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THE IMPORTANCE OF CONTEXT IN IDENTIFYING RACISM IN THE WORKPLACE

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SUMMARY

This mini dissertation follows a doctrinal approach that analyses the most relevant South African legislation and case law in the consideration of context and history in terms of racial discrimination. The main purpose of this study is to determine whether the South African courts consider the context and history in which the racial incidents have occurred, in order to determine whether an employee's dismissal is fair. In order to determine this, the study places emphasis on two recent Constitutional Court judgments. In *Duncanmec (Pty) Limited v Gaylard NO and Others*[1] and *Rustenburg Platinum Mine v SAEWA obo Bester and Others,*[2] the Constitutional Court placed particular relevance on the consideration of context and history. These two judgments appear to endorse conflicting views regarding the fairness of the dismissal of employees during discrimination cases. However, through this study it becomes clear that the courts did take history and context into account when deciding whether discrimination occurred at the workplace and the decisions did not contradict each other.

[1] [2018] 12 BLLR 1137 (CC).
[2] [2018] BLLR 735 (CC).

CHAPTER 1
INTRODUCTION

"No one is born hating another person because of the colour of his skin, or his background, or his religion. People must learn to hate, and if they can learn to hate, they can be taught to love, for love comes more naturally to the human heart than its opposite."

-Nelson Mandela-

1. CONTEXTUAL BACKGROUND

Racial discrimination remains a contentious and sensitive issue in South Africa.[3] The legacy of racial discrimination emanates from a complex South African history.[4] Legalizing discrimination in the past set the scene for inequality and subsequently various forms of discrimination thrived at the South African workplace.[5]

The concept "discrimination" first appeared in South African labour law in the early 1980s.[6] Discrimination against employees on the grounds of race, sex and trade union membership

[3] See https://abcnews.go.com/International/teacher-south-africa-suspended-controversial-photo-students-viral/story?id=60307560 where a teacher was suspended after a photo emerged of black and white students sitting at separate desks. See also a recent article at https://www.news24.com/SouthAfrica/News/just-in-catzavelos-pleads-guilty-to-crimen-injuria-for-k-word-slur-video-20191205 in which it was reported that Mr Catzavelos pleaded guilty for using the "k-word" in a video posted on social media.
[4] Du Toit & Potgieter (2014) 1.
[5] Ibid.
[6] Du Toit & Potgieter (2014) 9. See *Raad van Mynvakbonde v Minister van Mannekrag en 'n Ander* (1983) 4 *ILJ* 202 (T).

were considered to be an "unfair labour practice" by the Industrial Court.[7] The distinction between "differentiation" (treating people differently on permissible grounds) and "discrimination" (treating people differently on impermissible grounds) was subsequently considered by the Industrial Court.[8] The ILO Convention 111 of 1958 on Discrimination in Employment and Occupation was a very important marker for the Industrial Court in defining "discrimination."[9]

The first time the word "unfair" was included to qualify discrimination, was in 1988 when the definition of unfair labour practice was amended to include "unfair discrimination by any employer against any employee solely on the grounds of race, sex or creed."[10] This change was necessary due to the logic of apartheid.[11] A proviso followed that "any action in compliance with any law or wage regulating measure shall not be regarded as an unfair labour practice."[12] This meant that any measures implemented by apartheid regulations were deemed to be "fair" discrimination.[13] Unfair discrimination subsequently included discrimination over and above what the law permitted.[14] However, this definition of unfair labour practice was repealed in 1991 by the Labour Relations Amendment Act 9 of 1991.[15]

A new democratic order emerged in 1994 subsequent to the collapse of the apartheid regime in the 1980s.[16] The first fundamental changes that were brought about after the end of apartheid, was the introduction of the Constitution of 1993[17] (the interim Constitution). The equality clause in the Bill of Rights contained a general prohibition against "unfair discrimination"[18] and all law had to subsequently comply with the Bill of Rights.[19]

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[7] Du Toit & Potgieter (2014). See *UAMAWU v Fodens (SA) (Pty) Ltd* (1983) 4 *ILJ* 212 (IC); *Biyela & others v Sneller Enterprises (Pty) Ltd* (1985) 6 *ILJ* 33 (IC); *MAWU & others v Siemens Ltd* (1986) 7 *ILJ* 547 (IC).
[8] Du Toit (2007) *LDD* 3. See *Biyela & Others v Sneller Enterprises (Pty) Ltd* (1985) 6 *ILJ* 33 (IC).
[9] Ibid.
[10] Section 1 of Act 28 of 1956 (as amended). See Du Toit & Potgieter (2014) 10.
[11] Du Toit & Potgieter (2014) 10.
[12] Ibid.
[13] Ibid.
[14] Ibid.
[15] Ibid.
[16] Thabane & Rycroft (2008) *ILJ* 43. See also Saunders (2012) accessed at https://www.sahistory.org.za/archive/book-6-negotiation-transition-and-freedom-chapter-1-transition-context-christopher-saunders.
[17] The Interim Constitution.
[18] Section 8 (2) of the Interim Constitution.
[19] Chapter 3 of the Interim Constitution.

A new Labour Relation Act ("the LRA"),[20] that took effect in November 1996, included an express prohibition of unfair discrimination "against an employee", making provision for the constitutional prohibition of unfair discrimination in the employment context.[21] The interim Constitution was replaced by the "final Constitution".[22] The Constitution[23] then included an equality clause which expressly required the enactment of national legislation "to prevent or prohibit unfair discrimination".[24]

Another fundamental change in inequality occurred in August 1999 when the Employment Equity Act[25] ("the EEA") came into force.[26] The EEA, more specifically section 6, provided for a detailed prohibition of unfair discrimination in the employment context.[27] The prohibition of unfair discrimination contained in the EEA is obtained from the right to "equal protection and benefit of the law"[28] included in section 9(4) of the Constitution[29] which provides that "[n]ational legislation must be enacted to prevent or prohibit unfair discrimination."[30]

Although South African legislation has developed significantly in order to make provision for inequality and unfair discrimination, it should be kept in mind that legislation does not rectify the past discrimination deeply rooted in South African history.[31] As quite correctly pointed out by O Regan J:

> "Our history is of particular relevance to the concept of equality. The policy of apartheid, in law and in fact, systematically discriminated against black people in all aspects of social life ... The deep scars of this appalling programme are still visible in our society."[32]

[20] 66 of 1995.
[21] Du Toit & Potgieter (2014) 10.
[22] Constitution, 1996.
[23] Ibid.
[24] Du Toit & Potgieter (2014) 11.
[25] 55 of 1998.
[26] Du Toit & Potgieter (2014) 11.
[27] Ibid.
[28] Section 9(1) of the Constitution.
[29] Constitution, 1996.
[30] Section 9(4) of the Constitution, 1996. See Du Toit (2006) *ILJ* 1311 & 1312.
[31] Du Toit *et al* (2015) 653.
[32] *Brink v Kitshoff NO* [1996] ZACC 40.

2. SIGNIFICANCE OF THE STUDY

Racial discrimination in South Africa's extensive history has set a foundation of inequality, creating conflict and creating disputes and tension in the workplace.[33] Courts and tribunals that have dealt with racial disputes have quite correctly condemned racism in the strongest sense due to its destructive role in assaulting people's dignity in the past.[34] Recent judgments[35] made by the Constitutional Court have raised a debate, namely whether the courts are consistent in determining whether dismissals are unfair due to racial discrimination.

In *Duncanmec (Pty) Limited v Gaylard NO and Others*[36] the Constitutional Court concluded that singing struggle songs in the workplace containing lyrics such as "my mother is rejoicing when we hit the boer" is not racially offensive. This seemingly stands in conflict with the judgment of *Rustenburg Platinum Mine v SAEWA obo Bester and Others*[37] in which the Constitutional Court held that referring to another employee as "swart man" was in fact racially offensive. The context, however, in which these phrases were used is of great significance and will be analysed in detail throughout this study.

It is of importance to understand how the Constitutional Court reached these ostensibly conflicting conclusions and what the courts regard as unacceptable discriminatory conduct. The sooner employees and employers understand what type of racial conduct is regarded as unacceptable, the sooner expensive litigation about this contentious matter will decrease.

[33] See *Crown Chickens Pty (Ltd) t/a Rocklands Poultry v Kapp and others* (2002) 23 *ILJ* 863 (LAC).
[34] Thabane & Rycroft (2008) *ILJ* 44.
[35] *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] 12 BLLR 1137 (CC); *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC).
[36] [2018] 12 BLLR 1137 (CC).
[37] [2018] BLLR 735 (CC).

3. RESEARCH QUESTIONS

It has not become uncommon for employees to be dismissed for discriminatory conduct such as uttering racial slurs and comments towards fellow employees.[38] This study is aimed at analysing whether dismissal is always an appropriate sanction in such instances and whether the courts consider the context in which the conduct had taken place and to what extent South Africa's complex history is considered. In order to determine the above question, the following aspects will also be considered:

1. What factors do the South African courts consider in determining whether a dismissal is fair when racial discrimination in the workplace has taken place?

2. Do the courts consider the legacy of apartheid or vulnerability of complainants when determining whether discrimination is unfair?

