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## Employment Law ALERT

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#### Discriminate in the workplace at your peril

Our chequered past as a nation means that issues of unfair discrimination will be with us for many years to come, including in the workplace. To believe otherwise would be naïve. Much has already been written on this subject, but in this article we provide a snapshot of two recent cases, one of racism and the other of xenophobia, and the steps that need to be taken to protect employees against racism. If not, the employer will face serious consequences.



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We should not lose sight of the fact that within the concept of unfair discrimination lie various types of discrimination, including race, gender, sexual orientation, nationality, age and religion. Over the centuries, society has found a myriad of forms of division, and this has carried through to today.

In the world of work, section 6 of the Employment Equity Act 55 of 1998 (EEA) provides that an employer must take steps to promote equal opportunity by eliminating unfair discrimination. It reads:

*"No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."*

### Facts

In the January 2023 decision of the Labour Court in *Solidarity obo A Oosthuizen v The South African Police Service* [JS1030/17] [2023], Judge Nkutha-Nkontwana, found that the South African Police Service (SAPS) failed to protect its employee, Colonel Oosthuizen, against racial abuse suffered at the instance of her direct subordinates and the failure of the employer to protect and defend her dignity. The court found against the SAPS and ordered it to pay Colonel Oosthuizen R300 000 compensation under the EEA for the harassment she suffered.

In 2017, Oosthuizen worked as a commander of the human resources management team. She instituted disciplinary steps against two junior employees, Warrant Officers Tikoe and Mphana. Both Tikoe and Mphana were under her command and were alleged to have misconducted themselves on timekeeping offences.



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Oosthuizen requested that the warrant officers complete leave forms as part of their corrective action, and she issued a verbal warning to one of the two junior employees. In response to Oosthuizen's action, Tikoe and Mphana had an altercation with her, where they threatened and intimidated her, and proceeded to accuse her of making a racial slur i.e. using the "K" word. The warrant officers thereafter instituted a grievance against the colonel. Oosthuizen lodged a grievance requesting that disciplinary proceeding be instituted against the warrant officers, for what she claimed were false accusations made against her of the racial slur.

Instead of dealing with the grievance, the SAPS transferred the colonel to another branch, pending the finalisation of the disciplinary investigation that was instituted against her. A hearing was held, and Oosthuizen was acquitted on all charges. We have only summarised the rather detailed facts of the harassment suffered by the colonel and the lack of action by the SAPS to effectively deal with the prevailing circumstances.

### Failure to comply with internal policies

Oosthuizen eventually sued the SAPS under the EEA. The Labour Court found the SAPS was liable in terms of section 60 of the EEA for the racial harassment and bullying perpetrated by the warrant officers against Oosthuizen. The court found that for the SAPS to escape the actionable discriminatory conduct of its two employees, it must show (i) that it took reasonable precaution to prevent and promptly correct the inimical behaviour, and (ii) that the employee(s) unreasonably failed to take advantage of the employer's preventive or corrective opportunities. To achieve that, the SAPS would be expected to transcend the confines of superficial compliance and deal with its historical ethos and systems that may have created a toxic environment which is susceptible to racial harassment.

### Vicarious liability

Pertinently, subsection 6(3) of the EEA provides that: "*Harassment of an employee is a form of unfair discrimination and is prohibited on anyone, or a combination of grounds of unfair discrimination listed in subsection (1).*" The failure by of an employer to act in accordance with section 60 may warrant vicarious liability for contravening the provisions of the EEA. In brief, section 60 of the EEA affords an employer the way around being liable for the conduct of its employees. Where an employer cannot fit into the exceptions created it will be liable to the aggrieved employee.

These are not academic claims and there are many examples of cases where awards have been made against employers for the conduct of their offending employees. Employers must beware.



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### Xenophobia

Also, in the recent award issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) in *South African Transport and Allied Workers Union obo Flatela v Passenger Rail Agency SA (SOC) Ltd*, [2023] 1 BALR 113 (GAJB423622), an employee was charged and dismissed for misconduct arising from a social media post. Nothing new. In a social media post, the employee Bulelani Flatela, referred to the Passenger Rail Agency of South Africa, as an organisation “run by Zimbabweans, who treat us like foreigners”. Flatela was found to have brought the employer’s name into disrepute. The CCMA found that the dismissal was fair. This award follows a line of other awards and judgments.

### Conclusion

Employees should be aware that making discriminatory remarks in the workplace will have real consequences. Also, making false allegations of colleagues being racist will not go unnoticed.

Policies alone will not end discrimination in the workplace. There needs to be a paradigm shift towards wanting to advance the transformed society our Constitution demands.

Employers should guard against claims from employees or third parties who are subjected to unfair discrimination at the hands of employees through the principle of vicarious liability. If nothing else, our recent history has also shown us that South Africans now live in an increasingly litigious society.

Almost a year ago, the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (Code) was promulgated under the EEA. Claims under the Code are already being made by aggrieved employees. The Code creates an obligation on an employer to prevent and eliminate all forms of harassment in the workplace. Whilst the SAPS judgment was not determined under the Code the court did make reference to the Code.

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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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