REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 751/2013

In the matter between:

ADRIAN SIMMERS **Applicant**

and

CAMPBELL SCIENTIFIC AFRICA (PTY) LTD **First Respondent**

JOSEPH WILSON THEE N.O. **Second Respondent**

CCMA **Third Respondent**

Heard: **24 April 2014**

Delivered: **9 May 2014**

Summary: Sexual harassment – whether conduct constitutes sexual harassment and whether sanction of dismissal was fair. Review – whether conclusion reasonable. Arbitration process – whether leading of evidence and cross-examination via Skype prevented a fair trial.

JUDGMENT

STEENKAMP J

Introduction

[1] "Do you want a lover tonight?" Do these words constitute sexual harassment, uttered by an employee to a consultant, off company premises where both parties were staying in a lodge? And if it does, is it dismissable?

[2] The further question that arises in this case is whether the hearing of evidence and cross-examination at arbitration via a Skype telephone link prevented a fair trial of the issues.

[3] These questions arise in the context of a review application. The further question that arises, therefore, is whether the conclusion reached by the arbitrator was one that a reasonable arbitrator could not reach.[1]

Background facts

[4] The applicant, Adrian Simmers, is a senior employee (an installation manager) of the first respondent, Campbell Scientific Africa (Pty) Ltd (CSA). He accompanied a contractor to CSA, Frederick le Roux, and a consultant to the company, Ms Catherine Markides, to Botswana to survey a site in order to install some equipment for the Botswana Power Corporation. Ms Markides was employed by Loci Environmental (Pty) Ltd. They stayed over at a lodge. All three of them had supper together. While Le Roux was paying the bill, Simmers and Markides walked out of the restaurant and waited in the parking lot. Simmers said to Markides, "Do you want a lover tonight?". She made it clear that she did not and that she had a boyfriend. He responded, "if you change your mind during the night, come to my room". She did not. He did not pursue it.

[5] The next day, Markides mentioned the incident to Le Roux. She left for Australia. Upon his return to South Africa, Le Roux mentioned the incident to CSA's managing director, Mr Visagie. Visagie sent an email to Markides apologising for Simmers's conduct and requesting details.

[6] Markides replied as follows:

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[1] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC)*; Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)*; Gold Fields Mining Ltd (Kloof Gold Mine) v CCMA & ors* [2014] 1 BLLR 20 (LAC).

> "I accept your apology and understand that Adrian's behaviour at times was not appropriately representative of CS Africa. My impression of CS Africa is of professionalism and efficiency, despite what happened. I understand that this was Adrian's personal misconduct. He made some inappropriate advances to me, he was also unprofessional in terms of his conduct about Frederick, he said some things to me about Frederick that were undermining and unnecessary. I'm sure you can understand that I found this inappropriate. Otherwise, the experience was pleasant, and I must assure you that I am not harbouring any 'hard feelings' towards you, Frederick or CS Africa."

[7] Visagie wrote to Markides again and asked her for "a short declaration on both the inappropriate advances and unprofessional conduct towards Frederick" to be used in a disciplinary hearing. She responded:

> "I found Adrian's conduct to be inappropriate. He constantly attempted to influence my opinion of Frederick into condescension, saying that he was a perfectionist, that he was stubborn, that he took too much time to do his job, that he didn't listen, that he was an impossible person to work with. It was uncomfortable for me that he (Adrian) would try to talk about Frederick behind his back to me.
>
> One night after we had dinner, Frederick was finalising the bill, and Adrian and I were standing in the parking area. I said that I was not tired, Adrian suggested that we do something, to which I said (reluctantly) that we should speak to Frederick. He refused saying that he did not want Frederick to know or to be involved. I then said that I was just going to go to bed. He said that it was difficult to be alone, that he was lonely and asked if I wanted to go for a walk (alone with him) or go to his room with him. I refused, he then asked about my boyfriend (whom I had mentioned earlier) and asked if I was in contact with him, if it was a serious relationship. I said yes, I speak to him every day and [it was] serious. Adrian then asked again if I was sure I didn't want to spend some time with him, to which I refused again, and said I was just going to go to bed. He then reiterated his offer, saying that if I changed my mind, I could just go to his room during the night. I again said that I was going to bed. Frederick then came back from settling the bill and I said good night to them both. Overall, I felt uncomfortable with Adrian's conduct, and was surprised by his advances to me, and his disrespectful behaviour towards Frederick."