3. What are the appropriate remedies against an employer when racial discrimination has taken place in the workplace?

4. What lessons can be gained from incidents where employees were found guilty for committing racial conduct in the workplace?

4. RESEARCH METHOLOGY

Throughout this study I will be following a doctrinal methodology framework, which will include the analyses of legal precedent and legislative interpretation.[39] This doctrinal approach involves an analysis of the relevant legislation and case law and will ultimately conclude a statement of the law subsequent to the issue under investigation.[40]

[38] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC).
[39] Hutchinson (2015) *Erasmus Law Review* 131.
[40] Hutchinson (2014*) Law Library Journa*l 584.

5. LIMITATIONS

This study will not cover affirmative action. I will also not be conducting a comparative study, as the focus falls on South Africa's context and history of racial discrimination.

6. STRUCTURE

This dissertation consists of six chapters. In Chapter 2 a brief overview is given on the application of the term "unfair discrimination" in terms of the Constitution of the Republic of South Africa[41] as well as ILO Convention 111 of 1958.

Chapter 3 conducts an analysis of the legislative framework in South Africa. Specific attention is given to legislation aimed to prohibit unfair discrimination in the employment context. A short overview of our country's background before the enforcement of legislation prohibiting unfair discrimination is also discussed.

Chapter 4 analyses South African case law, with a main focus on the evaluation and comparison of the Constitutional Court judgments of *Duncanmec (Pty) Limited v Gaylard NO and Others*[42] and *Rustenburg Platinum Mine v SAEWA obo Bester and Others.*[43] Even though there is an abundance of case law concerning racial discrimination in the workplace, these two Constitutional Court judgments are emphasized, as they both have extreme relevance in the consideration of context and history. Compared to one another, at face value, the Court may seem to have a biased approach when considering the fairness of racial discrimination in the workplace. However, the context in which the Court concluded its decision is considered, together with the fact of whether dismissal is appropriate in the given circumstances in order to ultimately eliminate racial discrimination in the workplace.

[41] Constitution, 1996.
[42] [2018] 12 BLLR 1137 (CC).
[43] [2018] BLLR 735 (CC).

Chapter 5 sets out the duties of an employer when unfair discrimination in the workplace has taken place, as well as the appropriate remedies against an employer that fails to properly execute its duties.

In chapter 6 the conclusion of the dissertation is reached and explores recommendations of how employers and employees should approach incidents of racial discrimination in the workplace and how racial discrimination can be avoided or ultimately eliminated in the workplace.

CHAPTER 2
THE CONSTITUTION AND ILO CONVENTION 111 OF 1958

1. **INTRODUCTION**

The right to equality is enshrined in the Constitution.[44] Section 9 gives expression to the achievement of equality and provides that "everyone is equal before the law and has the right to equal protection and benefit of the law"[45] and also "includes the full and equal enjoyment of all rights and freedoms."[46] However, equal protection and benefit of the law should be understood against South Africa's history of inequality, racism and sexism.[47] According to the South African Human Right's Commission, unfair discrimination based on race has been the most of all the equality related complaints received by the Commission.[48] A high number of labour relations complaints were also received, which arose mainly from the violation of the right to equality in the workplace.[49] Despite the protection offered by our Constitution as well as the Employment Equity Act ("the EEA"),[50] these high number of complaints are emblematic of the deep inequalities that still remain in South Africa 25 years into our democracy.[51] South Africa's extensive history regarding racism sheds light on the current racial inequality in modern South Africa and the importance of the need to remove

[44] S 1 of the Constitution of the Republic of South Africa, 1996.
[45] S 9(1) of the Constitution, 1996. See Van Niekerk *et al* (2018) 121.
[46] S 9(2) of the Constitution, 1996. See Van Niekerk *et al* (2018) 121.
[47] A report on the "Human Rights Commission's work on Equality and Social Cohesion", accessed at https://www.sahrc.org.za/index.php/focus-areas/immigration-equality/equality on 5 May 2019.
[48] Ibid.
[49] Ibid.
[50] 55 of 1998. See par 2, chapter 3.
[51] Ibid.

it.[52] Throughout this chapter, I will explore what role the Constitution as well as Convention 111 of 1958 plays in interpreting inequality and unfair discrimination in the South African workplace.

2. **THE CONSTITUTION**

The Constitution[53] seeks to establish "a society based on democratic values, social justice and fundamental human rights", in which there shall be "human dignity, the achievement of equality and the advancement of human rights and freedoms."[54] Section 9 of the Constitution gives expression to these values and provides that everyone is equal before the law and has the right to equal protection and benefit of the law.[55] Achieving equality however, remains one of South Africa's greatest challenges, considering that it remains one of the most unequal societies in the world.[56]

When the final Constitution[57] replaced the interim Constitution in February 1997, it expressly made provision for the enactment of national legislation "to prevent or prohibit unfair discrimination."[58] The present Constitution substituted the interim Constitution's equality clause with a similar one, with more emphasis on substantive equality and requiring the regulation of the prohibition of unfair discrimination by enactment of national legislation.[59] Substantive equality's approach is a focus on equality of outcomes.[60] This entails a consideration of the economic and social conditions of groups and individuals and the results or effects of a rule, rather than its form, is of importance.[61]

While substantive equality is sought in South Africa, human dignity has become essential in ensuring equality.[62] When the issue of equality emerges, the extent to which a person's

[52] Currie & De Waal (2010) 249.
[53] Constitution, 1996.
[54] Preamble and s 1 of the Constitution, 1996.
[55] S 9(1) of the Constitution, 1996. See Van Niekerk *et al* (2018) 121.
[56] Dupper & Garbers (2011) 75.
[57] Constitution, 1996.
[58] Du Toit & Potgieter (2014) 11.
[59] Du Toit (2006) *ILJ* 1330.
[60] Van Niekerk *et al* (2018) 122.
[61] Ibid.
[62] In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), the Constitutional Court stated: "[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new

human dignity was impaired plays a significant role.[63] Equality jurisprudence of the court has the purpose to proscribe treatment of persons as lesser human beings because they belong to a certain group.[64]

The Constitution presents itself as the starting point for the interpretation of the EEA[65] and has a particular relevance in interpreting the meaning of unfair discrimination in the employment context.[66] Section 9 of the Constitution[67] offers substantive protection against unfair discrimination or differentiations based on prohibited grounds[68] or on any other basis.[69] *Harksen v Lane NO*[70] interpreted and applied section 9(3),[71] in which a two-stage test for determining unfair discrimination was established. The first step is to establish whether there was discrimination and the second step is to determine whether it was unfair.[72] Fairness could be considered a moral enquiry and "value judgment" that distinguishes between permissible and impermissible discrimination.[73]

When applying this moral enquiry, the Constitutional Court has adopted the approach to consider all relevant factors and by determining the effect of the discrimination on the complainant or his or her group.[74] According to *Minister of Finance v Van Heerden*[75] the courts should also consider the following criteria set out in *Harksen v Lane:*[76]

1.) Whether the discrimination is on a listed ground; whether the complainants have suffered from the past disadvantages and subsequently what their position is in society.
2.) The purpose or goal that is to be achieved; in other words, if the aim is not to impair the complainants, the discrimination may be fair.

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constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups".
[63] Pretorius *et al* (2018) at para 2.2.
[64] Ibid.
[65] 55 of 1998.
[66] Pretorius, *et al* (2018) at para 1.2.
[67] Constitution, 1996.
[68] S 9(3) and s 9(4) of the Constitution, 1996.
[69] S 9(1) of the Constitution, 1996. See Dupper & Garbers (2011) 78.
[70] [1997] 11 BCLR 1489 (CC).
[71] Constitution, 1996.
[72] Ibid.
[73] Fairness is referred to as a "value judgment" in *NEHAWU v University of Cape Town 2003* (3) SA 1 (CC) 33 in terms of "fair labour practices", which can also be applied to s 9. See Dupper & Garbers (2011) 79.
[74] *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) 37.
[75] 2004 (6) SA 121 (CC) at para 27.
[76] *Harksen v Lane NO* [1997] 11 BCLR 1489 (CC). See Dupper & Garbers (2011) 80.

3.) Considering all relevant factors, whether there has been an impairment of the complainant's fundamental human dignity.

In other words, the consideration of context goes beyond the mere "circumstances of each case."[77] The courts subsequently need to properly assess and interrogate the social, political and legal context in which the act or violation of rights occur.[78] The relationships between disadvantaged groups and privileged groups should be considered in determining a group's social or economic position.[79]

In *Mbana v Shepstone & Wylie*[80] the Constitutional Court stated the following:

> "the Employment Equity Act proscribes unfair discrimination in a manner akin to section 9 of the Constitution. Apart from permitting differentiation on the basis of the internal requirements of a job in section 6(2)(b), the test for unfair discrimination in the context of labour law is comparable to that laid down by this Court in *Harksen*."

It is therefore of great importance that when interpreting the prohibition of unfair discrimination in the EEA, the Constitutional Court's endorsement of substantive equality as well as the methodology by the court be considered.[81] There can be no doubt that the provisions of the Constitution is a good starting point and that it should play a significant role in the development of substantive equality as well as the interpretation of legislation regulating unfair discrimination.

