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EMPLOYMENT ALERT

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What do you meme? What does it matter?

It's hard to log on to any social media platform or chat forum without coming across a meme that speaks to a current point of view or a cultural belief that you hold. A meme is defined as a statement, made in a witty and humorous way, consisting of an image, text or a video. The point of a meme is its dissemination and if there is one thing that recent history has taught us, it's that going viral isn't always a good thing.

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In the recent case of *Onelogix (Pty) Ltd v Johannes Meyer and others*, Van Niekerk J reviewed an arbitration award in terms of which an employee was found to have been unfairly dismissed for sharing a WhatsApp meme.

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In the recent case of *Onelogix (Pty) Ltd v Johannes Meyer and others*, Van Niekerk J reviewed an arbitration award in terms of which an employee was found to have been unfairly dismissed for sharing a WhatsApp meme. The meme depicted a white boy drinking a beer and smoking a cigar and was captioned "GROWING UP IN THE 80'S BEFORE ALL YOU P#SSIES TOOK OVER – MAY AS WELL DIE YOUNG." The meme was shared with a few co-workers and was accidentally sent to the employee's supervisor, a Mr. Skweyiya. Mr Skweyiya took offence to the meme and testified that he saw "P#SSIES" to mean the democratically elected ANC government who "took

over" in 1994. Furthermore, he testified that the word "P#SSIES" was offensive towards women. While Mr. Skweyiya saw the meme as a racially motivated stab at the new democratically run South Africa, the employee claimed that the meme was a joke and indicative of growing up in the 80's, which he did.

The Arbitrator, in this matter of *Onelogix*, referred to the Constitutional Court judgment in *Rustenburg Platinum Mine v SA Equity Workers Association obo Bester and others* (2018), when it was decided that it was not how the employer understood the words nor the subjective feelings of the person(s) to whom a remark has been made, but how a reasonable, objective and informed person would, on the correct facts, perceive a remark. The Arbitrator noted that the employee was not the author of the meme, and that it originated in the USA and therefore should be looked at in the American context where the word "p#ssies" indicated weakness. A reasonable person would also then interpret the meme as having no racial connotations.

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What do you meme? What does it matter?...continued

The court concluded that context, therefore, must be considered, and in the South African context a reasonable person would consider the meme to be offensive and suggest racial undertones.

On review of the award by the employer, the Labour Court in this matter took a different view to the Arbitrator and highlighted the caution that was expressed by the Constitutional Court in *Bester* where the issue was the use of the phrase "swart man". The court's view was that *"It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary"*. In accordance with this, the arbitrator's presumption of neutrality in his interpretation of the meme was therefore an error of law.

The court concluded that context, therefore, must be considered, and in the South African context a reasonable person would consider the meme to be offensive

and suggest racial undertones. The court also stated that the Arbitrator had erred by not looking at the previous conduct of the employee who had some five days before the meme incident been issued with a final written warning for using the "K" word to another road user. The employee was not dismissed for that incident due to his slur being out of earshot of the other road user. The award was consequently reviewed, set aside and replaced with an award dismissing the referral.

The outcome of this case illustrates how important context is, especially in South Africa. Our country's sensitivity towards racial issues as well as gender-based violence and inequality should therefore be a factor when considering communications that, on the face of it, appear neutral or harmless.

Hugo Pienaar and Asma Cachalia



EMPLOYMENT

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Employment Law
booklet to assist
you in navigating
the employment
relationship during
the current economic
uncertainty.



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E-learning Offering

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The module will empower your organisation with a greater appreciation and understanding of what constitutes sexual harassment, how to identify it and what to do if it occurs.

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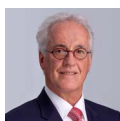


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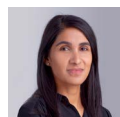
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