the Commissioner sought to determine whether it was gross to justify the dismissal, it is my view that his conclusions in that regard failed to take into account the principles applicable in resolving disputed versions. It is inexplicable as to how the Commissioner could possibly have come to the conclusion that Kruger had merely said '*Thank You'* to Pienaar at the end of their telephonic conversation when the facts before him were as follows;

20.3.1 The Commissioner, just to reiterate, had accepted, and even on Kruger's own version that she was inclined to use foul language. The evidence of Smith, who sat opposite Kruger in the office and prior to the latter's call to Pienaar was that she was aware that Kruger was upset about something, and was about to call Pienaar. Smith had unsuccessfully appealed to her to calm down. Kruger, and on her own version, was upset at the time she made the call, and had started the conversation by with bombs such as *'pissing her off*'; *'you don't give a sh..t*'; '*all you f….ng care about is…*'; '*I am f…ng sick of it*…'; and *'you did not f….ng notice that…'*

20.3.2 Smith's evidence was that Kruger had started the conversation with *'I am f….ng cross with you'*. She nevertheless did not hear anything else other than *'You'* at the end of the conversation when Kruger ended it. The Commissioner did not examine what the reliability or probabilities of this version were, even if proffered on behalf of the Applicant. In my view, it is highly improbable that Smith, who was seated across Kruger, could not have heard the rest of the conversation, and had conveniently only heard the latter say *'You'*, at the end of that conversation.

20.3.3 The Commissioner criticised Pienaar's evidence on the basis that the latter recalled little about that conversation, or that he was evasive when questioned

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about the conversation, or the Applicant had not called witnesses to corroborate Pienaar's version. The Commissioner had on the other hand accepted Kruger's evidence on the grounds that she was forthright about the incident and had conceded from the onset that she was guilty of insolence towards Pienaar.

20.3.4 Pienaar's evidence in chief however as can be gleaned from the record[9] was that Kruger had at the end of the conversation said to him *'F…k you'* and dropped the phone. He had under cross-examination, disputed the version put to him that Kruger had merely said to him; *'all you f….ng care about are the people in PE and I am f…ng sick of it. Thank you'*[10].

20.3.5 Even if it could be said that Pienaar could not recall the entire conversation, the issue remained whether Kruger's direct version was more probable than that of Pienaar, and the immediate answer must be in the negative. This is so in that it was common cause that at the time she made the call, Kruger was was upset. On her own version, she had a propensity to use foul language and her conversation with Pienaar was expletive laden throughout. In the light of these chain events and pattern of behaviour, what would have been the purpose of saying *'Thank you'* after that tirade? The probabilities are that she had indeed said *'F…. k you'* to Pienaar at the end of her conversation and dropped the phone on him. She had pursued her tirade against Van Rensburg thereafter, and capped it all by throwing her mobile phone against the door and walking out of the workplace as attested to by Smith. These could not have been the actions of an individual who was grateful for the fact that Pienaar had merely listened to her. Whether the Applicant had failed to call a witness to corroborate Pienaar's version is neither here nor there, as firstly, any such witness would merely have confirmed what Pienaar had said the conversation was all about, and secondly, there was direct evidence from Pienaar, which the Commissioner was obliged to assess its probabilities, as against that of Kruger's. Sadly, the Commissioner was found wanting in this regard.

20.3.6 A Commissioner is required to consider all relevant evidence and to undertake a balanced, equitable and impartial assessment of the evidence

[9] Page 16 lines 1 to 16
[10] See page 45 of the record, line 7

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and to make a reasonable finding on a balance of probabilities. In this case, the Commissioner failed to do that, and the conclusion to be reached is that he committed a gross irregularity. In the light of the evidence before him, and upon a proper assessment of the probabilities of the competing versions, the conclusions reached by the Commissioner that the Applicant had not discharged the onus placed on it to demonstrate through credible evidence that its version was more probable or more acceptable than that of Kruger, and that the misconduct in question was not gross, does not fall within the band of reasonableness.

