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1. Introduction

This was an application in terms of s 145 of the Labour Relations Act 66 of 1966. Toyota sought to have the decision of the CCMA, ordering the re-instatement of Mr Lungile Njini - then an employee of Toyota for 17 years – be set aside, and that his dismissal be declared fair. The case represents an interesting interplay between the quest for discipline and productivity in the workplace and the right to exercise one's constitutional right to culture as provided for in s 30 of the Constitution of the Republic of South Africa Act.[1] This note is divided into four parts: (1) the facts of the case; (2) the award of CCMA arbitrator; (3) the legal question; (4) the judgment of the Labour Court; (5) the discussion, and (6) the conclusion.

2. The facts

At the time, Toyota's written leave policy provided for, among other benefits, compassionate leave in case of death of an 'immediate family' member of an employee. In turn, 'immediate family' included husband, wife, grandparents, father, mother, father-in-law, mother-in-law, sister, brother, brother-in-law, sister-in-law, child, grandchildren'. As proof of such death, the employee was required to submit a death certificate, or provide an affidavit 'indicating the relationship between the employee and the deceased person'.

In 2017 Mr Njini was dismissed by Toyota for misconduct, in that he had, between May 2013 and February 2015, dishonestly provided false information about his relationship to the deceased persons that he claimed to be his 'immediate family', as consequence of which he was granted compassionate leave payments for which he did not actually qualify. Two of the deaths in question involved his nephew and his father's wife, whom he, in African parlance, referred to as his 'son' and 'mother' respectively.

3. The award made by Commission for Conciliation Mediation and Arbitration

Njini, represented by the National Union of Metalworkers of South Africa (NUMSA), approached the Commission for Conciliation Mediation and Arbitration[2] for redress. The arbitrator found in favour and declared his dismissal to be unfair; and ordered his re-instatement.

It would seem the arbitrator was alive to cultural sensitivities and nuances in matters of this nature. He was also prepared to accept that Njini was not a sophisticated person, and that he did not understand the intricacies of his employer's policy on leave, including compassionate leave. The arbitrator also considered the fact that Njini always followed the practice, on the shopfloor, of an employee approaching 'his group leader to ask for leave who in turn completes the application form and forwards it to HR for approval, together with the supporting death certificate'. In other words, the group leader, not Njini (or a colleague in a similar position), filled in the relevant documents in that regard, and submitted them to the Human Resources' department on his behalf.

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[1] Hereinafter referred to as ('the Constitution').
[2] Hereinafter referred to as ('the CCMA').

For that reason, the arbitrator did not find Njini's conduct to be dishonest in anyway. He was also of the view that dismissal, as a sanction, was 'grossly inappropriate' in the 'unique circumstance of the case'. The following factors weighed heavily with him: (1) that Njini's had been in the employ of Toyota for 17 years at the material time; (2); that he had an unblemished disciplinary record whilst so employed; and (3) that there was no genuine break-down in the employer-employee relationship. Toyota was not satisfied with the decision; hence the application for review – to the Labour Court.

4. The legal question

The legal question to be to be considered was whether the arbitrator acted as a reasonable decision-maker when he adjudged Njini's dismissal to be unlawful and ordered his re-instatement.

5. The Judgment of the Labour Court

Whitcher J began by setting out the parameters within which an arbitrator must perform his or her function. Citing *Herholdt v Nedbank Limited*[3] on the 'narrow' approach to reviewing award made by the CCMA, he said:[4]

a. It must be established, either that the arbitrator has misconceived the nature of the enquiry, or that he or she arrived at an unreasonable result.

b. For an award to be unreasonable, the arbitrator's conclusion must be one that a reasonable decision-maker could not reach on the material that was before the arbitrator.

c. Material errors of fact, including errors concerning the weight and relevance to be attached to certain facts, are only of consequence if their effect is to render the outcome unreasonable.

d. If the arbitrator's reasons provide a reasonable 'route' leading towards the conclusions, it must follow that the decision is one that could have been reached (and in fact was) made by a reasonable decision-maker. A review application would, in such circumstances, not succeed.

e. Even if there are flaws in the arbitrator's reasons, a review must still consider whether apart from the arbitrator's reasons, "the result is one that a reasonable decision-maker could reach in light of the issues and the evidence."

f. A review court is required to examine the merits 'in the round' only.

In other words, the decision of the arbitrator should be that which only a reasonable decision-maker conducting that enquiry could have reached, in light of all the facts having been considered.[5] The Labour Court judge also emphasised the point that an arbitrator 'is not at large to consider and decide the issues afresh'.[6] If he were to do that, the learned judge said, it would constitute a fatal error.[7] He also said that the test should always be whether the decision reached by the arbitrator was reasonable in the circumstances of the case.[8]

6. Discussion

[3] (2013) 34 ILJ 2795 (SCA), and *Booi v Amathole District Municipality* (2022) 43 ILJ 91 (CC).
[4] Para 25.
[5] Para 44.
[6] *Booi v Amathole District Municipality* (2022) 43 ILJ 91 (CC); [2021] ZACC 36 para 43; see also *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) para 50
[7] *Booi* para 43.
[8] *Booi* para 43.

