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EMPLOYMENT ALERT

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NO PLACE FOR RACISM IN THE WORKPLACE

The Labour Appeal Court (LAC) issued a stern warning that it will not tolerate racism, in any form, in the workplace. In the recent case of the *City of Cape Town v Freddie & Others* (2016) 37 ILJ 1364 (LAC), the LAC reviewed and set aside an arbitration award in which the Arbitrator found that the employee was unfairly dismissed for making repeated unsubstantiated racist allegations about his manager.



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In this case, when the employee's manager guided him on how to properly compile a particular report and instructed him to seek assistance from a fellow employee to finalise the report, the employee embarked on a bombardment of emails to the manager. In the emails he accused the manager of incompetency and of being a dismal failure. The emails were also copied to various employees. When the manager requested that the employee cease such conduct and desist from unnecessarily copying in others in the offensive and inappropriate emails, the employee accused the manager of being a racist and compared him to Hendrik Verwoerd.

The employer dismissed the employee on charges of serious misconduct in that he was grossly insubordinate, insolent and aggressive towards management and that he had sent derogatory and racially offensive emails to his manager. During the arbitration, the employee attempted to justify his allegations of racism by stating that the manager had insulted him in front of his colleagues. The employee also made unfounded allegations of being discriminated against on the basis of his race.

The employee challenged his dismissal at the Bargaining Council. The arbitrator found that there was no evidence to prove the racism alleged by the employee and that it was the employee's subjective view. The arbitrator held that the employee had shown some remorse (albeit only after receiving advice from his attorney to do so). On this basis and the employee's length of service, the arbitrator found that the employment relationship had not irretrievably broken down and that since the employer was a large organisation, the employee could be placed elsewhere. The dismissal, was according to the arbitrator, unsubstantiated. On review, the Labour Court agreed with the arbitrator and placed emphasis on what it regarded as strong mitigating factors in favour of the employee.

The Labour Court order was taken on appeal. On appeal, the LAC had to determine whether the dismissal was an appropriate sanction. The LAC noted that it was common cause that the employee was guilty of the misconduct and found that the arbitrator was wrong in ruling that the employee was remorseful as his apology was belated and only as a result of his attorney's advice.

NO PLACE FOR RACISM IN THE WORKPLACE

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Furthermore, the LAC reiterated that the use of racist language against a person or class of persons constitutes hate speech and is prohibited in terms of the Constitution and other law in South Africa.

The LAC also held that where an employee could not own up to their own misdemeanor and displayed a lack of remorse, the dismissal would be substantively fair. The LAC found that the decision of the arbitrator in this case was not one of a reasonable decision maker and that the employee's dismissal was an appropriate sanction in the circumstances. In respect of racial slurs made by the employee that the manager "was even worse than Verwoerd" (without justification or justifiable cause), the LAC found that it constituted an offensive racial insult and was totally unacceptable in the workplace. The LAC reflected on the history of the country and stated that Hendrik Verwoerd is known as the Architect of Apartheid as he, amongst other things, implemented a system of laws which segregated the different races in our country and allowed the several atrocities to take place against black people (African, Coloured and Indians) without any impunity.

Furthermore, the LAC reiterated that the use of racist language against a person or class of persons constitutes hate speech and is prohibited in terms of the Constitution and other law in South Africa.

The LAC also referred to the case of *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*, wherein Zondo JP stated:

"Within the context of labour and employment disputes this Court and the Labour Court will deal with acts of racism very firmly. This will show not only this Court's and the Labour Court's absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace particularly."

This judgment sends a clear message to employees and employers that racist conduct and unfounded allegations of racism in the workplace is wholly unacceptable and will not be tolerated by the courts. The Labour Court and Labour Appeal Court have undertaken to deal with these types of matters with a firm hand. Employers and employees should ensure that racism in the workplace is eliminated. We advise that employers should adopt appropriate strategies and implement relevant policies in order to identify and eliminate racism in the workplace.

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Samiksha Singh and Zola Mcaciso

Employment STRIKE GUIDELINE

Our Employment practice's new
EMPLOYMENT STRIKE GUIDELINE
answers our clients' FAQs.

Topics discussed include strikes, lock-outs and picketing.

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Fiona Leppan ranked by CHAMBERS GLOBAL 2016 in Band 3: Employment.



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BAND 2
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2009-2016

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TIER 2
FOR LABOUR AND
EMPLOYMENT

2015 RANKED #1 BY
DEALMAKERS
FOR M&A DEAL FLOW
7 YEARS IN A ROW
1st by General Corporate
Finance Deal Flow

2014 1st by M&A Deal Flow
1st by M&A Deal Value
1st by General Corporate Finance
Deal Flow

2013 1st by M&A Deal Flow
1st by M&A Deal Value
1st by Unlisted Deals - Deal Flow

2012 1st by M&A Deal Flow
1st by General Corporate Finance
Deal Flow
1st by General Corporate Finance
Deal Value
1st by Unlisted Deals - Deal Flow

DealMakers

2015
1ST

South African law firm and
12th internationally for Africa
& Middle East by deal value

2ND

South African law firm and
2nd internationally for Africa
& Middle East by deal count

1ST

South African law firm and
15th internationally for Europe
buyouts by deal value



NO.1

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YEARS IN A ROW
for client service excellence

#6YearsInARow



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