

Race discrimination: Employers not "innocent bystanders"

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Without Prejudice

In recent months, South African society has witnessed an upsurge of racist incidents that have resulted in certain people becoming household names for all the wrong reasons. Names such as Vicky Momberg who lashed out at black police officers trying to assist her following a smash-and-grab incident in Johannesburg using the k-word 48 times; Jacobus Kruger in the reported ConCourt decision of *SARS v Kruger* who called his manager the k-word saying "I don't understand how k*****s think. A k***** must not tell me what to do"; Penny Sparrow, the estate agent who referred to black people as "monkeys" on Facebook; and Velaphi Khumalo who posted a racist tirade on Facebook in January 2016 stating that "I want to cleanse this country of all white people. We must act as Hitler did to the Jews", are some of the now infamous names that have made headlines.

There can be no doubt that racism within the workplace is also a concern. The Constitutional Court has condemned the use of racist language and has warned that it will not be tolerated. The Labour Appeal Court has also affirmed that in the context of employment disputes it will deal with acts of racism "very firmly" and that such an approach will contribute to the "fight for the elimination of racism in the workplace".

There have been various instances where the courts have demonstrated that racism in the workplace will be dealt with decisively. To this end the courts have upheld the dismissal of a black employee who stated during a staff meeting that he "hated white people"; and also of an employee who had referred to another as a "*bobbejaan*". Similarly, the dismissal of an employee who said "los die k**** - laat vrek" ("leave the k****- let him die like an animal"), and a black employee who called a white employee a "Dutchman". Also upheld was the dismissal of a black police officer who had commented on the Facebook page of the leader of the Economic Freedom Fighters (EFF), Julius Sello Malema (President of the African National Congress Youth League at the time) "F**k this white racist sh*t! We must introduce black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA. When the black Messiah (NM) dies, we'll teach whites some lesson. We'll commit a genocide on them. I hate whites".

In its latest decision in *Rustenburg Platinum Mine v SA Equity Workers Association on behalf of*

Bester & others (2018) 39 ILJ 1503 (CC), the ConCourt considered a dispute related to the fairness of the dismissal of Bester who was dismissed on grounds of insubordination and making a racist remark by using the words "*swart man*". These words were uttered when he stormed into a meeting and belligerently demanded that the officer responsible for allocating parking bays to staff "*verwyder daardie swart man se voertuig*" ("remove that black man's vehicle"). The parties accepted that the use of the words "*swart man*", as such, is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner. The test to determine whether the use of the words is racist is objective - whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory.

Handing down its judgment, the ConCourt made a pivotal observation that "it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction." The court reiterated its earlier remark in *SARS v Kruger* that "South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations."

In the *SARS v Kruger* case, the ConCourt highlighted the special role employers, in this case an organ of state, had to play in the fight against racism and in efforts to eradicate it in the workplace and society. There exists an obligation on employers to decisively deal with racism in the workplace or face punitive measures.

Section 60 of the Employment Equity Act 55 of 1998 (EEA) provides that where an employee is alleged to have contravened a provision of the EEA while at work, the conduct must be brought to the employer's attention. The employer must consult all relevant parties and take the necessary steps to eliminate the alleged conduct. Should an employer fail to take the necessary steps, the employer "must be deemed also to have contravened that provision". Section 60(5) states that an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.

In *SA Transport & Allied Workers Union on behalf of Finca v Old Mutual Life Assurance Co (SA) Ltd & another* (2006) 27 ILJ 1204 (LC), an employer's decision to issue an employee with a verbal warning following an incident of race discrimination was challenged before the Labour Court. The offending employee had asked "*Hoekom sit jy my langs die k*****s?*" ("Why did you seat me next to the k*****s?"). The Labour Court held that the employer had discriminated against Finca by failing to take the necessary steps to protect him against racism in the workplace. The employer's failure to take proper steps to prevent racism being perpetrated at the workplace by certain of its employees constituted direct and unfair discrimination against Finca. Finca was awarded compensation.

In the recent unreported case of *Shoprite Checkers (Pty) Ltd v Samka and others* (C844/15) [2017] ZALCCT 64 (29 November 2017), Samka, an employee, claimed that she had been bullied, victimised and harassed by a customer who had called her a "stupid k*****". She claimed that all of this amounted to discrimination on the ground of race and sued her employer for compensation. The CCMA found that Shoprite had failed to investigate the customer's racist comment properly and ordered the customer to pay Samka compensation of ZAR75 000.

On review, the Labour Court, while accepting that that the words used by the customer amounted to one of the worst racist insults, held that the question was whether the employer could be held liable for the utterances of one of its customers. The court found that nothing in the EEA extends liability that far. The Act provides that if an employee discriminates against a colleague while at work, the employer may be held liable if it fails to take steps to eliminate the racist conduct. Section 60 of the EEA, however, applies only to conduct by employees of the employer. Samka had remedies against the customer under the common law or other statutes.

It is clear that employers have a statutory obligation to take all necessary and reasonably practicable steps to eradicate unfair discrimination the workplace. This is in line with their responsibility to provide a safe working environment for workers and the constitutional obligation not to harm any person's dignity. Employers must have the necessary policies in place, and firmly deal with incidents of racism, or face being on the receiving end of punitive financial consequences.

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