[8] CSA called Simmers to a disciplinary hearing on allegations of sexual harassment, unprofessional conduct, and bringing the name and image of the company into disrepute. Markides had left for Australia and did not testify. The chairperson of the hearing found that Simmers had committed the misconduct complained of and CSA dismissed him. He referred an unfair dismissal dispute to the CCMA.

[9] An initial arbitration award was reviewed and set aside by Rabkin-Naicker J because of procedural irregularities. It was remitted to the CCMA where a fresh arbitration was conducted before the second respondent (the Commissioner).

The arbitration

[10] Markides was in Australia. The arbitrator allowed her evidence to be led via Skype. A video link could not be established and she testified and was cross-examined telephonically. There were a number of breaks in transmission. There were also pauses between questions and answers occasioned by the Skype link.

[11] With regard to the allegation of sexual harassment, the arbitrator was satisfied that the conduct complained of was relevant to the workplace, although Markides is was not an employee of CSA and the incident occurred outside of working hours. He came to this conclusion on the basis that the protagonists were working together in a remote location and were accommodated at the same lodge.

[12] The arbitrator further found that Simmers's conduct constituted sexual harassment. His finding was based on the following premise:

> "The fact that the applicant had not denied that he had made the remarks to the complainant certainly would suggest that he was aware or should have been aware that his remarks on the day of the incident would not be welcome and therefore would constitute sexual harassment. The evidence presented during the arbitration proceedings relate to the complainant email makes it clear that the suggestions were in fact not welcome."

[13] The arbitrator further found that Simmers's conduct was inappropriate:

> "I find it a bit inappropriate that a stranger would approach another person and ask whether she has a boyfriend. The complainant testified that even though she did not tell the applicant to stop, she had made it clear in no uncertain terms that it was not acceptable and that she had blatantly refused the invitation. I therefore find that the applicant's proposals to Ms Markides constituted sexual harassment in the form of unwanted verbal sexual advances."

[14] On the second allegation of misconduct, the arbitrator found that Simmers's remarks about Le Roux were unprofessional and could have had the effect of bringing the company's name into disrepute.

[15] In determining whether dismissal was an appropriate sanction, the arbitrator recognised that the Code of Good Practice: Dismissal promotes progressive discipline. However, he did not consider the misconduct in this case "as a minor incident that calls for a lesser sanction". He found that dismissal was fair.

Evaluation / Analysis

[16] Apart from the procedural complaint relating to evidence by Skype, the applicant has identified the following questions for determination:

16.1 Sexual harassment: Can the words "do you want a lover tonight" and "come to my room if you change your mind" constitute sexual harassment? Is it relevant that Simmers and Markides were not co-employees when considering the context within which sexual harassment takes place? And if the words "do you want a lover for tonight" do in fact constitute sexual harassment, are these words sufficiently serious to justify a dismissal?

15.2 Unprofessional conduct and causing harm to the company's image: Charge 2 is for unprofessional conduct, charge 3 for harm caused to the company's image. But both charges are based on the averment that Simmers discussed the employer's business with colleagues and a client but no finding was made on charge 3. The questions that arise are whether Simmers's discussions justified a dismissal or other punishment.

Evidence from Australia

Was allowing the complainant to give evidence via a long-distance call a reviewable irregularity?

[17] Simmers argues that he was prejudiced by the fact that, when Markides testified at arbitration, she did so over a long-distance link by telephone, and not in person or even by Skype video as was initially indicated. He also argued that he was prejudiced by the fact that Markides did not testify at the disciplinary hearing; but that is not a relevant factor, as the arbitration was a hearing *de novo.*

[18] Simmers further argued that Markides had the benefit of delays, pauses, broken connections, time to compose herself, to think of her answers, to reconsider the questions whether in chief or in cross-examination, and that she did not have to face the man she had accused. The arbitrator could also not test her demeanour – an important factor in a sexual harassment case.