[21] What remains to be determined is whether the Commissioner's conclusions on the issue of sanction can be considered to that of a reasonable decision maker. Grogan in addressing the use of inappropriate language in the workplace stated that;

> *"While it is expected that the workplace is not a finishing school, there are limits to the language which employees are permitted to use to express their views. Swearing and invective are generally considered to amount to misconduct, which may in certain cases justify dismissal even on the first occasion; This is so especially so when employees use abusive words or phrases that impair the dignity and sensibilities of those against whom they are directed."*[11]

[22] To the extent that the invariable conclusion on the probabilities is that Kruger had directed the foul language towards Pienaar as a superior, the issue is whether in the light of the circumstances of the case, it can be said that the sanction of dismissal was fair. It is trite that there are a variety of factors that a Commissioner ought to take into account in considering the appropriateness/fairness of sanction. The courts have consistently emphasised that 'fairness' is a double-edged sword, as it does not only serve to benefit and protect one of the parties to the employment relationship[12].

[23] In this case, the Commissioner had concluded that a dismissal was not appropriate based on his reasoning that he was not convinced that a trust relationship had irretrievably broken between Kruger and the Applicant; that Kruger had not been suspended after the incident; that Kruger had a clean disciplinary record, and the fact that the Applicant's code called for a final written warning for disrespect or impudence towards a superior.

[24] The Commissioner's above observations were however premised on an unreasonable conclusion in regards to the gross nature of the misconduct as already illustrated above.

[11] John Grogan, Dismissal (Juta & Co Lt, Lansdowne, 2002) at page 179

[12] See NEHAWU v University of Cape Town & others (2003) 24 ILJ95 (CC) par 38-39. See also Branford v Metrorail Services (Durban) 2003 24 ILJ 2269 (LAC) 2278H-2279A

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The foul language as already concluded was directed towards Pienaar as a superior. It was insulting, demeaning, disrespectful and uncouth in the extreme. Foul language as evident in this case cannot by all accounts be classified as 'descriptive' as the Commissioner had concluded. There is nothing *'descriptive'* about an expletive such as *'F…k you',* as directed towards a superior, let alone anyone in the workplace including the lowest paid or ranked employee.

[25] Kruger does indeed have good reasons to be embarrassed by the ease with which profanities come out of her mouth, especially in the workplace. Her conduct towards Pienaar demonstrated lack of respect, and invariably demeaned and destroyed the relationship between her and him as her immediate superior, and it can safely be concluded that such conduct had the effect of humiliating him in the extreme. It does not require further evidence to draw such inferences from the tirade in question.

[26] Even if the use of foul language may have been condoned by the Applicant in the workplace overtime, there was a limit within which such language could be tolerated. It is accepted that the demands of a modern workplace are generally stressful and can sometimes be taxing on normal senses of civility and decency. A workplace is not by all accounts, a meeting place for saints, the decorous and/or prudish. In the same vein, it can however never be acceptable that workplaces should be avenues for stressed-out individuals to leisurely and gratuitously emit vulgarities towards anyone. The concept of 'industrial language' if ever there is such a thing, cannot be a license to be obscene and uncivilised. Accordingly, it cannot be accepted for an employee to relate to a superior in the manner that Kruger had.

[27] In regards to the issue of whether the trust relationship between the parties had irretrievably broken down, the Labour Appeal Court in *Woolworths (Pty) Ltd v Mabija and Others*, recently amplified the long-standing approach adopted in *Edcon Ltd v Pillemer NO and Others*[13] and held that;

> *'The fact that the employer did not lead evidence as to the breakdown of the trust relationship does not necessarily mean that the conduct of the employee, regardless of its obvious gross seriousness or dishonestly, cannot be visited with dismissal without any evidence as to the impact of the misconduct. In some cases, the outstandingly bad conduct of the employee would warrant an inference that the trust relationship has been destroyed. It is however always better if such evidence is led by people who are in a position to testify to such break down. Even if the relationship of trust is breached, it*

[13] At para 19

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would be but one of the factors that should be weighed with others in order to determine whether the sanction of dismissal was fair [Citations omitted][14].

