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EMPLOYMENT ALERT

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No more "Boers" allowed in the workplace!?

Racial tension and animosity are amongst the many social ills that form part of South Africa's apartheid legacy. Eradicating these problems is made no easier by people's prejudiced beliefs that often manifest in the use of derogatory, offensive and racist language. In recent times, there have been numerous incidents of people publicly using overtly racist and often taboo words to describe others. These incidents have been met by public outrage and increasingly severe consequences.

#sorrynotsorry: No freedom to falsely criticise your employer in the media

Employees should carefully consider any public utterances against their employers. More importantly, they should refrain from making false statements against their employer, unless they are prepared to suffer the consequences.

CDH
CLIFFE DEKKER HOFMEYR

No more "Boers" allowed in the workplace!?

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Racial tension and animosity are amongst the many social ills that form part of South Africa's apartheid legacy. Eradicating these problems is made no easier by people's prejudiced beliefs that often manifest in the use of derogatory, offensive and racist language. In recent times, there have been numerous incidents of people publicly using overtly racist and often taboo words to describe others. These incidents have been met by public outrage and increasingly severe consequences.

The Constitution prohibits racism through safeguarding every person's rights to dignity and equality. It also expressly limits the right to freedom of expression to exclude the advocacy of hatred which is based on race. This legal stance is mirrored in other legislation such as the Employment Equity Act, No 55 of 1998 and the Labour Relations Act, No 66 of 1995, both of which specifically address racism in the workplace.

People who publicly use derogatory words and other expressions of racism may face legal sanctions including private claims for defamation as well as criminal charges for *crimen iniuria*. Such behaviour is also a certain way of incurring severe disciplinary action at the workplace.

Recent cases have emphasised that our society and law is taking a zero-tolerance policy towards racism and the use of derogatory language. The Constitutional Court has approached this issue with the utmost seriousness. In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* [2017] JOL 37679 (CC), the court held that "'k*****' is the worst insult that can ever be visited upon an African person in South Africa, particularly by a white person. It runs against the very essence of our constitutional ethos or quintessence."

In recognition of this, the court limited the amount of compensation owed to the offending employee whose dismissal was procedurally unfair. This position was extended by the court in *Rustenburg Platinum Mine v SAEWA obo Bester and others* 2018 (8) BCLR 951 (CC) where an employee was dismissed for calling an African colleague a "swartman." The court held that even seemingly neutral language may be offensive and constitute racism depending on the context and the intention of the speaker. The dismissal was considered fair in the circumstances.

It is also becoming clear that nobody is immune to the legal and employment-related consequences of racism. Recently, in *Makhanya v St Gobain* [2019] 7 BALR 720 (NBCCI), the CCMA held that "boer" carries similar derogatory connotations to the "k-word" and dismissed an application for unfair dismissal that arose from an African employee's use of the word.

It is therefore clear that *all* South Africans must beware that the language that they use is not discriminatory or racially-offensive *to anyone*. Employers would be prudent to alert their employees to the severe consequences that may follow the use of derogatory language both in and out of the workplace.

Hugo Pienaar and Lauren Loxton

#sorrynotsorry: No freedom to falsely criticise your employer in the media

The Labour Court found that the statements made by the applicants in the media had a detrimental effect on the employment relationship as they brought the employer's name into disrepute.

In the matter of *Joseph Nzimande and two others v Didben NO and Others*, the applicants were dismissed for making false statements to the media, bringing the name of their employer into disrepute and failing to obey an instruction to them to raise their grievances through the recognised internal channels.

The applicants were employed by the South African subsidiary of a multinational mining company. The applicants were part of a march to the Department of Labour to deliver a memorandum of grievances against their employer. The march was attended by about 600 fellow employees. One of the applicants had invited the media to the march where they were interviewed by the SABC. The interviews were subsequently aired on three radio stations.

In the interviews the applicants, amongst other things, alleged that their employer was forcing employees to work long hours without pay and that it had withheld 2.6 billion (currency unspecified) from its Australian head office that was meant to be distributed amongst the employees.

These statements were false and, unsurprisingly, the employer dismissed the applicants for their conduct. The applicants referred an alleged unfair dismissal dispute to the CCMA. At the arbitration hearings they initially denied that they had made the statements but then conceded that they had, when the radio interviews were played to them. The employer argued that they had breached its communications policy by making unauthorised statements about it to the media. The applicants contended that they did not need permission from their employer to make the statements as they were exercising their right to freedom of speech.