[19] But it must be borne in mind that these are arbitration proceedings – designed to be informal and conducted with the minimum of legal formalities.[2] Markides was in Australia. It would have been unacceptably costly and time-consuming for her to be flown back to South Africa to give evidence. The arbitrator allowed her evidence in the manner envisaged by section 138 (1) of the LRA. He conducted the arbitration in a manner that he considered appropriate in order to determine the dispute fairly and quickly. Simmers was represented by counsel who had the opportunity to cross-examine Markides telephonically. It was not an ideal situation, but it was one that is envisaged by the LRA. It did not prevent Simmers from having a fair hearing. It does not constitute a reviewable irregularity.

[2] Labour Relations Act 66 of 1995 (LRA) s 138(1).

Errors of law and reason?

[20] It must be borne in mind that an error of law or a flaw in the arbitrator's reasoning does not render an arbitration award reviewable in itself.[3] But Mr *Ackermann* argued that the errors committed by the arbitrator rendered his conclusion unreasonable.

Illogical and unreasonable finding

[21] The Commissioner found that the conduct complained of was relevant to the workplace. He appears to proceed from the understanding, although it is not clear, that the employee's case was that the alleged misconduct was irrelevant because it did not relate to the workplace. This was never argued at the arbitration, as Mr *Ackermann* pointed out.

[22] What was argued on behalf of Simmers was that this was an important factor, namely, that the probabilities were that one adult had propositioned another adult within a social context because it was outside the work-place. For the same reason it is certainly relevant that there was no disparity of power and that the parties were not co-employees. These facts all stack up in favour of Simmers precisely because this is a sexual harassment case. Cases of off-duty harassment of non-employees are extremely rare[4]. However, the fact remains that the conduct complained of took place in a work-related context. A relevant factor that the Commissioner did not take into account, is that Simmers and Markides were not co-employees and that they would probably never work together again – she has gone to Australia. It is also relevant that the incident was once-off and that it occurred outside the workplace and outside of working hours. But all of that goes to the questions of whether it constituted sexual harassment and whether dismissal was a fair sanction. it does not make the award reviewable in and of itself.

[23] Another important element of the award is the Commissioner's finding that "the fact that the applicant had not denied that he had made the remarks

[3] *Nedbank Ltd v Herholdt; Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA & ors* [2014] 1 BLLR 20 (LAC).

[4] Le Roux, Rycroft and Orleyn *Harassment in the Workplace*, page 150, footnote 38 which refers to only three cases, none of which were in heard in the Labour Court.

to the complainant certainly would suggest that he was aware or should have been aware that his remarks on the day of the incident would not be welcome and therefore constitute sexual harassment." This is illogical. It is a *non sequitur.* The conclusion does not follow from the premise. The issue in question is whether the remarks by Simmers constitute sexual harassment, not the fact that he made them. He admits that he did. But to say, as the Commissioner does, that because Simmers made the remarks he knew that they constituted sexual harassment is a finding that cannot be sustained. It is circular reasoning. This is a decision which a reasonable decision-maker could not have reached.

[24] However, the question for this Court remains whether the overall conclusion reached by the commissioner is a reasonable one, considering all the evidence at the arbitration in the round.

"Do you want a lover tonight?" Sexual harassment or not?

[25] The next – and probably the most important – question to consider is whether Simmers's behaviour constitutes mere sexual attention or sexual harassment.

[26] CSA does not have a policy on sexual harassment. The commissioner properly had regard to the Code of Good Practice on the Handling of Sexual Harassment Cases[5]. But there was no evidence at the arbitration that Simmers's conduct crossed the line where sexual attention becomes sexual harassment. The Code[6] specifies that that is the case when --

26.1 the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment;

26.2 the complainant made it clear that she considers the behaviour offensive; and/or

26.3 the alleged perpetrator should have known that his behaviour was unacceptable.

[5] GN 1357 *Government Gazette* 27865, 4 August 2005.

[6] Item 4.

[27] The Code[7] makes it clear that a person may indicate that sexual conduct is unwelcome by walking away. That is what Markides did in this case. Simmers did not pursue her. Verbal conduct includes sexual advances – but it must be unwelcome, and the alleged perpetrator should have known that or the recipient of the advance should have made it clear.

[28] In this case, it is common cause that Simmers did not persist in his overtures once Markides told him that it was unwelcome. The words he used were certainly inappropriate, albeit uttered "more in hope than expectation", as Mr *Ackermann* remarked. But I agree with him that it did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment.