[28] In line with the above approach, this would imply that where an employee has committed gross misconduct, and a Commissioner makes a finding that the sanction of dismissal was nevertheless inappropriate on the basis that the employer failed to lead evidence on the breakdown of a trust relationship, this will constitute a reviewable irregularity on the Commissioner's part. Thus where it is clear that the employee was guilty of the gross misconduct as in this case, it should invariably be concluded that the effect thereof would be to render the employment relationship intolerable. To the extent that it may have been found that the misconduct was not gross however, the onus is still upon the employer to lead evidence of the irretrievable breakdown of the relationship.

[29] In this case, the misconduct in question was gross. Kruger on her own admission, was predisposed to using foul language. As already concluded elsewhere in this judgment, she had been grossly insolent towards Pienaar. On the evidence before the Commissioner, Kruger was advised by Smith to calm down before making the call to Pienaar. She was nevertheless bent on venting out, and had done so in the most vulgar manner. There is no evidence to suggest that she had immediately apologised to Pienaar after her foul-mouthed tirade, including and up to the date of her dismissal. In essence, she failed to appreciate or acknowledge the effect of her verbal abuse towards Pienaar. It was only at the commencement of the arbitration proceedings that she had conceded to having been insolent towards Pienaar, and even then, she had sought to water-down the vulgarity, by describing it as merely 'descriptive'. Pienaar on the other hand, and contrary to the Commissioner's conclusions, had testified that the trust relationship had broken between the employer and employee after the altercation[15]. The issue of whether Kruger was suspended or not after the incident, and contrary to the Commissioner's conclusions or observations, was not material to a determination of the appropriate sanction. A suspension, whether precautionary or otherwise, does not necessarily follow with each incident of alleged misconduct, nor is it necessarily determinative of whether a trust relationship has been broken or not.

[30] It is acknowledged as the Commissioner had done, that the Applicant was no less blameworthy in that it had allowed if not condoned the use of foul language in the workplace over time, and that Pienaar was equally guilty rather than setting an example. It is apparent that the Commissioner in imposing the sanction of a final written warning had considered these

[14] [2016] 6 BLLR 568 (LAC) at para 21. See also Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and others (2015) 36 ILJ 1453 (LAC)

[15] Line 3 at page 19 of the record

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and other factors, including the fact that Kruger had a clean disciplinary record, and the fact that the Applicant's own disciplinary code provided for a final written warning for insolent remarks in respect of a first offence and a dismissal in respect of a second offence. Furthermore, the code in respect of the use of foul language called for a warning, final written and dismissal for a first, second and third offence.

[31] The above considerations clearly appear to have persuaded the Commissioner that a sanction of dismissal was not appropriate. However, even if these factors could have been compelling, given the nature of the insolence and the effect thereof, a working relationship could not possibly have been sustainable, and the decision of the Commissioner to reinstate her with a final written warning under the circumstances cannot by accounts be that of a reasonable decision maker.

[32] To the extent that there might be merit in the argument that the factors as above may have called for some form of remedy, the provisions of section 193 (2) (b) and (c) of the LRA are clear. Thus, in considering whether to reinstate or not as required by the provisions of section 193 (2) of the LRA[16], a Commissioner is still obliged to consider whether the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable, or whether it was reasonably practicable for the employer to reinstate or re-employ the employee. In this case, and in the light of the evidence that a trust relationship had been broken as a consequence of the incident between Kruger and Pienaar, it followed that it would not have been reasonably practical to impose a continued employment relationship between the parties, as the circumstances that led to the dismissal made that relationship unsustainable. This was even moreso in the light of Kruger's conduct after her tirade, which included her throwing her work issued mobile phone at the door, walking out of the workplace, specifically stating that she was *'sick of this place'*, and her outright failure to show any form of contrition. In this case, the Commissioner paid scant regard to the provisions of section 193 (2) of the LRA in considering a remedy, and it follows that an order of reinstatement was therefore not a reasonable decision to come to.