3. **ILO CONVENTION 111 OF 1958**

South Africa ratified ILO Convention 111[82] ("Convention 111") in March 1997, which require all the member states that adopt the convention, "to declare and pursue a national policy", as well as to enact legislation "calculated to secure the acceptance and observance of the

[77] Dupper & Garbers (2011) 80.
[78] Ibid.
[79] Ibid.
[80] [2015] ZACC 11 at par 25.
[81] Pretorius *et al* (2018) at para 1.2.
[82] Discrimination (Employment and Occupation) Convention 111 of 1958.

policy."[83] Since then this signified our country's commitment to enact legislation to promote equality of opportunity in employment as well as eliminating unfair discrimination.[84]

The result was the enactment of the EEA[85] in 1998.[86] The EEA,[87] made provision for the Act to be interpreted in compliance with international law obligations such as the ILO Convention 111.[88] The listed grounds contained in the convention are also contained in section 6 of the EEA.[89]

Convention 111 of 1958, describes discrimination as:

> "any distinction, exclusion, or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation."[90]

Convention 111 of 1958 also identifies seven grounds of discrimination. These grounds are race; colour; sex; religion; political opinion; national extraction; and social origin.[91] Convention 111 of 1958 follows a narrower approach than article 26 of the International Covenant on Civil and Political Rights.[92] This instrument contains a non-exhaustive list of eleven grounds of discrimination.[93] The ILO supervisory bodies have, however, adopted a broad interpretation of these seven grounds of discrimination in numerous cases. It is safe to say that despite its old age, Convention 111 is still able to address present day issues in terms of discrimination.[94]

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[83] Art 2 and 3(b), Convention 111. See Du Toit & Potgieter (2014) 11.
[84] Du Toit (2006) *ILJ* 1330.
[85] 55 of 1998.
[86] Du Toit (2006) *ILJ* 1330.
[87] 55 of 1998.
[88] S 3(d) of the EEA, 1998.
[89] Du Toit (2006) 27 *ILJ* 1337.
[90] Art 1(1)(a) of Convention 111 of 1958. The definition of "discrimination" is described in only four human rights conventions in terms of international law. Article 1(1) of Convention 111; Article 1(1) of the UNESCO Convention on the Elimination of Discrimination in Education; Article 1(1) of CERD; Article 1 of CEDAW. See also Nielsen (1994) *The International and Comparative Law Quarterly* pp. 827–856.
[91] Art 1 of Convention 111 of 1958.
[92] Adopted by the General Assembly of the United Nations on 19 December 1966.
[93] Nielsen (1994) *The International and Comparative Law Quarterly* 831.
[94] Ibid, 856.

The definition of discrimination contained in Convention 111 essentially has the same scope as section 6(1) of the EEA,[95] despite it being more focussed on elements in the workplace than the wider terms of the Constitution.[96] This definition does not separate the element of discrimination from the prohibited grounds.[97] It forms a single concept that results in a two-stage inquiry, similar to that followed in *Harksen v Lane NO & Others*[98]. The questions posed by Convention 111 can be summarized as follows:

> " 1. Did the conduct complained of amount to –
> (a) A distinction, exclusion or preference
> (b) Having the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation? And if so,
>
> 2. was it made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin or on such other grounds as determined in accordance with art 1(b) (above)?"[99]

Even though Convention 111 combines "discrimination" and "unfairness" into a single concept, it was noted in *South African Airways (Pty) Ltd v GJJVV*[100] that there is no difficulty in combining the two stages of the South African test[101] with the elements of the Convention's definition.[102] The terms of Convention 111 have been applied by various courts in South Africa.[103] However, the application thereof was not always consistent, considering that certain judgments decided the meaning of unfair discrimination in a strictly constitutional context.[104] The South African concept of discrimination, when interpreted in compliance with the ILO definition, should be understood as meaning "any distinction, exclusion or preference… which has the effect of nullifying or impairing equality of opportunity in

[95] 55 of 1998.
[96] Dupper & Garbers (2011) 153.
[97] Ibid.
[98] [1997] 11 BCLR 1489 (CC).
[99] Dupper & Garbers (2011) 153.
[100] [2014] 8 BLLR 748 (LAC) para 34-35.
[101] See the two-stage test in *Harksen v Lane* in par 2 supra.
[102] Du Toit *et al* (2014) 662.
[103] In *PFG Building Glass (Pty) Ltd v CEPPAWU and Others* (2003) 24 *ILJ* 974 (LC) Pillay J stated that: "the values embodied in Convention 111 are well entrenched in both the EEA and the Constitution").
[104] *Leonard Dingler Employee Representative Council and Others v Leonard Dingler (Pty) Ltd and Others* (1998) 19 *ILJ* 285 (LC). See also Dupper & Garbers (2011) 150-153.

treatment in employment or occupation."[105] This criterion is subsequently more specific and measurable than the broad constitutional criteria.[106]

When it comes to the interpretation of unfair discrimination against the background of international law, an approach of absolute prohibition of discrimination on grounds based on personal characteristics is adopted.[107] In other words, if section 6 of the EEA is interpreted in compliance with Convention 111, discrimination against an employee based on race or another prohibited ground will *ipso facto* be unfair.[108] This interpretation was followed in *HOSPERSA on behalf of Venter v SA Nursing Council*[109] and the court further concluded that:

> "The onus is then on the employer to show that its conduct did not amount to 'discrimination' as defined, or to justify it."

From the above, it is clear that the ILO does not make specific reference to the taking into account of history and context when considering unfair discrimination. However, it must be remembered that ILO Conventions do not contain detailed sets of rules. It only establishes broad principles which seek to provide guidance to member countries.

4. **CONCLUSION**

The interpretation of unfair discrimination requires that the provisions of the EEA must be interpreted in compliance with the Constitution and with ILO Convention 111.[110] When interpreting section 3(d) of the EEA, the prohibition on unfair discrimination in terms of section 6(1) must comply with the requirements of Convention 111.[111] The difference between article 1(1) of Convention 111 and section 6(1) of the EEA, which is the EEA's reference to the term "unfair", is more technical than substantive.[112] It can therefore be

[105] Du Toit *et al* (2014) 662.
[106] Ibid. See also *McPherson v University of Kwazulu-Natal and Another* [2008] 2 BLLR 170 (LC) where the court once again sought affirmation when it considered the interpretation of s 6 of the EEA on art 1 of Convention 111.
[107] In *HOSPERSA obo Venter v SA Nursing Council* (2006) 27 *ILJ* 1143 (LC) at para 32.
[108] Dupper & Garbers (2011), 154.
[109] (2006) 27 *ILJ* 1143 (LC) at para 32.
[110] Du Toit *et al* (2014) 655.
[111] Dupper & Garbers (2011), 155.
[112] Ibid.

concluded that the term “unfair discrimination” applied by our courts over the past 25 years is consistent with international law in the form of Convention 111.[113] Even though in the past the courts have frequently approached the meaning of “unfair discrimination” in terms of the Constitution instead of the EEA and Convention 111,[114] no conflict exists between Convention 111 and the Constitution in terms of employment discrimination.[115] Subsequently, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with Convention 111.[116] While section 9 of the Constitution prohibits unfair discrimination in general terms, Convention 111 adds criteria in a broader sense that are specific to the employment context.[117] It can therefore be concluded that both the Constitution and Convention 111 has significance in the interpretation of unfair discrimination and would subsequently need to be considered in the instance of racial discrimination in the employment context occurs.

[113] Du Toit (2006) 27 *ILJ* 1341.
[114] See for example *Stokwe v MEC, Department of Education, Eastern Cape Province* (2005) 26 *ILJ* 927 (LC).
[115] Dupper & Garbers (2011) 150 - 152.
[116] S 233 of the Constitution, 1996.
[117] Du Toit *et al* (2014) 655.

CHAPTER 3
LEGISLATIVE FRAMEWORK

1. INTRODUCTION

South Africa has enacted various laws in order to give effect to the constitutional imperative of eliminating discrimination, promoting equality and greater inclusion of the previously disadvantaged in the country's economy.[118] The three laws that play a core role in South Africa's transformation at the workplace are the Employment Equity Act ("the EEA")[119], the Skills Development Act[120] and the Broad-based Black Economic Empowerment Act.[121] The Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA")[122] also aims to promote equality and prevent unfair discrimination. However, this Act does not focus on the workplace. For the purpose of this chapter, I will mainly focus on the role of the EEA[123] and conclude whether sufficient guidelines exist in current South African legislation to minimise racism in the workplace. I will also discuss what the courts consider when determining the fairness of discrimination and to what extent the context of vulnerability and past disadvantages are considered. This will ultimately play a role in regards with the consideration of context and history that will be discussed in more detail in chapter 4.

[118] Dupper & Garbers (2011) 97.
[119] 55 of 1998.
[120] 97 of 1998.
[121] 53 of 2003. See also Dupper & Garbers (2011) 97.
[122] 4 of 2000.
[123] 55 of 1998.