The arbitrator was not impressed with this explanation. He found them guilty of the allegations against them, and found that their dismissals were fair. To make matters worse for the applicants, he ordered costs against them because of the manner in which they had conducted themselves during the arbitration hearings.

The applicants then applied to the Labour Court to have the arbitration award reviewed and set aside. The Labour Court found that the statements made by the applicants in the media had a detrimental effect on the employment relationship as they brought the employer's name into disrepute. The court found that although employees were entitled to raise legitimate grievances and to threaten to exercise their constitutional right to strike, they were not entitled to make false and defamatory statements against their employer. The court found that the applicants had acted on a frolic of their own and outside the rules of engagement. They had embarked on the march as employees and had

#sorrynotsorry: No freedom to falsely criticise your employer in the media *...continued*

The Labour Court held that freedom of expression is not unfettered.

made false statements against their employer contrary to established policies. Their contention that they were merely exercising their freedom of speech and did not need their employer's permission to make statements to the media was without merit.

The Labour Court held that freedom of expression is not unfettered. It was unacceptable of the applicants to make false statements against their employer even in the adversarial context of industrial action. The court dismissed the review application.

This judgement serves as a caution to disgruntled employees that they should carefully consider any public utterances against their employers. If there is a workplace communications policy, they should comply with the policy. More importantly they should at all times refrain from making false statements against their employer, lest they be prepared to suffer the consequences.

Jose Jorge and Steven Adams

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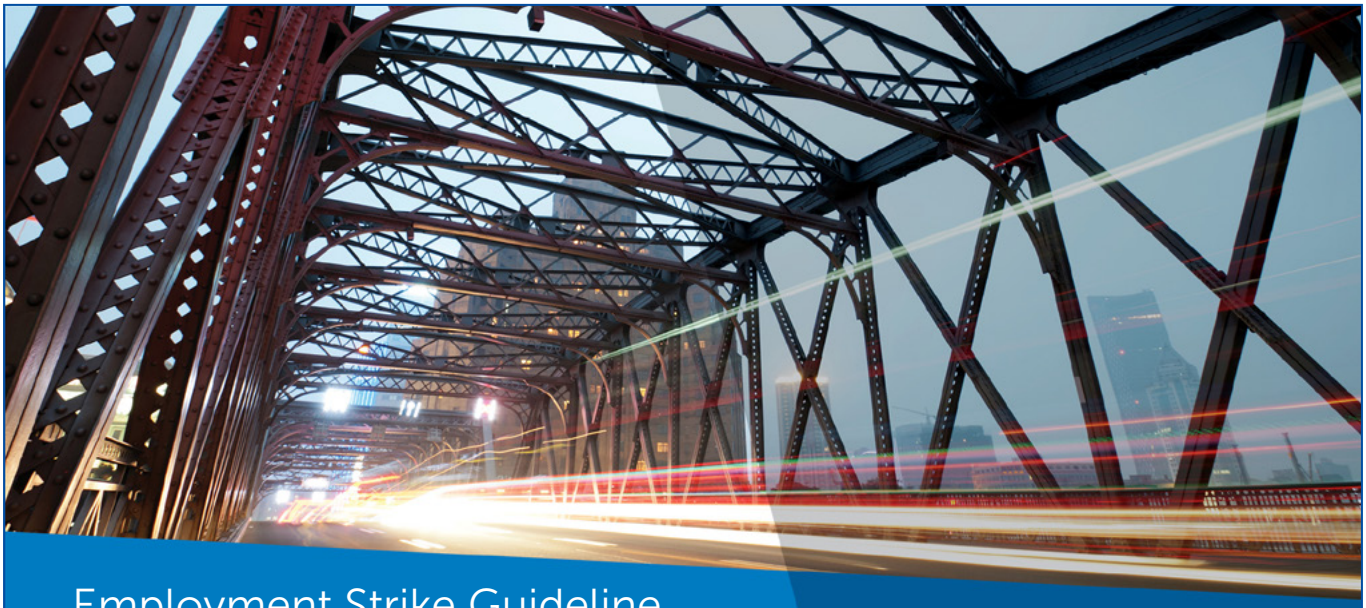

Employment Strike Guideline

Find out what steps an employer can take when a strike is unprotected.

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Hugo Pienaar was named the exclusive South African winner of the **ILO Client Choice Awards 2017 and 2019** in the Employment & Benefits category.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 1 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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