[29] It is true that a single incident of unwelcome sexual conduct can constitute sexual harassment[8]. But it is trite that such an incident must be serious. It should constitute an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace. This nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault; or *quid pro quo* harassment. In this case, it is common cause that the Commissioner dealt with a single incident. He found so. Once Markides made it plain to Simmers that it was not welcome, he backed off.

[30] The Commissioner places much store in the fact that the parties hardly knew each other. From this the Commissioner concludes that Simmers's proposition amounted to sexual harassment. That is not the correct question. The question is whether his proposition, inappropriate as it was, amounted to sexual harassment, not whether the parties knew each other.

[31] This is not simply a matter of semantics. The reason for this is the nature of sexual harassment. Misunderstandings are frequent in human interaction. An inappropriate comment is not automatically sexual harassment. This was a fundamental error made by the Commissioner one that led directly to his conclusion that dismissal was a fair sanction. Simmers's comment was sexual attention, crude and inappropriate as it

[7] Item 5.

[8] 2005 Code Item 5.3.3.

may have been. It was a single incident. It was not serious. It could only have become sexual harassment if he had persisted in it or if it was a serious single transgression. Add to this the fact that there was no workplace power differential, the parties were not co-employees, and the incident took place after work. The advance was an inappropriate sexual one, but it did not cross the line to constitute sexual harassment. It certainly did not lead to a hostile work environment; in fact, Markides left for Australia shortly after the incident, and it is unlikely that the parties will ever work together again – they do not even work for the same employer.

[32] As Justice Scalia remarked in the US Supreme Court in *Oncale v Sundowner Offshore Serives Inc*[9], applying Title VII of the Civil Rights Act[10]:

> "The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the 'conditions, of the victim's employment. 'Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview.' *Harris,* 510 U. S., at 21, citing *Meritor,* 477 U. S., at 67. We have always regarded that requirement as crucial, and as sufficient to ensure that courts and juries do not mistake ordinary socializing in the workplace -- such as male-on-male horseplay or intersexual flirtation -- for discriminatory "conditions of employment."

[33] As to the effect of the alleged harassment on Markides there is very relevant evidence which the Commissioner failed to appreciate, namely Markides's emails. She had time to think, and summarise and apply her mind to what happened when preparing her emails. In fact, these emails were solicited by the employer. If one has regard to the most important email, sent to Visagie at his request on 11 June 2012, the high-water mark of Markides's complaint is that she found Simmers's conduct to be inappropriate (referring, in fact, to his comments about Le Roux); that she

[9] 523 US 75.

[10] Civil Rights Act 1964 USC 2000e – 2(a)(i).

was surprised by his advances; and that she felt uncomfortable with his conduct "overall", including his disrespectful behaviour towards Le Roux. She did not say that she was afraid, nor nervous, nor threatened, nor apprehensive. In her evidence at arbitration she could not provide a plausible explanation why she did not include the following allegations, raised for the first time at arbitration, in her email:

33.1 that she was "incredibly nervous";

33.2 that she felt insulted;

33.3 that she had put Le Roux's cell phone number into her cell phone in case Simmers approached her during the night.

[34] By failing to take this evidence into account the arbitrator reached a decision that no reasonable decision-maker could have reached on the facts before him.

Sanction

If Simmers's conduct was sexual harassment, was dismissal justified?

[35] I am of the view that CSA did not establish, on Markides's evidence, that Simmer's conduct amounts to sexual harassment. But even if it did, it could not justify dismissal. In coming to the contrary conclusion, this is one of those rare cases where the commissioner reached a conclusion that no reasonable arbitrator could have reached.

[36] It is common cause that Simers did not touch Markides. His verbal conduct was crude and inappropriate, but it was not a demand for sex. It was an unreciprocated advance. In blunt terms, he was "trying his luck". It was inappropriate but it did not justify dismissal. The Commissioner concludes, correctly and reasonably, that this was a once-off incident. There was no power differential and the parties were together for only a brief sojourn. It did not create a hostile work environment for Markides. No reasonable commissioner, in my view, could have found that this incident justified dismissal as a fair sanction.

[37] Simmer's conduct was inappropriate. But, given the circumstances outlined above, a fair sanction would have been some form of corrective discipline including a written or final written warning[11]. In coming to the conclusion that dismissal was a fair sanction, the commissioner reached a conclusion that a reasonable arbitrator could not reach.