2. **LEGISLATIVE FRAMEWORK PERTINENT TO RACISM**

The EEA replaced item 2(1)(a) of Schedule 7 of the Labour Relations Act ("the LRA")[124] when it came into force in August 1999.[125] Section 6 of the EEA included a more detailed approach in terms of the prohibition of unfair discrimination in the employment context. The EEA gave effect to the enactment of national legislation "to prevent or prohibit unfair discrimination" in the employment context, as well as giving effect to "the obligations of the Republic as a member of the International Labour Organisation," specifically Convention 111.[126] The EEA was enacted in order to achieve equity in the workplace by prohibiting unfair discrimination as well as implementing affirmative action measures to ensure equitable representation in the workforce.[127]

PEPUDA also sets out to promote equality and makes provision for the prohibition of unfair discrimination in terms of section 9(4) of the Constitution.[128] It can, however, not be applied in the employment context.[129] In other words, the Act has applicability between persons and between persons and the state and consequently potential rights exist for all legal personalities.[130] The EEA, in contrast, only applies to employers and employees.[131]

"Racial discrimination" is defined in the International Convention on the Elimination on all Forms of Racial Discrimination as:

> "any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."[132]

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[124] 66 of 1995.
[125] Du Toit & Potgieter (2014) 11.
[126] Ibid, 11.
[127] Section 2 of the EEA, 1998.
[128] Du Toit & Potgieter (2014) 19.
[129] S 5(3) of PEPUDA states that: "[t]his Act does not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act 55 of 1998), applies."
[130] Cooper & Lagrange (2001) *ILJ* 1532.
[131] Ibid.
[132] South Africa ratified this convention on 10 December 1998. Accessed at http://bit.ly/2ISNm1O on 10 September 2019.

Racial discrimination is not as clearly defined in South African legislation. Even though the EEA does not define racism, section 6 of the EEA clearly prohibits unfair discrimination on one or more grounds including race, consistent with section 9 of the Constitution.[133] The term racism is also not defined in the LRA.[134] Section 187(1)(f) of the LRA does make provision for dismissals to be automatically unfair if the employer contravenes sections 5 or 6 of the EEA when dismissing the employee.[135] Subsequently employees are also protected by the LRA against discrimination on the ground of race in relation to dismissal.[136]

Clearly there is no lack of legislation in South Africa to protect individuals from unfair discrimination and harassment. It does, however, lack in detail, specifically in terms of defining racism in the workplace. Be that as it may, a clear framework exists in determining whether the unfair discrimination (i.e racial conduct) would be considered unfair.

3. **FRAMEWORK FOR ESTABLISHING FAIRNESS OF DISCRIMINATION**

A two-pronged test has been applied by courts for unfair discrimination, requiring a court to firstly determine whether the differentiation constitutes discrimination and if affirmative, to consider whether such discrimination is unfair.[137]

When determining fairness in relation to discrimination, emphasis is placed on the experience of the victim of unfair discrimination.[138] The final factor in determining the fairness of unfair discrimination, is the impact of the discrimination on the complainant.[139] In order to determine the fairness of the impact on the complainants, factors such as the position of the complainants and the extent to which the rights or interests of the complainant had been affected, should be considered.[140]

In considering the position of the complainant in the society, the vulnerability of the group affected by the discrimination plays a significant role in that consideration is given to the fact

[133] Nxumalo (2019) *ILJ* 61 – 62. See Van Niekerk *et al* (2018) 125.
[134] The LRA, 1995.
[135] S 187(1)(f) of the LRA, 1995.
[136] Nxumalo (2019) *ILJ* 61 – 62. The LRA should therefore be applied when dismissals occur.
[137] *Harksen v Lane NO* [1997] 11 BCLR 1489 (CC).
[138] Pretorius *et al* (2018) 26-27.
[139] *Harksen v Lane NO* [1997] 11 BCLR 1489 (CC) at 1510E.
[140] *President of RSA v Hugo* [1997] 6 BCLR 708 (CC) at 730B.

of whether they have suffered past disadvantage.[141] The more vulnerable the group affected by the discrimination, the more likely the discrimination is to be unfair.[142]

In *Hoffman v South African Airways*[143] the court expressed the need to consider the context of not only past relationships, but the constant changing of positions in power and privilege. The disadvantages suffered by a group in the past does not necessarily coincide with their current vulnerability.[144] The degree to which a complainant has suffered previous discrimination in the past will always play a central role in the determination of the fairness of discrimination. However, Sachs J expressed the following:

> "The doors of the courts must, of course, be equally open to all South Africans, independently of whether historically they have been privileged or oppressed…Thus persons who have benefited from systematic advantage in the past and who continue to enjoy such benefits today, are by no means excluded from the protection offered by section 8."[145]

In considering the extent to which the rights or interests of the complainant have been affected by the discrimination, one of the key factors is whether the discrimination has led to the impairment of the complainant's fundamental dignity or an impairment of a comparably serious nature.[146]

The impact on the complainant and subsequently the context of past relationships as well as current vulnerability also play a great role in determining whether a dismissal was unfair in relation to discrimination on the ground of race.

[141] Pretorius *et al* (2018) 28. See *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) at 755E-F and *Harksen v Lane NO* [1997] 11 BCLR 1489 (CC) at 1510F.
[142] Pretorius *et al* (2018) 28.
[143] [2000] 11 BCLR 1211 (CC) at par 28.
[144] Pretorius *et al* (2018) 28.
[145] *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) at par 47–48.
[146] *Harksen v Lane NO* [1997] 11 BCLR 1489 (CC) at 1511B, 1516G.

4. **CONCLUSION**

Even though the abovementioned legislation clearly prohibits racism in the workplace, there is a clear lack of guidelines on what exactly constitutes racism and how such incidents should be handled in the workplace.[147] The courts have adopted a no tolerance approach to racism in the past. However, the question arises whether there are appropriate guidelines available, especially to employers, on how to address racism in the workplace.[148] Codes of Good Practice are available on subjects such as sexual harassment[149] and dismissals.[150] It is suggested that if a Code of Good Practice relating to racism was to be formulated by policy makers,[151] awareness would increase and ultimately minimise the number of racial incidents in the workplace. If not, employers would still have a framework of guidelines on how to appropriately handle incidents of racism in the workplace, which is crucial when considering how these occurrences are increasing rapidly.

Guidelines do however exist in establishing whether racial discrimination is fair. From the abovementioned case law, it is apparent that the courts are urged to consider the impact of the discrimination on the complainant and subsequently the past disadvantages the complainant has suffered, together with his or her current state of vulnerability.[152]

[147] Nxumalo (2019) *ILJ* 62.
[148] Ibid.
[149] Code of Good Practice on Handling Sexual Harassment Cases.
[150] Code of Good Practice: Dismissal, Schedule 8 of the LRA, 1995.
[151] Nxumalo (2019) *ILJ* 62.
[152] See chapter 2, par 3 above.

CHAPTER 4
ANALYSING CONTEXT AND HISTORY IN TERMS OF UNFAIR DISMISSALS

1. INTRODUCTION

According to Pillay, notwithstanding the fact that South Africa is a constitutional democracy, "it still continues to struggle with the issue of racism which has become ever so prevalent in many ways in the country".[153] The issue not only remains a challenge in our society, but also within the workplace.[154] Throughout this chapter I will explore the context and reasoning behind the way the courts deal with the issue of racism in the workplace, specifically in instances where workers have been dismissed due to racist and/or derogatory behaviour.

The courts have quite correctly taken a strong and no tolerance approach towards racism in the workplace.[155] Due to the lack of specific guidelines in legislation pertaining to racism in the workplace, I will discuss and compare the courts' guidelines and approaches when dealing with racism in the workplace throughout this chapter. Emphasis will be placed on two recent Constitutional Court judgments in particular, namely *Rustenburg Platinum v SA Equity Workers Association obo Bester & Others* ("Bester")[156] and *Duncmanmec (Pty) Ltd v*

[153] Pillay (2017) *Verbum et Ecclesia* 6.
[154] Nxumalo (2019) *ILJ* 61.
[155] Ibid, 62
[156] [2018] BLLR 735 (CC).

Gaylard NO and Others ("Duncanmec").[157] These two cases have particular relevance in the consideration of context and history. At face value these two judgments appear to have conflicting views. However, the Courts' reasons for its decisions become clearer once the context and history are considered. This consideration of context and history will be discussed in more detail throughout this chapter.

2. *RUSTENBURG PLATINUM V SA EQUITY WORKERS ASSOCIATION OBO BESTER & OTHERS*[158]

2.1 Background

On 28 May 2013 the respondent ("Mr Bester") was dismissed on the grounds of insubordination and the making of racial remarks.[159] Mr Bester was allocated a parking bay by the applicant's chief safety officer, Mr Sedumedi.[160] Mr Sedumedi at some point allocated the adjacent parking bay to Mr Thlomelang, an employee of a sub-contractor at the Mine.[161] After Mr Bester found a large 4X4 vehicle parked in the adjacent parking bay and having had difficulty reversing his own vehicle, he decided to take the matter up with the safety officer, Mr Sedumedi.[162] The failure of Mr Sedumedi's response to this issue ultimately led to the incident that occurred on 24 April 2013.[163]

The employer's (Rustenburg Platinum Mine) version of this particular incident is that Mr Bester disrupted a meeting while in progress, pointed his finger at Mr Sedumedi and said in a loud and aggressive manner: "verwyder daardie swart man se voertuig" ("remove that black man's vehicle").[164] Mr Bester's version, however, was that Mr Sedumedi was merely discussing jogging routes with another employee when Mr Bester calmly raised the parking issue.[165] Mr Sedumedi, according to Mr Bester, responded by saying "jy wil nie langs 'n swart man stop nie ... dit is jou probleem" ("you do not want to park next to a black man ...