In a country as diverse as South Africa, there is bound to be a great deal of societal dislocation which is precipitated by cultural, religious, and linguistic differences, particularly in the school setting or on the shopfloor in the workplace. The dislocation becomes much more pronounced where the values and practices of the one group which, because of economic and other advantages, are imposed on the disadvantaged one.[9]

Black people, in South Africa, the United States of America, and elsewhere in the world, have always been told how they should dress up and conduct themselves at school or the workplace. Straight hair - not long, combed-out Afro hair – has been touted as the standard of decency and decorum.[10] Isiphandla[11] and other African adornments are considered be in conflict with Christianity or other related faiths.[12] Workers and pupils are often told to 'look people straight in the eye' when they talk to them.[13] This, it is believed, albeit wrongly, that it is a sign of honesty and integrity. And, that if a person looks away while another is talking to him or her for -out of shyness or respect – he or she is dishonest – someone not to be trusted.[14] However, in an African setting, the opposite holds true.[15]

Breastfeeding in public is another contested terrain in multiracial multicultural countries. White people - and those black people who have undergone some acculturation – often express some revulsion and opprobrium at the sight of the naked breast or nipple of a woman who is feeding her child in public.[16] Whilst in the African context, and on the basis of *ubuntu*, this act may be considered life-saving and necessary, it is likely to be proscribed as criminal in other communities.[17] What makes this act of nutritional nourishment a crime, in the latter instance, is that it is considered to have 'the tendency to deprave the morals of others, or to outrage public decency'. Sadly, in the South African context, it is the Eurocentric or Western moral values, which are espoused by a minute section of the population – have been used as the yardstick in this regard.[18] Moreover, while breastfeeding is visited with social revulsion and opprobrium, the wearing of the skimpiest of swimwear public beaches is tolerated and

[9] For instance, in *Du Plessis v De Klerk and Another* 1996 (3) SA 850 (CC) para 163, said: 'Ours is a multi-racial, multi-cultural, multi-lingual society in which the ravages of apartheid, disadvantage and inequality are just immeasurable. The extent of the oppressive measures in South Africa was not confined to government/individual relations but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society'.

[10] See 'Racist school hair rules' suspended at SA's Pretoria Girls High' BBC News https://www.bbc.com/news/world-africa-37219471 (accessed 24.08.22.

[11] This is bracelet which is cut from the skin of a goat that would have been slaughtered during a Zulu traditional ceremony for the purpose of thanking or appeasing one's ancestors.

[12] See *Pillay v MEC, Education KwaZulu-Natal* 2008 (1) SA 474 (CC) para 44.

[13] See 'Racist school hair rules' suspended at SA's Pretoria Girls High' BBC News https://www.bbc.com/news/world-africa-37219471 (accessed 24.08.22).

[14] See S Uono & JK Hietanen "Eye Contact Perception in the West and East" view from https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4340785 (accessed 03. 09.22).

[15] See Uono & Hietanen 'Eye Contact Perception' (n 14) above.

[16] See, J Burchell & J Milton 557-558.

[17] Burchell & J Milton 557-558.

[18] See Mbiti 17.

encouraged.[19] An impression seems to have been created that pre-colonial Africans never had a moral and ethical code[20] – or any concept of beauty aesthetics.[21]

However, it bears pointing out that the Constitution[22] has not made matters any easier. It has created a legal paradox of sorts. While s 30 grants everyone the right 'to speak the language, and to participate in the cultural life of his or her own choice', s 2 proclaims the founding document as 'the supreme law of the Republic'. Therefore, to be valid, all customs and cultural practices must comply with the provisions of the Constitution. The balance seems to have been very difficult to strike in this context, particularly for school administrators and human resource practitioners. The mean between the need for discipline in the workplace, on the one hand, and respect for other people's store of knowledge, culture and folklore, on the other, has been difficult to establish.[23] For instance, in *Pillay v MEC, Education KwaZulu-Natal*,[24] the question was whether a school could exclude a pupil from its premises and programmes merely because she wore a nose stud for cultural purposes. Ms Pillay, the respondent in this matter, contended that that the insertion of the nose stud was part of a time-honoured family tradition. She also said that the stud was to be inserted when a girl (in this case her daughter Sunali) reached physical maturity, and was, therefore, marriageable. In his judgment, and with reference to the school's Code of Conduct, Langa CJ said:

> The ground of discrimination is still religion or culture as the Code has a disparate impact on certain religions and cultures. The norm embodied by the Code is not neutral, but enforces mainstream and historically privileged forms of adornment, such as ear studs which also involve the piercing of a body part, at the expense of minority and historically excluded forms. It thus places a burden on learners who are unable to express themselves fully and must attend school in an environment that does not completely accept them.

