

HIGHLIGHTS OF THE INDUSTRIAL LAW REPORTS

Dismissal — Racist Conduct and Language

In both *SA Breweries (Pty) Ltd v Hansen & others* (at 1766) and *SA Equity Workers Association on behalf of Bester v Rustenburg Platinum Mine & another* (at 1779) the Labour Appeal Court confirmed that the test whether words uttered are derogatory and racist is objective. However, in *SA Breweries* where the employee had been dismissed for saying to a sub-contractor that ‘julle kaffirs is almal donnerse ewe onnosel’, the court found that where the word ‘kaffir’ is used its derogatory connotation is so blatant as to be taken as established. In *SA Equity Workers Association* the employee had been dismissed after he referred to a fellow employee as a ‘swartman’ when demanding that he move his vehicle. Relying on the objective test to determine whether the use of the word ‘swartman’ was racist, the court found that, on the evidence, it was clear that the word was not used to denigrate or demean but to identify the fellow employee whose name was unknown to the employee. The court commented that this matter illustrated that, in a racially charged society such as ours where an accusation of racism has far reaching and serious consequences, it is important to scrutinise carefully the context in which a race descriptor is used, and not to presume that the mere use of a race descriptor is axiomatically derogatory and racist. Race descriptors such as ‘black man’ and ‘black woman’ are neutral and it is only by locating them in a ‘pejorative’ context that their use should be condemned as racist.

In *National Commissioner of the SA Police Service & another v Nienaber NO & another* (at 1859) a SAPS station commander had been dismissed after he uttered the words ‘ek is nie god van kafferland nie’ in a station meeting. The appeals authority reduced the sanction of dismissal to one of suspension for six months, and the commissioner sought to review the authority’s finding in terms of s 158(1)(h) of the LRA 1995. The Labour Court found that the impugned decision was unreasonable and irrational on its face. It found further that the employee had attempted to justify his conduct on the basis that he had not used the word ‘kaffir’, but an idiom that meant that he ‘was not a tin god’. In the court’s view the employee

did not comprehend what the implications of the words he uttered were in this country and under our Constitution — the Constitutional Court has endorsed the notion that the use of the word ‘kaffir’ on its own and/ or in combination with other words and terms is so offensive that it is ‘unspeakable’.

In *Mayisela v Commission for Conciliation, Mediation & Arbitration & others* (at 1826) where the employee had been dismissed, inter alia, for making allegations of racism against his manager, the Labour Court found on review that the employee’s conduct did not amount to misconduct. To hold that the employee had misconducted himself would have the consequence of concealing instead of unearthing an allegation of racism, which, if true, was itself serious misconduct which could not be glossed over, accommodated or excused. The court warned that, although it was not acceptable for a person simply to accuse another of being a racist, in this matter it had been imperative for the employer to investigate the allegations made by the employee to establish the veracity thereof.

In *Cantamessa and Edcon Group* (at 1909) the employee had posted a comment referring to the government as ‘monkeys’ and President Zuma as ‘stupid’ on her private Facebook page outside working hours and using her personal laptop. She was dismissed for making the racist and derogatory comment, but six fellow employees who ‘liked’ her comment were given final written warnings. A CCMA commissioner rejected the employer’s submission that the employee linked herself to the employer by stating her occupation on her Facebook page — the employee merely stated her occupation as a fact about herself and such did not constitute a link to the employer entitling it to discipline her for conduct occurring outside working hours. He found further that no reasonable Internet user would associate the employer with the employee’s private post and that the employee had not been guilty of breaching any of the employer’s rules and policies because none of them regulated the use of social media outside of work. He also found that it was not racist merely to refer to the president as ‘stupid’ nor defamatory to refer to the government as ‘monkeys’. Finally, he found that the employer had failed to act consistently when it gave final written warnings to the employee’s co-workers who had ‘liked’ her comment — if the employer viewed the conduct as racist, all employees should have been subject to the same sanction.

In *Chemical Energy Paper Printing Wood & Allied Workers Union on behalf of Dietlof and Frans Loots Building Material Trust t/a Penny Pinchers* (at 1922) the employee had posted a comment on his Facebook page alleging racism by his employer. He was dismissed and a CCMA commissioner upheld the dismissal. He found that the employee had made a false accusation of racism against his employer in his Facebook post. A false accusation of racism was as deplorable as racism, and justified dismissal for a first offence. In *SA Pelagic Fishermen’s Union on behalf of Mouton and Lucky Star Operations (A Division of Lucky Star Ltd)* (at 1929) the employee, a skipper of a fishing vessel, made an offensive remark about coloured people in a WhatsApp group with crew members, many of whom were coloured. He was dismissed, despite his long service and expression of remorse. A CCMA commissioner upheld the dismissal, finding that race discrimination was never fair nor justified and that the courts had been enjoined to play a particularly critical role in the fight against racism.

Unfair Discrimination — Race

In *Biggar v City of Johannesburg (Emergency Management Services)* (at 1806) the Labour Court found that a Black employee and his family had been subjected to racial harassment and abuse by his colleagues at the employee residence provided by the employer, and that the employer had failed to take the necessary steps to protect the Black employee and his family and to deal with racial harassment in a decisive manner as required by s 60 of the Employment Equity Act 55 of 1998. The court found further that, although the racial incidents were not work related and primarily involved the families of the employees, they took place at the employer's premises and contaminated the work environment in a manner that compromised safety and job performance.