[157] [2018] 12 BLLR 1137 (CC).
[158] [2018] BLLR 735 (CC).
[159] Ibid, 737.
[160] Ibid.
[161] Ibid.
[162] Ibid, 738.
[163] Ibid.
[164] Ibid.
[165] Ibid.

that is your problem").[166] Mr Bester denied shouting or pointing fingers at anyone.[167] The applicant charged Mr Bester with two acts of misconduct, the first charge being for disrupting a safety meeting and the second charge for making racial remarks by referring to an employee as a "swart man".[168] Mr Bester was found guilty on both charges and subsequently dismissed.[169]

2.2 **Litigation history**

Following Mr Bester's referral of the matter to the CCMA for an unfair dismissal dispute, the Commissioner found that Mr Bester's dismissal was substantively and procedurally unfair.[170] According to the Commissioner, it was highly probable that Mr Bester used the term "swart man" to identify the person who parked next to him. In the Commissioner's opinion it was not used in a derogatory manner and he could not see how the said phrase could be classified as a racial remark.[171]

However, the Labour Court disagreed and found that despite Mr Bester's denial, Mr Bester uttered the words "swart man", which was supported by evidence.[172] According to the Labour Court, Mr Bester's reference to Mr Tlhomelang was derogatory and racist and Mr Bester was not merely "referring to a physical attribute in order to identify a certain person", as the Commissioner suggested.[173] The Labour Court concluded that the Commissioner reached a decision that a reasonable decision-maker would not have reached and subsequently reviewed and set aside the award.[174]

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[166] Ibid.
[167] Ibid.
[168] Ibid.
[169] Ibid, 739.
[170] *SAEWA obo Bester v Rustenburg Platinum Mine*, unreported arbitration award of the CCMA, Case No NWRB1692-13 (19 December 2013) (Arbitration Award) at para 32.
[171] Ibid, par 26.6-7.
[172] *Rustenburg Platinum Mine v SAEWA obo Bester* [2016] ZALCJHB 75 (Labour Court judgment) at para 19.
[173] Ibid, par 23.
[174] Ibid, par 26.

2.3 **The significance of context**

The Labour Appeal Court decided that the test to determine whether Mr Bester's words were derogatory, should be an objective one.[175] The context in which the words were used should therefore be taken into account.[176] According to the Labour Appeal Court, the conclusion that the use of the words "swart man" were derogatory and racist, was not the only plausible conclusion that could be drawn from the facts and probabilities.[177] It was equally plausible that the context in which Mr Bester used the words "swart man" was to describe Mr Tlhomelang, whose name was unknown to Mr Bester.[178] The Labour Appeal Court agreed with the conclusion of the Commissioner that the dismissal of Mr Bester was substantively and procedurally unfair.[179] The Constitutional Court pointed out that the Labour Appeal Court asserted the context in which the words were uttered and considered whether the context transformed a neutral term into a pejorative one.[180] The Constitutional Court was however of the view that the Labour Appeal Court misdirected itself by finding in favour of Mr Bester's defence that was not supported by evidence.[181] The defence that the words "swart man" were used as a descriptor, was never raised by Mr Bester.[182]

According to the Constitutional Court, the Labour Appeal Court failed to recognise the impact of the legacy of apartheid that has left our country in such a prevalent state.[183] By failing to recognise the racist views of the past, the objective enquiry is approached incorrectly.[184] It would not be correct in deciding whether a statement is derogatory or racist to presume that the context is neutral, as our country's historical context dictates the contrary.[185] The Labour Appeal Court incorrectly assumed the phrase "swart man" to be neutral, instead of considering the significance of the use of these words in a post-apartheid South Africa.[186] The Constitutional Court was therefore of the view that the Labour Appeal Court failed to

[175] *SA Equity Workers Association o.b.o Bester v Rustenburg Platinum Mine* [2017] 8 BLLR 764 (LAC).
[176] Ibid, par 19.
[177] Ibid, par 27.
[178] Ibid.
[179] Ibid, par 32.
[180] [2018] BLLR 735 (CC) at para 34.
[181] Ibid, par 46.
[182] Ibid.
[183] Ibid, par 48.
[184] Ibid.
[185] Ibid.
[186] Ibid.

interpret the context in which the words were used, together with the totality of the circumstances, incorrectly.

2.4 **The sanction of dismissal**

The Constitutional Court previously stated that if an employee is guilty of racial conduct and admits wrongdoing, apologises and is willing to partake in some sort of a rehabilitation program, it may be relevant in determining whether dismissal was an appropriate sanction.[187] Mr Bester, however, showed a lack of remorse and completely denied using the words "swart man" and conceded that if he had done so, it could be a dismissible offence.[188] The fact that Mr Bester was dishonest in denying making the statement weighed heavily against him when the sanction was considered.[189] In *Sidumo v Rustenburg Platinum Mines*[190] the Constitutional Court stated that "[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal."[191]

The Court concluded that Mr Bester conducted himself in a manner that did not respect the dignity of his co-black workers and subsequently demonstrated by his actions that he had not acknowledged the apartheid past and embraced the new democratic order.[192] The Court therefore found the sanction of dismissal to be an appropriate sanction.[193]

3. ***DUNCANMEC (PTY) LIMITED V GAYLARD N.O AND OTHER[194]***

3.1 **Background**

On 30 April 2013 employees of Duncanmec, who were also members of NUMSA, embarked on an unprotected strike at the employer's premises.[195] They sang struggle songs and

[187] See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2017] 1 BLLR 8 (CC) in this regard.
[188] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC) at para 46 and 59.
[189] Ibid, par 61.
[190] [2008] (2) BCLR 158 (CC) at para 117.
[191] *Sidumo v Rustenburg Platinum Mines* [2008] (2) BCLR 158 (CC) at para 117.
[192] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC) at para 62.
[193] Ibid, par 63.
[194] [2018] 12 BLLR 1137 (CC).
[195] Ibid, par 10.

disregarded instructions and ultimatums from managers.[196] One of the struggle songs translated to: "Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer."[197] The employees were charged with misconduct, including participation of an unprotected strike and inappropriate behaviour.[198] For the purpose of this study, I will only focus on the second charge which was formulated as follows:

> "Gross misconduct being inappropriate behaviour in that on the 20th April 2013, while participating in an unprotected strike action, you behaved inappropriately by dancing and singing racial songs in an offensive manner while you were on duty and continued to do so while defying management's lawful ultimatum to return to work."[199]

After the Chairperson found the employees' conduct to be hatred speech towards the "white" race and recommended for the employees to be dismissed based on charge two,[200] NUMSA and its members challenged the dismissal in the Bargaining Council.[201] The Arbitrator differed from the view of the Chairperson by finding the song to be inappropriate, but not to constitute racism.[202] She was of the following view:

> "While I regard the singing of the song translated to 'stand on top of the rooftop and shout that my mother is rejoicing if we hit the boers' as inappropriate, particularly within the context of a workplace, I am of the view that a differentiation between singing this song and referring to someone with a racist term needs to be drawn. This is since this song is a struggle song and there is a history to it. While this is the case the song can be offensive and cause hurt to those who hear it."[203]

The arbitrator subsequently found that the employment relationship had not been "tarnished irrevocably" and that dismissal had not been an appropriate sanction in the circumstances.[204]

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[196] Ibid.
[197] Ibid.
[198] Ibid, par 11.
[199] *Duncanmec (Pty) Limited v Gaylard N.O and Other* [2018] 12 BLLR 1137 (CC) at para 27.
[200] Ibid, par 15.
[201] Ibid, par 16.
[202] Ibid, par 17.
[203] Ibid.
[204] Ibid, par 18.

