

17 MAY 2018

EMPLOYMENT ALERT

IN THIS
ISSUE

GROUND-BREAKING JUDGMENT

**RACISM IS OFTEN SUBTLE NOT OVERT -
RUSTENBURG PLATINUM MINE (SUBSTITUTED
BY SIBANYE RUSTENBURG PLATINUM MINES) VS
SOUTH AFRICAN EQUITY WORKERS ASSOCIATION
OBO MEYER BESTER**

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Racism is often subtle not overt. It can manifest in all manner of ways, including dismissive tones, policies, a sense of entitlement or displays of otherness, to name but a few. In South Africa it is established law that racism in the workplace must not be tolerated. In the matter of *Modikwa Mining Personnel Services* (2013) 34 ILJ 373 (LC) the Labour Court expressed that:

[23] Our courts have dealt with many incidents of racism, the vast majority of which have involved incidents of overt racism by whites against Africans. There will no doubt be occasion when this court will have to deal with implicit, indirect or covert incidents of racism. The context in which such incidents occur or the racial slurs are made will always be important...

[27] Implicit, indirect and covert acts of racism, depending on the context in which they occur, may be offensive, if not more offensive than overt racist acts precisely because they are aimed at achieving the effects of racism through indirect, underhand and divisible means.

That time has now come. On 17 May 2018, the Constitutional Court handed down judgment in *Rustenburg Platinum Mine (substituted by Sibanye Rustenburg Platinum Mines) vs South African Equity Workers Association obo Meyer Bester*.

The facts

In April 2013, Mr Bester attempted to raise a parking issue with Mr Sedumedi, the applicant's Chief Safety Officer. His attempts were ignored. On 24 April 2013 Mr Bester interrupted a safety meeting, pointed his finger at Mr Sedumedi and told him to "verwyder daar die swart man se voetui" or he would approach management.

On 25 April 2013 Mr Bester was charged with insubordination for allegedly disrupting or interacting with certain employees during an ongoing safety meeting without the requisite consent. In addition, he was charged with making racial remarks. Importantly, during his disciplinary hearing, Mr Bester denied ever uttering the words 'swart man'. He was unrepentant and extremely confrontational with the employer's witnesses who testified during the disciplinary hearing.

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The Labour Appeal Court found that, in the context, the inference that the phrase was derogatory and racist was not the only plausible inference which could be drawn from the proven facts and probabilities.



On 23 May 2013 Mr Bester was found guilty on both charges at a disciplinary hearing and on 28 May 2013 he was dismissed after an unsuccessful appeal.

The Commission for Conciliation, Mediation and Arbitration (CCMA)

Mr Bester approached the CCMA and on 19 December 2013 the Commissioner found that Mr Bester's reference to 'swart man' was a descriptor and could not be found to be racist. The Commissioner held his dismissal substantively and procedurally unfair, awarding reinstatement and back-pay.

The Labour Court

The applicant took this decision on review to the Labour Court. On 26 January 2016, the court found that the Commissioner had reached a decision that a reasonable decision maker could not have reached and as such it could review the decision. The Labour Court further found that Mr Bester's reference to the driver of the other vehicle as 'swart man' was derogatory and racist. As a result, the court held that Mr Bester had committed an act of serious misconduct that warranted dismissal.

The Labour Court substituted the arbitration award and found Mr Bester's dismissal both substantively and procedurally fair.

The Labour Appeal Court

Mr Bester lodged an appeal. On 3 May 2017 the Labour Appeal Court held that the Labour Court had erred by applying a subjective test and stated that the test to determine whether the phrase "swart man" was derogatory must be objective and the context in which the phrase was uttered had to be considered. It further stated that, for a review to succeed, the context must show that the only reasonable inference from the proven facts was that 'swart man' was racist and derogatory and that it was said with the intention to demean. The Labour Appeal Court found that, in the context, the inference that the phrase was derogatory and racist was not the only plausible inference which could be drawn from the proven facts and probabilities. Instead, Mr Bester could have used the phrase as a way to describe the driver, whose name he did not know. As such the Labour Appeal Court held that the dismissal had been substantively and procedurally unfair.



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The Constitutional Court held that the Labour Court was correct in reviewing and setting aside the CCMA's award as he had reached a decision that a reasonable decision-maker could not have reached.