[38] It remains to be considered whether the other alleged misconduct – charges 2 and 3 at the disciplinary hearing – was proven and, if so, whether the commissioner reasonably concluded that dismissal was a fair sanction.

Unprofessional conduct and bringing the company's name into disrepute

Did Simmers's discussions about Le Roux with Markides justify a dismissal?

[39] Markides characterised Simmers's discussion with her about Le Roux as inappropriate and disrespectful. This constituted misconduct. The arbitrator reasonably came to that conclusion. But it cannot reasonably be said to be misconduct for which an employee can fairly be dismissed, without any progressive discipline being considered.

[40] Both charges 2 and 3 refer to Simmers discussing the business with a client (Markides). But Markides was not a client. She was a consultant to the company. On this basis the Commissioner made a material error of fact, but I do not agree that it is reviewable in itself. The question remains whether his conclusion was reasonable.

[41] In my view, it was not. Simmers did behave unprofessionally in discussing Le Roux's perceived shortcomings with a consultant to the company. It created a bad impression in Markides's mind – she considered it inappropriate and surprising. But her testimony was that it did not

[11] Contrast the facts of the following cases and the sanctions imposed. In *SABC v Grogan & Another* [2006] 2 BLLR 207 (LC), *Maepe v CCMA* [2008] 8 BLLR 723 (LAC), *Mokoena & another v Garden Art (Pty) Ltd & another* [2008] 5 BLLR 428 (LC), *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC) and *Rustenburg Base Metal Refiners (Pty) Ltd v Solidarity* (2009) 30 *ILJ* 378 (LC) dismissal was not considered a fair sanction. By contrast in *Gaga v Anglo Platinum Ltd* [2012] 3 BLLR 285 (LAC), *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC), *Reddy v University of Natal* [1998] 1 BLLR 29 (LAC), and *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) dismissal was considered a fair sanction. In most of these cases some form of physical invasiveness or persistent conduct was present.

influence her positive view of CSA. It did not justify dismissal as a fair sanction for a first offence. Some form of progressive discipline would have been appropriate.

Conclusion

[42] The commissioner's decision to allow Markides to give evidence via a Skype telephone link was not a reviewable irregularity. It conforms with the provisions of s 138(1) of the LRA.

[43] The commissioner's conclusion that Simmers's conduct constituted sexual harassment that justified dismissal as a fair sanction, on the other hand, is one that is so unreasonable, in my view, that no other commissioner could have come to the same conclusion. Firstly, on the facts, the conduct did not constitute harassment; but even if it did, it was not of a serious enough nature to justify dismissal as a fair sanction for a first offence.

[44] The same considerations apply to the charges of unprofessional conduct and bringing the company into disrepute. The misconduct was not of such a nature that progressive discipline should not have been imposed. No reasonable commissioner could, in my view, have come to a different conclusion.

[45] This means that the award should be reviewed and set aside. It would serve little purpose to remit it, other than to occasion further delays and costs. It is unlikely that Markides will return from Australia to testify once more. All the evidence has been recorded and transcribed. The Court has read and listened to the evidence (a compact disk was provided to the Court). It is in as good a position as a CCMA commissioner to substitute its own finding, especially in circumstances where the commissioner could not physically observe Markides's demeanour.

[46] I am of the view that dismissal was not a fair sanction. Simmers should be reinstated. But that does not mean that he should get off scot free. His behaviour was inappropriate and unprofessional. For that he should be given a final written warning.

Costs

[47] The applicant was represented by the University of Stellenbosch Legal Aid Clinic. He was partly successful, but in law and fairness, he is not entitled to any costs.

Order

[48] The arbitration award of the second respondent under case number WECT 13445-12 dated 16 August 2013 is reviewed and set aside. It is replaced with the following award:

> "The dismissal of the employee, Adrian Simmers, was substantively unfair. He is reinstated retrospectively, coupled with a final written warning valid for 12 months."

[49] The final written warning is valid for 12 months from the date of this judgment.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Lourens Ackermann Instructed by Marion Hattingh of the Legal Aid Clinic, University of Stellenbosch.
FIRST RESPONDENT:	Willem Jacobs (attorney).