3.2 The significance of context

Following Duncanmec's referral to have the Arbitrator's award reviewed and set aside, the Labour Court agreed with the Commissioner, especially when considering the context and peaceful nature of the strike.[205] The Labour Court was of the following view:

> "The employees conceded they sang the song, however they deny that it is wrong to sing it in a work environment and had the potential to cause hurt to other employees particularly white employees, however these employees' denial is understandable considering the history of the song."[206]

The Labour Court found that when considering the context of a strike which usually includes the singing of struggle songs in support of workers' rights, it cannot be concluded that the Arbitrator's award was so unreasonable for it to be reviewed.[207] Consequently the application was dismissed.[208] An application for leave to appeal by Duncanmec was also rejected by the Labour Court as well as the Labour Appeal Court.[209]

The Constitutional Court had to consider whether the singing of the struggle song in question amounted to racism and whether the impugned award was unreasonable.[210] The Court concluded that the only reference to race, namely the word "boer", was not in itself racially offensive.[211] The Court further noted that the Arbitrator did in fact consider the distinction "between singing the song and referring to someone with a racist term" and did not hold that the song included racist words.[212] The Arbitrator did, however, find the song to be inappropriate.[213] NUMSA did in fact not contest the singing of the song to be inappropriate and offensive in the circumstances and the Court concluded that the employees were guilty of a racially offensive conduct.[214] The Court was, however, of the view that given the Arbitrator's consideration of the inappropriateness of the singing of the song distinguished from crude racism, she paid specific attention to the context in which the misconduct took

[205] Ibid, par 27.
[206] *Duncanmec (Pty) Limited v Gaylard N.O and Other* [2018] 12 BLLR 1137 (CC) at para 27.
[207] Ibid, par 26.
[208] Ibid, par 28.
[209] Ibid.
[210] Ibid, par 36.
[211] Ibid, par 37.
[212] Ibid, par 38.
[213] Ibid.
[214] Ibid, par 39.

place.[215] The Arbitrator also emphasized the context in which the strike took place and was described by her as "peaceful and shortlived."[216]

3.3 **The sanction of dismissal**

The Arbitrator considered all the evidence before her which included the employees' personal circumstances and the fact that they all had clean records and ultimately found the sanction of dismissal to be substantively unfair.[217] She also considered the competing interests of Duncanmec and the employees and concluded that a final written warning, reinstatement and limited compensation was fair in the circumstances.[218] The Court was of the view that the Arbitrator illustrated rationality in her reasoning and therefore found that the reasonable requirement had been met.[219] Consequently the appeal was dismissed.

4. **CONSIDERING DISMISSAL AFTER THE OCCURRENCE OF RACIAL CONDUCT**

An employer may dismiss an employee for a fair reason followed by a fair procedure in terms of section 188 of the Labour Relations Act.[220] There can be no doubt that an employee who is found guilty of racial conduct, ought to be dismissed.[221]

However, in terms of our law there is no set principle that requires dismissal to follow automatically after racist conduct has occurred.[222] It is required by the courts and arbitrators to deal with racism firmly but also to treat the perpetrator fairly.[223] In *Sidumo v Rustenburg Platinum Mines*[224] the Constitutional Court listed the following factors for commissioners to consider when determining the fairness of a dismissal:

> "(i) the importance of the rule that was breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee's challenge to the

[215] Ibid, par 51.
[216] Ibid, par 51.
[217] Ibid.
[218] Ibid, par 52.
[219] Ibid.
[220] The LRA, 1995.
[221] According to *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* (2002) 23 *ILJ* 863 (LAC) *and City of Cape Town v Freddie* [2016] 6 BLLR 568 (LAC).
[222] Ibid, par 48.
[223] Ibid.
[224] [2007] 12 BLLR 1097 (CC) at para 78.

> dismissal; (iv) the harm caused by the employee's conduct; (v) whether additional training and instruction may result in the employee not repeating the misconduct; (vi) the effect of dismissal on the employee; and (vii) the long-service record of the employee."[225]

When an employee's dismissal is found to be unfair after racial conduct occurred, reinstatement might not be the appropriate remedy.[226] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration*[227] an employee of SARS ("Mr Kruger") referred to his superior as a "kaffir" which ultimately led to his dismissal.[228] *In casu* the Constitutional Court had to consider whether reinstatement would be appropriate in instances where crude racism occurred.[229] The Court was of the view that the evidence supported the fact that the misconduct committed rendered the continued employment relationship intolerable and therefore reinstatement was the most inappropriate remedy .[230]

The Court referred to *Crown Chickens v Kapp*[231] when considering the sanction and emphasized the importance of the courts' role in eliminating racism or racial abuse.[232] The Court further stated that the use of the word "kaffir" in the workplace would not automatically lead to dismissal.[233] Circumstances would play a significant role, as exceptional circumstances may indicate the employment relationship to be tolerable.[234] The Arbitrator;[235] however, failed to consider the seriousness of the misconduct and its potential impact in the workplace and failed to motivate or elaborate as to why the reinstatement in those circumstances was appropriate.[236] Another factor that did not weigh in favour of Mr Kruger when the Court considered the fairness of the sanction, was that even though he was in fact guilty of racism he failed to apologise, acknowledge or show remorse for his racist

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[225] Botha (2018) *THRHR* 679.
[226] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2017] (2) BCLR 241 (CC), at para 42.
[227] [2017] (2) BCLR 241 (CC).
[228] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2017] (2) BCLR 241 (CC), par 15.
[229] Ibid, par 32.
[230] Ibid, par 41,42.
[231] *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* (2002) 23 ILJ 863 (LAC); (2002) 6 BLLR 493 (LAC) at para 35.
[232] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2017] (2) BCLR 241 (CC), par 43.
[233] Ibid.
[234] Ibid.
[235] In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2017] (2) BCLR 241 (CC).
[236] Ibid, par 44.

conduct.[237] The Court also stated that the Arbitrator should in fact have taken into account the problems that racism has caused and is still causing in our country.[238] The Court found that by ignoring these crucial factors and ordering SARS to reinstate Mr Kruger, the Arbitrator acted unreasonably and the Court subsequently reviewed and set aside the reinstatement part of her award and ordered SARS to pay Mr Kruger compensation instead.[239]

When an employee shows a lack of remorse and proceeds to raise the defence of complete denial when he or she is in fact guilty of misconduct (racial conduct), it would count against the employee, as it would be difficult for an employer to re-employ an employee who was dishonest and did not assure to re-establish the trust that has broken down.[240] In *Sidumo v Rustenburg Platinum Mines*[241] the Court stated: "[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal", and when an employee is dishonest in denying making a racist or derogatory statement it weighs heavily against him when considering a sanction.[242]

5. **THE COURTS' APPROACH WHEN DEALING WITH RACISM IN THE WORKPLACE**

Even though in *Duncanmec*[243] the word "boer" was not considered racist in the context in which it was used, it is important to note that no one is immune to consequences following the use of words that could be considered derogatory or racist.[244] In *Makhanya v St Gobain*[245] the Arbitrator held that the usage of the word "boer" has similar derogatory

[237] Ibid, par 45.
[238] Ibid, par 48.
[239] Ibid, par 49.
[240] Botha (2018) *THRHR* 679. See also *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC), par 59-60.
[241] [2007] 12 BLLR 1097 (CC).
[242] *Sidumo v Rustenburg Platinum Mine* [2007] 12 BLLR 1097 (CC) at para 117; *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (CCT127/17) [2018] BLLR 735 (CC) at para 61.
[243] *Duncanmec (Pty) Limited v Gaylard N.O and Other* [2018] 12 BLLR 1137 (CC).
[244] Pienaar & Loxton (2019) accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/Employment-alert-29-july-No-more-Boers-allowed-in-the-workplace-.html
[245] [2019] 7 BALR 720 (NBCCI).

connotations to the "k-word" and subsequently dismissed an African employee's unfair dismissal referral that arose from the employee's use of the word.[246]

It is therefore clear that the courts or arbitrators have a consistent approach when dealing with racism in the workplace. In considering the context in which the alleged racial words were used, no bias exists from the courts in terms of favouring a specific race. The courts would subsequently find that the dismissal of an employee found guilty of uttering racial slurs in the workplace to be fair, regardless of their race. Each case is therefore determined in terms of its context and totality of the circumstances.

6. **THE EFFECT OF RACIAL ALLEGATIONS**

From the abovementioned case law, it is apparent that courts have been adopting a zero-tolerance approach when dealing with racial conduct in the workplace.[247] As previously mentioned, an employee guilty of racial conduct may be fairly dismissed.[248]

Considering the damage racism can cause, the courts have started to develop a line of jurisprudence that includes false claims of racism and the consequences of making such false allegations.[249] An example is the recent case of *Legal Aid South Africa v Mayisela and Others*[250] where a former employee of Legal Aid South Africa ("Mr Mayisela") was charged with an attack on dignity of his superior in that Mr Mayisela accused her of racism after he received a negative performance review from her.[251] The Labour Appeal Court stated that:

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[246] Ibid. Pienaar & Loxton (2019) accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/Employment-alert-29-july-No-more-Boers-allowed-in-the-workplace-.html

[247] See *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC); *Duncanmec (Pty) Limited v Gaylard N.O and Other* [2018] 12 BLLR 1137 (CC); *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC). See also Pienaar & Loxton (2019) accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/Employment-alert-29-july-No-more-Boers-allowed-in-the-workplace-.html.

[248] See paragraph 4 supra.

[249] "Red carded for playing the race card" accessed at https://www.werksmans.com/legal-updates-and-opinions/red-carded-for-playing-the-race-card/

[250] (2019) 40 *ILJ* 1526 (LAC) (5 February 2019).

[251] Ibid, par 43.

> "unjustified allegations of racism against a superior in the workplace can have very serious and deleterious consequences. 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 Court was of the view that Mr Mayisela's subjective view that he was subjected to racist conduct did not warrant his claim for alleged racism and subsequently found that the conclusion of the Commissioner that the dismissal was substantively fair was reasonable and not susceptible to review.[252]

The adverse effect on a person, in terms of unfounded accusations of racism, needs to be emphasized. As correctly stated in *Legal Aid South Africa v Mayisela,*[253] false accusations of racism are demeaning, insulting and an attack on dignity. The Labour Court also emphasized this point in *SACWU and Another v NCP Chlorchem (Pty) Ltd and Others:*[254]

> "I can hardly conceive of any place or circumstance or country where, if a person is told that he is racist, it will not be experienced by such person as him or her being insulted and abused."

