



CONSTITUTIONAL COURT OF SOUTH AFRICA

South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others

CCT 19/16

Date of hearing: 11 August 2016

Date of judgment: 08 November 2016

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

Today the Constitutional Court handed down judgment in a matter where the term “kaffir” was used at a workplace. The central question was whether the use of this word rendered the employment relationship intolerable thus ruling out reinstatement as an appropriate remedy.

Mr Kruger, an employee of the South African Revenue Service (SARS), called Mr Mboweni, his team leader, a kaffir. As required by the collective agreement which binds SARS, a disciplinary hearing was convened. Mr Kruger pleaded guilty to using the term kaffir and was found guilty. The Chairperson of the disciplinary enquiry imposed the sanction of a final written warning valid for six months, a suspension without pay for 10 days and referred Mr Kruger to counselling. Dissatisfied with that sanction, the Commissioner of SARS (Commissioner) altered the sanction to a dismissal.

Mr Kruger referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the grounds that his dismissal was substantively and procedurally unfair. He contended that the Commissioner did not have the power to alter the sanction imposed by the Chairperson of the disciplinary enquiry. The CCMA Arbitrator found that Mr Kruger had, despite his subsequent denial, committed the alleged misconduct. However, she held that the collective agreement did not allow the Commissioner to substitute the sanction imposed by the Chairperson of the disciplinary enquiry. The CCMA Arbitrator ordered SARS to reinstate Mr Kruger subject to the conditions imposed at the disciplinary hearing.

SARS approached the Labour Court, on the ground that Mr Kruger's reinstatement was inappropriate because its relationship with Mr Kruger had become intolerable. It contended that his conduct was insubordinate, racist, derogatory and abusive. Mr Kruger argued that the award was reasonable because the Commissioner did not have the authority to alter the sanction as it did. The Labour Court found in favour of Mr Kruger. Aggrieved by that outcome, SARS appealed to the Labour Appeal Court. The parties advanced substantially the same arguments as they did in the Labour Court. The Labour Appeal Court also found in favour of Mr Kruger.

In the Constitutional Court, SARS submitted that the CCMA Arbitrator acted improperly by ordering reinstatement and that the award was reviewable because no reasonable arbitrator could have reached that decision. SARS admitted that the dismissal was procedurally unfair but argued that reinstatement should not have been ordered since the employment relationship had become intolerable. Mr Kruger argued, among other things, that the appeal should be dismissed because no evidence was led to establish an irretrievable breakdown or the intolerability of the employment relationship.

In a unanimous judgment written by Mogoeng CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring), the Court highlighted the seriousness of the use of the word kaffir and described it as a very egregious, derogatory and humiliating expression. The Court held that the use of that word amounts to hate speech and that courts are obliged to act fairly but firmly against those who use it, to contribute to the eradication of racism in line with the foundational values of our Constitution. It found that the CCMA Arbitrator acted unreasonably in ordering Mr Kruger's reinstatement.

The Court held that in a case of an unfair dismissal, the correct approach is first to consider the provisions of section 193(1) and then section 193(2) of the Labour Relations Act to determine that re-instatement, re-employment or compensation is the appropriate remedy to grant. It concluded that based on the seriousness of the misconduct of using the word kaffir and the evidence led to demonstrate the intolerability of the employment relationship between SARS and Mr Kruger, the Arbitrator should not have ordered the reinstatement of Mr Kruger.

Having considered the gravity of the misconduct and factors in favour of Mr Kruger, the Court concluded that a just and equitable remedy to grant was compensation. Since SARS was in principle prepared to pay compensation of not more than six months of Mr Kruger's salary, the Court ordered that he be paid compensation of a salary over that period and that each party is to pay its own costs.