Constitutional Court

The Constitutional Court held that the correct test was whether a reasonable, objective and informed person would, on the correct facts perceive 'swart man' to be racist and derogatory. In a unanimous judgment, Theron J found that the Labour Appeal Court's starting point – that phrases are presumptively neutral – fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. The Labour Appeal Court, like the CCMA, failed to take into account the totality of the circumstances in this case and came to an unreasonable conclusion that 'swart man' was used innocuously. The Constitutional Court held that the Labour Court was correct in reviewing and setting aside the CCMA's award as he had reached a decision that a reasonable decision-maker could not have reached. The Labour Appeal Court's order was therefore set aside.

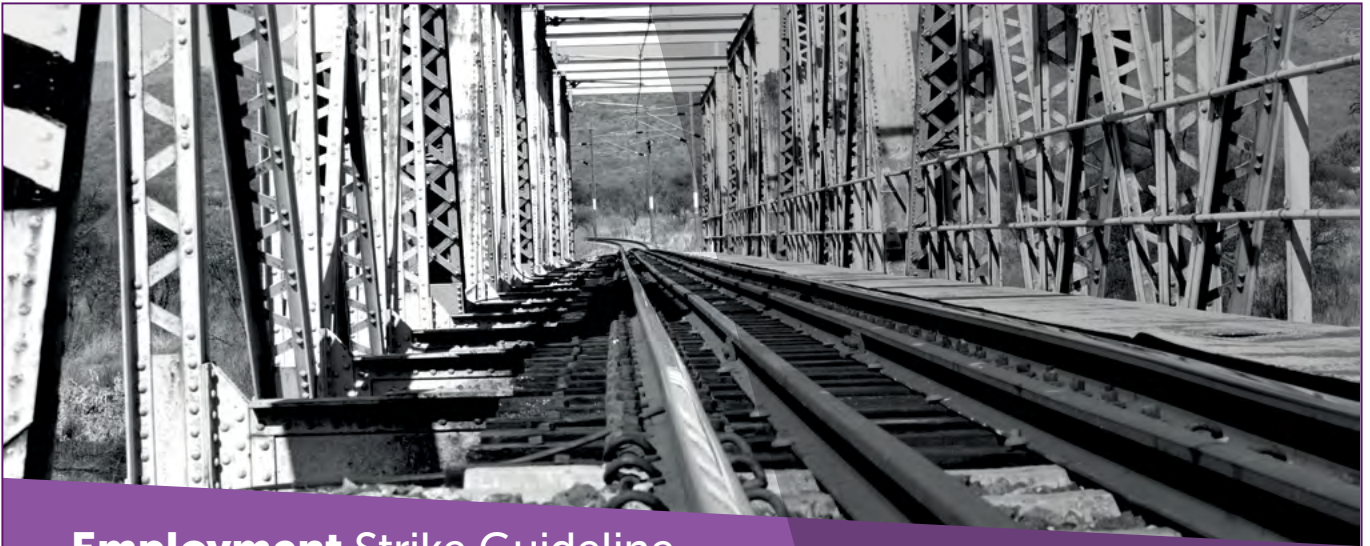
Since Mr Bester did not demonstrate any remorse for his actions and made no attempt to apologise, the Constitutional Court found that dismissal was an appropriate sanction.

Conclusion

This is a ground-breaking judgment for two main reasons. Firstly, the decision provides authority for the contention that a CCMA commissioner must come to a conclusion based on the evidence before him and cannot create a defence that has not been articulated by the parties. Secondly, and most importantly, this decision is the first time the Constitutional Court has grappled with less overt, subtler forms of racism in the workplace. The decision establishes the test for determining whether seemingly neutral statements are nevertheless derogatory or racist when viewed against the totality of circumstances and taking heed of apartheid's legacy of institutionally entrenched racism. The case also emphasises the importance of an employee being able to demonstrate introspection and a willingness to acknowledge any wrongdoing in order to justify rehabilitating the employee back into the employer's trust and employ.

Michael Yeates





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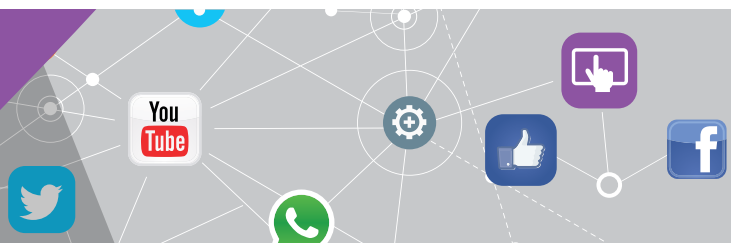
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