In *Association of Mineworkers & Construction Union on behalf of Mohale & others and Beatrix Gold Mine—A Division of Sibanye Gold Ltd* (at 1886) several apprentices sought relief against their employer in terms of the EEA after a supervisor had allegedly called them 'kaffirs'. The CCMA commissioner noted that, as the apprentices relied on a listed ground of discrimination, the employer bore the onus of proving that the alleged discrimination did not occur. Having regard to the oral and documentary evidence before her, the commissioner was satisfied that the evidence did not establish that any racial discrimination had taken place. She dismissed the apprentices' claim.

Transfer of Business as Going Concern

In *High Rustenburg Estate (Pty) Ltd v National Education Health & Allied Workers Union on behalf of Cornelius & others* (at 1758) the Labour Appeal Court upheld the Labour Court ruling that s 197(5) of the LRA 1995 applied to an arbitration award that was reversed by the Labour Court after the transfer of the undertaking had taken place. On a correct interpretation of s 197 it could not have been intended that the review of an award binding on the old employer immediately before the transfer of its business as a going concern would have no legal consequences for the new employer if the award was substituted on review after the transfer had taken place.

Disciplinary Enquiry — Malicious Prosecution

The High Court had to consider whether the unsuccessful disciplinary proceedings instituted against the plaintiff police officer by the SA Police Service in terms of its Discipline Regulations 2006 gave rise to an action for malicious proceedings. It compared English tort law and the South African law of delict, noting that our law is founded on general principles of liability. It noted further that the right to dignity is entrenched in the Constitution and there is no sharp line drawn in our law between the different forms of injuria — a strict and dogmatic approach cannot be applied to the various forms of personality infringement that a person might suffer. Taking into account that a formal charge of a criminal nature was laid against the plaintiff at the SA Police, that a statutory law regulating disciplinary proceedings with regard to this charge was then set in motion, that these proceedings were unsuccessful, and assuming that all the other elements of the delict were also present, the strict approach

of the English law of torts would inhibit the flexible manner in which the general principles of South African law should be applied to the case. In the circumstances, the court found that the disciplinary proceedings instituted against the plaintiff fell within the ambit of malicious proceedings as a cause of action. The court therefore issued a declaratory order to that effect (*Mahlangu v Minister of Police* at 1749).

Co-operatives Act 14 of 2005 — Whether Members of Worker Cooperative Employees

In *National Bargaining Council for the Clothing Manufacturing Industry (KZN) v Glamour Fashions Worker Primary Co-operative Ltd & others* (at 1849) the Labour Court, having considered the relevant provisions of the two Acts, found that there is no direct, a priori conflict between the provisions of the Co-operatives Act 14 of 2005 and the LRA 1995 and that members of a legitimate worker cooperative do not fall under the definition of ‘employee’ in the LRA.

Essential Services — Arbitration in terms of s 74(4) of LRA 1995

When the parties to a wage dispute in an essential service failed to reach agreement, a dispute of interest was referred to arbitration in terms of s 74(4) of the LRA 1995. The CCMA arbitrator issued an award in which the final offer made by the employer was the increase awarded. The trade unions sought to review the award. The Labour Court considered the two main approaches to interest arbitrations, the hypothetical outcome approach and the fairness based approach, and the arbitrator’s preference for the latter approach and found that the arbitrator did not misconceive either his terms of reference, which provided for a combination of the two approaches, or the nature of the enquiry. On the ground of review that the arbitrator had ignored material evidence which led to an unreasonable conclusion, the court found that the decisive effect of an alleged failure to take account of material evidence or issues under the ordinary standard of a review based on reasonableness was difficult to establish because the ‘outcome’ determined by the arbitrator was one that did not emanate from the arbitrator’s own reasoning but merely reflected a choice made by the arbitrator from pre-determined options after reflecting on them in the light of the evidence. Accordingly, the court went on to find that the only way to apply the reasonableness test in the context of reviewing a ‘last offer’ award was if a rider were added to the test, namely that the arbitrator’s reasons for choosing one outcome rather than another was not a choice of pre-determined outcome no arbitrator could make on the evidence, when compared with the other possible outcomes (*National Union of Mineworkers & another v Commission for Conciliation, Mediation & Arbitration & others* at 1869).

Bargaining Council Arbitration — Conduct of Proceedings

In an application to review an arbitration award, the Labour Court found that the bargaining council arbitrator had committed a gross irregularity by *mero motu* rescinding his earlier decision to recuse himself from the arbitration proceedings. The court found further that the arbitrator had overstepped the mark when he failed to respect the role of the parties' representatives and assumed for himself the role of leading evidence and conducting the cross-examination of witnesses. His conduct of the proceedings had not been fair, consistent and even-handed and was in clear breach of the applicable principles (*Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council & others* at 1820).

Practice and Procedure

The Labour Appeal Court, in *Samuels v Old Mutual Bank* (at 1790), considered the purpose and objectives of the Labour Court Practice Manual in an application to revive an archived review application in terms of clause 16.2 and 16.3 of the manual. It noted that an application for revival is a form of condonation application in which good cause for revival has to be shown.

Where, in an appeal, the respondent raised the point in limine that the appeal was moot, the Labour Appeal Court found that s 21A(1) of the now repealed Supreme Court Act 59 of 1959 corresponded with the present s 16(2)(a)(i) of the Superior Courts Act 10 of 2013, and that the jurisprudence relating to the repealed provision remained relevant. According to this jurisprudence, where there is no longer any issue or *lis* between the parties, there is no 'appeal' that the court on appeal has any discretion or power to deal with (*Sun International Ltd v SA Commercial Catering & Allied Workers Union* at 1799).

Quote of the Month:

Commissioner Khumalo in *Cantamessa and Edcon Group* (2017) 38 *ILJ* 1909 (CCMA):

'The mere fact that a white person, such as the applicant, states that President Zuma is stupid does not constitute an act of racism.'