It can therefore be concluded that just as much as employees need protection from racism, it is equally unacceptable for employees to make false allegations against innocent parties.[255]

[252] Ibid, par 65.
[253] (2019) 40 *ILJ* 1526 (LAC).
[254] (2007) 28 *ILJ* 1308 (LC) at para 13.
[255] "Red carded for playing the race card" accessed at https://www.werksmans.com/legal-updates-and-opinions/red-carded-for-playing-the-race-card/

7. **CONCLUSION**

When comparing the Constitutional Court cases *Bester*[256] and *Duncanmec*[257] it is apparent that the context and intention in which alleged racist or derogatory words were used, is the core factor when deciding whether a dismissal was fair.[258] Even though the Court found the words "swart man" used by Mr Bester to be racially loaded,[259] and in contrast found that the use of the word "boer" was not racially offensive,[260] the Court emphasized in both cases the importance of the context in which the words were used. Our country's history also plays a significant role when considering the context.[261]This can be concluded from the fact that in *Duncanmec*[262] the Arbitrator considered the history to the struggle song that was sung and even though the song could be offensive, it did not constitute racism in the context that it was used.[263]

The question that arises is: when does the use of a racial descriptor or alleged derogatory words amount to racism and in effect to misconduct?[264] The test that could be applied is whether the words used were offensive and/or racist and violated human dignity in the context in which they were used.[265] Scott stated that "any racist attitude or action fails, fundamentally, to acknowledge the humanity of another" and furthermore that racist conduct "removes individuality, personhood, and ultimately, human dignity."[266] It can therefore be concluded that any offensive racial comment that impairs the human dignity of another may ordinarily amount to misconduct which would most likely justify the perpetrator's dismissal.[267]

When considering the above case law, it is clear that the courts do not tolerate racism in the workplace.[268] When considering dismissal as a result of racial conduct, the Court

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[256] [2018] BLLR 735 (CC).
[257] [2018] 12 BLLR 1137 (CC).
[258] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC), at para 38, 48 – 51.
[259] Ibid, par 49.
[260] *Duncanmec (Pty) Limited v Gaylard N.O and Other* [2018] 12 BLLR 1137 (CC), at para 37.
[261] Ibid, para 17.
[262] *Duncanmec (Pty) Limited v Gaylard N.O and Other* [2018] 12 BLLR 1137 (CC).
[263] Ibid, par 17.
[264] Nxumalo (2019) *ILJ* 69.
[265] Ibid.
[266] Scott (2010) *Skills at Work: Theory and Practice* 74.
[267] Nxumalo (2019) *ILJ* 69.
[268] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC), at para 56.

emphasises the importance of applying an objective test in the context of the case[269] and considering the totality of the circumstances.[270] The totality of the circumstances include the consideration of the history of apartheid and the racist views of the past.[271] It is therefore of dire importance that employees be mindful and vigilant of the words they use in the workplace and for employers to educate their employees on the issue of racism and alert them of the consequences of the use of derogatory or racist language in the workplace.[272]

[269] Ibid, par 38.
[270] Ibid, par 49.
[271] Ibid, par 48.
[272] Nxumalo (2019) *ILJ* 70. See Pienaar & Loxton (2019) accessed at https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/Employment-alert-29-july-No-more-Boers-allowed-in-the-workplace-.html

CHAPTER 5
THE LIABILITY OF THE EMPLOYER

1. **INTRODUCTION**

The Employment Equity Act ("The EEA")[273] not only prohibits unfair discrimination against employees but requires employers to eliminate unfair discrimination.[274] The employer must therefore prevent its employees from unfairly discriminating against others in the workplace.[275] The employer has the power to control conduct in the workplace and therefore should it fail to take the necessary preventative steps, it may be held liable.[276] Employer liability for unfair discrimination is regulated by four legal mechanisms, namely section 60 of the EEA, the common law doctrine of vicarious liability, an employer's common law duty to provide safe working conditions and the constitutional right not to be subjected to unfair discrimination and/or the constitutional right to fair labour practices.[277] In this chapter, I will only focus on the statutory liability of the employer in terms of racial discrimination imposed by section 60 of the EEA.

[273] 55 of 1998.
[274] Du Toit & Potgieter (2014) 15. See section 5 of the EEA.
[275] Ibid, p 105.
[276] Ibid.
[277] Ibid, p 106.

2. **AN EMPLOYER'S LIABILITY IMPOSED BY SECTION 60 OF THE EEA**

In terms of section 60(1) of the EEA, when an employee contravenes a provision of the EEA, or engages in any conduct that, if engaged by the employee's employer, would constitute a contravention of a provision of the EEA, the alleged conduct should immediately be brought to the intention of the employer.[278] If the employer has been made aware of the alleged conduct, it must consult with all the relevant parties and take the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA.[279] Should the employer fail to take the necessary steps and it is proved that the employee contravened a provision of the EEA, the employer should be deemed to have also contravened that provision.[280] The employer can, however, avoid liability by showing that it had done everything "reasonably practicable" to prevent the contravention.[281] "Reasonably practicable", a term derived from health and safety legislation entails "balancing the severity of the hazard or risk, the state of knowledge, the suitability of means to remove the risk and the cost of doing so."[282] An employer can therefore escape liability if it can prove that it had taken reasonable steps to ensure that an employee would not contravene a provision in the EEA.[283]

3. **AN EMPLOYER'S LIABILITY IN TERMS OF RACIST CONDUCT OF AN EMPLOYEE**

An employer that fails to take proper steps to prevent racist conduct at the workplace by its employees may constitute direct and unfair discrimination against the complainant.[284] This was confirmed by the Labour Court in *SATAWU obo Finca v Old Mutual Life Assurance Company*,[285] after a white employee had refused to have her workstation close to black co-employees and the employer subsequently did not take proper steps to protect its employees against racism in the workplace.[286] Revelas J stated that the reinstatement of

[278] Section 60(1) of the EEA, 1998. See *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC).
[279] Section 60(2) of the EEA,1998. See Du Toit *et al* (2015) 713.
[280] Section 60 (3) of the EEA, 1998.
[281] Section 60 (4) of the EEA, 1998. See Du Toit *et al* (2015) 713.
[282] Du Toit *et al* (2015) 713.
[283] Van Niekerk *et al* (2018) 156.
[284] *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC) at para 47.
[285] *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC).
[286] Ibid, par 4 & par 45.

the second respondent (who was guilty of racist remarks) reinforced the perception that the employer was protective of those employees who were guilty of making racist comments.[287] She further concluded that the remark was racist in nature and the employer's delay in taking action against the perpetrator and its failure to protect the victim of the racist comments amounted to direct discrimination and subsequently ordered the employer to pay compensation to the victim of the incident.[288]

An employer can, however, not be held liable for all incidents of racial conduct committed by non-employees. In *Shoprite Checkers (Pty) Ltd v Samka*[289] an employee alleged that the employer failed to protect her after a customer of the employer made racist remarks towards her. When the aggrieved employee referred the matter to the CCMA, in terms of section 60 of the EEA, the Commissioner found that the employer did not take the necessary steps "to prevent the misconduct from happening again" and was of the view that the employer could have taken measures to prevent the customer from entering the store again.[290] The Commissioner subsequently ordered the employer to pay the employee an amount of R75 000 in compensation.[291] The employer however took the matter on appeal and the question posed by the Labour Court was whether the employer could be held liable for the racial comments of its customer as opposed to an employee.[292] The Court interpreted section 60 to apply only in cases of conduct committed by an employee of the employer and found that the employer could not be held liable for the conduct of a customer.[293].

4. **AN EMPLOYER'S DUTY TO AVOID LIABILITY**

In terms of section 60,[294] the employer will only be liable if it fails to take the required action.[295] Section 60 can be separated into two different scenarios: (1) where no discrimination has taken place (yet); and (2) after a complaint has been raised. The first

[287] Ibid, par 38.
[288] Ibid, par 39.
[289] [2018] 9 BLLR 922 (LC).
[290] Ibid, 925.
[291] Ibid.
[292] Ibid, 927.
[293] Ibid.
[294] 55 of 1998.
[295] Du Toit & Potgieter (2014), 107.

scenario requires proactive or preventative measures while the second scenario requires reactive or responsive measures. Both scenarios are discussed below.

