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# EMPLOYMENT ALERT

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### The race card: Not the joker in the pack

In the matter of *Legal Aid South Africa v Mayisela and Others* LAC (CA9/17) [2019] ZALAC [Delivered 5 February 2019], the Labour Appeal Court (LAC), in considering a judgment granted in favour of the employee in a review application by the Labour Court, held that an employee who was dismissed for gross insubordination committed misconduct by failing to obey lawful and reasonable instructions as well as by making false accusations of tacit racism and harassment by the employer.

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## The race card: Not the joker in the pack

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After a disciplinary enquiry, an employee was found guilty of 17 charges and was dismissed. The employee referred the matter to the CCMA, where the commissioner found that the dismissal was substantively and procedurally fair. The Labour Court set aside that award and remitted the matter to the CCMA for reconsideration by a different commissioner. Thereafter, a different commissioner also found that the employee's dismissal was both procedurally and substantively fair. On review, the Labour Court held that the dismissal was substantively unfair. All the charges against the employee related to gross insubordination, gross insolence and falsely making tacit accusations of racism and harassment against the employer.

The gross insubordination charges related largely to the employee's failure to obey reasonable instructions to attend several meetings, and mainly a meeting to discuss his poor performance review by the employer. The employee took umbrage at receiving a low performance score and requested an explanation for the score. In response, the employer tried

to arrange several meetings to discuss the score and to allow the employee an opportunity to change such score. The employee however, refused to avail himself for any such discussions and demanded the employer's explanations be in writing. He further stated his intentions to raise constitutional issues with various constitutional bodies on the basis that he felt vilified as an African under the guise of poor performance. The Labour Court was sympathetic and found that because there was no evidence of any internal regulation or policy entitling the employer to call such a meeting, the calling of the meeting was inappropriate and unreasonable.

The LAC on the other hand, found that 'the right or prerogative of management to request a meeting to discuss performance is self-evidently inherent in every employment relationship. An employer has the authority to determine how issues of performance should be addressed.' The LAC held that an employer has the authority to determine how issues of performance should be addressed and that it is not open to an employee to dictate how the employer should deal with the issues.

The charge of falsely making tacit accusations of racism was based on an email in relation to arranging the meeting to discuss the employee's poor performance review. In the email the employee implied that the employer was racist by stating that "Africans are being vilified in the region under the coded name of poor performance." The Labour Court found that the employee was entitled to raise the matter and even take it to the Parliamentary Portfolio Committee.

## The race card: Not the joker in the pack...*continued*

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The LAC concluded that the employee's actions, reveal a poor level of judgment which supports the conclusion that the employee was not suited to the post he occupied.

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The LAC disagreed and held that 'employees who allege tacit racism should do so only on the basis of persuasive objective information leading to a compelling and legitimate inference, and in accordance with grievance procedures established for that purpose. Unfounded allegations of racism against a superior by a subordinate subjected to disciplinary action or performance assessment, referred to colloquially as "playing the race card", can illegitimately undermine the authority of the superior and damage harmonious relations in the workplace.'

The LAC concluded that the employee's actions, besides being insubordinate, reveal a poor level of judgment which supports the conclusion that the employee was not suited to the post he occupied. This case illustrates the LAC's strict stance on employees making false accusations of racism in order to get away with insubordination and trying to dictate performance reviews. It is clear from this judgment that such behaviour in the workplace will not be condoned under the guise of serious societal and workplace issues.

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*Michael Yeates and Kirstin Swanepoel*



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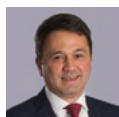
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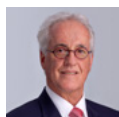
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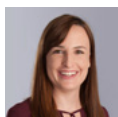
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