It is for that reason, therefore, that the school and the workplace are so jarringly alienating to the learner and the worker. The source of that grating experience is the arbitrary nature of the criteria that are relied on to determine the efficacy and propriety of any religious or cultural practice – or beauty and aesthetics - is exogenous. And, in many instances, it violates the dignity of the more vulnerable groups of that community.

It is also important to note that, in some South African communities religion and culture are very difficult to tell apart; the one is an integral part of the other. Language – in both written or spoken form - is the medium through which religious teachings and cultural practices of a

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[19] Burchell & Milton 555 express this conundrum in the following terms:
'Like crimes against sexual morality, crimes of indecency are highly subjective in their determination of what is indecent…and possess the potential for oppressing particularly the freedom of expression'.

[20] Turning a blind eye to the concepts of *Ubuntu*.

[21] In this regard, see *Beauty – Stanford Encyclopedia of Philosophy* https://plato.stanford.edu/entries/beauty/#:~:text=The%20nature%20of%20beauty%20is,goodness%2C%20truth%2C%20and%20justice; see also R Scruton who says: 'Almost anything might be seen as beautiful by someone or from some point of view, and different people apply the word to quite disparate objects for reasons that often seem to have little or nothing in common. It may be that there is some single underlying belief that motivates all of their judgments. It may also be, however, that the term *beautiful* has no sense except as the expression of an attitude, which is in turn attached by different people to quite different states of affairs'.

[22] The Constitution of the Republic of South Africa Act 108 of 1998.

[23] Despite South Africa being called, colloquially, the 'Rainbow Nation'. This moniker, for then nascent democratic state, has been attributed to the late Bishop Emeritus of the Anglican Church in South Africa, Archbishop Desmond Mpilo Tutu – see Mark Austin 'Desmond Tutu coined the phrase 'Rainbow Nation' and his hope lives on' found in https://news.sky.com/story/desmond-tutu-coined-the-phrase-rainbow-nation-and-his-hope-lives-on-12504006 (accessed 23.08.2022).

[24] *MEC for Education KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 35.

people are transmitted from one generation to the next.[25] Sadly, it is the same medium that has been used to isolate and alienate vulnerable groups, such as the workers – for ideological, political and economic reasons.[26] That objective has been achieved through the use of inadequate, derogatory and pejorative terms to describe African or oriental concepts, philosophies and epistemologies.[27] *Ubuntu*, for instance, which pervasive through African culture and jurisprudence,[28] is treated as a mere appendage or adjunct of some or other Western phenomenon. It is, in fact, a stand-alone, self-contained, relational ethic from which Western philosophies and epistemologies can borrow.[29]

The South African shopfloor comprises a large, unlettered underclass, which is vulnerable to exploitation.[30] For that reason, conformity – not *ubuntu*, fairness or equity – seems to be the over-riding consideration for human resource practitioners and school administrators. And the rights to fair labour practices,[31] freedom of expression,[32] and culture – and to speak one's own language – are in constant danger of being violated all the time – in the name of discipline and decorum if caution is not exercised, or balance properly struck.

7. Conclusion

Mr Njini's case is a clear demonstration that the Constitution is a living document; and that the right to culture is inextricably linked other constitutional rights, such as the right to fair labour practices and the right to dignity.

Also, lawyers and the courts have an obligation to constantly breathe life into it. That kind of exercise will help to remind all the denizens of the country and other peoples of the world that pre-colonial South Africa was, in no way, a wasteland where nothing was connected to nothing.

[25] See JS Mbiti *African Religions and Philosophy* (1990 6-7.
[26] For instance, the language in biblical texts has been, is still being distorted to justify discrimination amongst the peoples of the world on the basis of race and religion.
[27] Mbiti 7.
[28] See GE Devenish Commentary on the South African Bill of Rights (1999 12, 620-622.
[29] See Mbiti 6, where he describes this symbiosis, aptly, as follows: 'It is true that Africa has had contact with the outside world, but religious and cultural influence from this contact cannot have only one way: there was always a give-and-take process. Furthermore, African soil is not so infertile that it cannot produce its own new ideas'.
[30] The literacy levels in this group is still very low, at only 12% – see "Literacy and Numeracy are the Foundations of any Successful Business", viewed from https://eee.co.za/literacy-and-numeracy-are-the-foundations-of-any-successful-business (accessed 03.09.22).
[31] Section 23 of the Constitution.
[32] Section 15 of the Constitution.