[33] In the light of the above conclusions, and since a remedy of reinstatement was not appropriate after a proper consideration of the provisions of section 193 (2) of the LRA, the issue would then have been whether Kruger was entitled to any form of alternative remedy as

[16] Which provides that;

'The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless –

…….

…….

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contemplated in section 194 of the LRA[17]. Ordinarily, and only to the extent that the issue of remedy in the form of compensation remains to be determined, the issue is whether the matter should be remitted back to the CCMA. In my view, no purpose would be served with such an exercise given the history of this matter and the narrow issue to be determined. There is sufficient material before court for it to make a final determination on the matter[18].

[34] The provisions of section 194 (1) of the LRA[19] enjoins this Court and any arbitrator with discretion in regards to how much compensation, if any, should be awarded, taking into account what is just and equitable. Factors to be considered in awarding compensation have recently restated in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*[20]. In this case, the misconduct in question was gross, which had the effect of irretrievably breaking down the employment relationship. As already indicated, the Applicant had not done itself any favours by condoning the use of foul language in the workplace over a period, and the fact that Pienaar himself was equally guilty of such conduct did not assist the Applicant's case. Furthermore, Kruger's clean disciplinary record and the Applicant's own disciplinary code and procedure provided for progressive discipline in instances of the use of foul language and insolent behaviour. A harsher sanction was nevertheless called for in the light of the gross nature of the offence in question, and to the extent that there is merit in the argument that a dismissal was harsh, in my view, and having

[17] Which provides;

'194. Limits on compensation

(1) The compensation awarded to an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal.'

[18] See Palluci at para [58] where it was held that;

'Where all the facts required to make a determination on the disputed issues are before a reviewing court in an unfair dismissal or unfair labour practice dispute such that the court "is in as good a position" as the administrative tribunal to make the determination, I see no reason why a reviewing court should not decide the matter itself. Such an approach is consistent with the powers of the Labour Court under s 158 of the LRA, which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes. The need for bringing a speedy finality to a labour dispute is thus an important consideration in the determination, by a court of review, of whether to remit the matter to the CCMA for reconsideration, or substitute its own decision for that of the commissioner. Thus, where the issues are largely common cause, the pleadings comprehensive, the full record of both the disciplinary and arbitration proceedings are before the court, and there has been a elapse of almost 20 months from the date of dismissal to the date of finalisation of the review application, such as in this case, the consideration of bringing the dispute to a speedy finality would certainly have a bearing on the decision of the reviewing court to decide the dispute, and not remit it to the CCMA, because it is "in as good a position" as the CCMA to do so. The Labour Court's decision not to remit the dispute to the CCMA for determination is accordingly justifiable upon a consideration of the facts of this case'

[19] Which provides that;

'The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the *employee's* conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of remuneration on the date of *dismissal*. '

[20] (CCT19/16) [2016] ZACC 38 (8 November 2016) at paragraphs [50] to [58]

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had regard to all the circumstances of this case, an award of compensation equivalent to three months' salary is just and equitable.

[35] In regards to the issue of costs, and further to the extent that the Third Respondent was partially successful, considerations of law and fairness dictate that a cost order should not be made.

Order:

i. The portions of the arbitration award issued by the Second Respondent under case number ECEL2754/13 dated 2 April 2014, in terms of which;
   a) Ms. Lee-Ann Kruger was reinstated in the employ of the Applicant with a Final Written Warning valid for twelve months from the date of her dismissal; and
   b) In terms of which Ms. Lee-Ann Kruger was awarded back-pay in the amount of R169 421.45 are reviewed, set aside and replaced with the following:

      'The Applicant (Respondent in arbitration proceedings), is ordered to pay to Ms. Lee-Ann Kruger, compensation equivalent to three (3) months' salary calculated as at the date of her dismissal'

ii. There is no order as to costs.

_____

Tlhotlhalemaje, J

Judge of the Labour Court of South Africa

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APPEARANCES:

On behalf of the Applicant:	Adv. M Grobler
Instructed by:	Kirchmanns INC
On behalf of the Third Respondent:	Adv. F Le Roux
Instructed by:	Bax Kaplan Russell INC

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