4.1 **Proactive measures**

Section 60 should not be interpreted as an absolute duty placed on an employer to prevent any form of unfair discrimination that might conceivably take place.[296] The employer has the duty and responsibility to ensure that all measures that are "reasonably practicable" to prevent unfair discrimination have been taken.[297] The Labour Court failed to elaborate as to what constitutes "all reasonable" steps.[298] However, it is suggested that it would depend on the nature and size of the employment environment as well as the available resources, but training for example, would usually not be sufficient in isolation.[299] Additional evidence of constant awareness campaigns, assessments of the effect of training, and the extent to which management engages with employees would be required.[300] The employer's duty therefore basically entails to ensure that all employees understand the meaning of "unfair discrimination", what recourse and protection are available to victims and what the consequences would be for the perpetrator who is guilty of such discrimination.[301]

4.2 **Reactive measures**

If unfair discrimination takes place even though the employer had taken preventative steps, the employer may still be held liable if it fails to comply with the requirements of section 60.[302] As soon as an employer becomes aware of alleged unfair discrimination of an employee, it is required that the employer firstly "consult all relevant parties" and secondly to "take the necessary steps to eliminate the alleged conduct."[303] In terms of section 60(2) and 60(3)[304] it is implied that an initial consultation takes place, with an appropriate inquiry that follows to prove the allegation.[305] In order for an employer to show that it had done

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[296] Ibid, 108.
[297] Ibid.
[298] *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC)
[299] Le Roux (2006) paper presented at the 19th Annual Labour Law Conference, Johannesburg, p 5.
[300] Ibid.
[301] Du Toit & Potgieter (2014), 108.
[302] Ibid, 109.
[303] S 60(2) of the EEA, 1998.
[304] The EEA, 1998.
[305] Du Toit & Potgieter (2014), 110.

everything reasonably practicable it should be able to show, amongst others, that racism and other disciplinary conduct is ordinarily met with strong disciplinary action.[306]

5. **CONCLUSION**

This chapter has shown that employees may invoke section 60 of the EEA as a remedy against an employer, if it fails to respond adequately to a complaint of unfair discrimination or fails to take the necessary measures to eliminate unfair discrimination caused by one of its employees.[307] As mentioned above,[308] an employer has a duty to take measures such as to constantly create awareness amongst its employees about the repercussions of committing acts of unfair discrimination, such as racial conduct.[309] From the cases discussed,[310] it is apparent that the consequences for an employer's failure to take the necessary steps when becoming aware of racial discrimination committed by one of its employees can be serious. Employers can be held directly liable and be ordered to pay compensation to employees who fall victim to racial discriminatory conduct.[311] It is of great importance that employers act proactively as well as reactively.[312] Employers should therefore have policies in place regulating the procedures for possible racial incidents in order to limit its liability. Employers should also when becoming aware of any racial incidents or complaints by its employees, act immediately and ensue with an investigation regarding the incident. Failure to do so, may lead to the employer's direct liability and may have, amongst others, severe financial consequences for the employer.

[306] Le Roux (2006) paper presented at the 19th Annual Labour Law Conference, Johannesburg, p 5.
[307] Du Toit & Potgieter (2014), 111.
[308] See par 4.1 above.
[309] Le Roux (2006) paper presented at the 19th Annual Labour Law Conference, Johannesburg, p 5.
[310] See par 3 above.
[311] *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC).
[312] Du Toit & Potgieter (2014), 108.

CHAPTER 6
CONCLUSION AND RECOMMENDATIONS

1. INTRODUCTION

It has been emphasized by our courts that racism will not be tolerated in the workplace.[313] Making racist comments in the public domain or workplace is not only highly offensive, considering that we are a country in transition still attempting to restore dignity and equality, but may also negatively affect the business of the employer.[314] Achieving a society in which persons will be accorded equal dignity and respect regardless of belonging to certain groups, considering our racially charged past, will not be easy.[315] However, it remains the goal of the Constitution and the South African courts have at many occasions cautioned against racial comments in the workplace.[316]

[313] *Rustenburg Platinum Mine v SAEWA obo Bester & others* [2018] BLLR 735 (CC) at para 56.
[314] Ibid, para 56 & 57.
[315] *The President of the Republic of South Africa and another v Hugo* (1997) (6) BCLR 708 (CC) at para 41.
[316] See *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* [2002] 6 BLLR 493 (LAC).

2. THE CONSIDERATIONS OF SOUTH AFRICAN COURTS IN DETERMINING FAIRNESS

Chapter 2 set out the framework for interpreting racial discrimination which is the starting point at any enquiry of determining whether racial discrimination is fair. It was concluded that the provisions of the EEA together with the Constitution and ILO Convention should be applied.

Chapter 3 and 4 addressed two very important research questions: Firstly, do courts consider the legacy of apartheid or vulnerability of complainants in determining whether discrimination is fair? Secondly, what factors do the South African courts consider when establishing whether a dismissal is fair after racial discrimination has taken place?

Considering the first question, it became apparent that the impact of the discrimination on the complainant plays a core role in the determination of whether discrimination is unfair.[317] This means that a person's or a group's vulnerability plays a significant role in this consideration and ultimately means that past disadvantages are considered. Even though the Constitutional Court concluded that the impact of the legacy of apartheid should be considered after the occurrence of racial conduct,[318] the Court also stated that persons who have not been previously disadvantaged in the past are by no means excluded from protection.[319]

It became clear in considering the second question that when an employee is found guilty of racial conduct that dismissal would be a justifiable sanction.[320] However, there is no set rule that requires an employee to be dismissed after committing racial conduct. The circumstances of each case and whether the employment relationship is still tolerable are still the determining factors when deciding whether a dismissal is an appropriate sanction. Therefore, even though the courts do not tolerate racism in the workplace, there are still determining factors that will be considered before deciding whether a dismissal is fair in the given circumstances.

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[317] See par 3, p 20 & 21 supra.
[318] *Rustenburg Platinum Mine v SAEWA obo Bester & others* [2018] BLLR 735 (CC) at para 48.
[319] *Hoffman v South African Airways 2000* 11 BCLR 1211 (CC) at par 28.
[320] See par 5, p 32 supra.

3. THE IMPORTANCE OF CONTEXT AND HISTORY

Chapter 4 analysed the main purpose of this study, namely whether the South African courts consider the context and history in which racial conduct has taken place.

At face value the judgments of *Bester*[321] and *Duncanmec*[322] seem contradictory. In *Bester*[323] the Court concluded that the dismissal of an employee who referred to someone as "swart man" was fair. However, in *Duncanmec*[324] the Court found the dismissal of employees who sang about "hitting the boer" to be unfair. When understanding the context in which both cases took place, one would realise that these seemingly conflicting judgments are not as contradictory as it would seem. It is clear that in *Bester,*[325] the Court took into account the context in which Mr Bester uttered the words "swart man." It was decided that the words "swart man", per se, was not racist, but that the context in which the words were used was the determining factor in deciding whether it was considered derogatory or racist.[326] Subsequently the Court found the use of the term, within the context of the matter and considering the totality of the circumstances, racially loaded.

In *Duncanmec,*[327] the term "boer" was also not considered to be a racist term per se, however the context in which it was used had to be considered.[328] The Court decided that the Commissioner correctly considered the peaceful nature of the strike, during which the term was used.[329] Subsequently it could not be found that the singing of the song amounted to racism.

The courts therefore have a clear-cut approach when determining whether a statement is derogatory or racist in the workplace. The term that is used will not be considered in isolation, but the context in which it was used, together with the totality of the circumstances will be

[321] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC).
[322] *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] 12 BLLR 1137 (CC).
[323] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC).
[324] *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] 12 BLLR 1137 (CC).
[325] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] BLLR 735 (CC).
[326] Ibid, at para 38.
[327] *Duncanmec (Pty) Limited v Gaylard NO and Others* [2018] 12 BLLR 1137 (CC).
[328] Ibid, at para 37.
[329] Ibid, para 51.

considered. The totality of the circumstances may also include the history of the complainants relating to previous disadvantages and their current vulnerability.

4. **LESSONS TO BE GAINED AND RECOMMENDATIONS**

Chapter 5 addressed the two other research questions. Firstly, what are the appropriate remedies against an employer when racial discrimination has taken place in the workplace? Secondly, what lessons can be gained from incidents where employees were found guilty for committing racial conduct in the workplace?

When considering the first question, it should be concluded that there is always a possibility that an employer may be held liable, in terms of section 60 of the EEA, when an employee commits racial conduct in the workplace. Subsequently, employees have a remedy when an employer refuses to act on complaints of unfair discrimination that occurs in the workplace.

In terms of the second question, an important lesson for employers is to realise the importance of having policies and procedures in place to regulate incidents of racial conduct. In my opinion, a broad policy regulating misconduct would not suffice. Detailed policies specifically regulating racial conduct within the workplace should be in place. Employers should not only implement policies, but also constantly create awareness within the workplace on the issue of racism.

Another lesson to be gained is from the realisation of the serious consequences for employees who may be found guilty of racial conduct in the workplace. Employees should realise that if they should be found guilty of such conduct, they may be fairly dismissed. Even racism that occurs outside of the working environment can lead to an employee's dismissal and all employees should be made aware of this.

Harmonious relationships are extremely important within a workplace. It is suggested that it may be beneficial for the purpose of maintaining harmonious relationships between employees from different cultural backgrounds, to attend workshops during which they can participate in teamwork and learn about each other's cultural backgrounds. This may minimise cultural differences and unwanted racial conduct within the workplace.

It is further suggested that if policy makers formulate a Code of Good Practice relating to racism within the workplace, it could increase awareness amongst employers and employees and subsequently prevent such conduct. This Code of Good Practice should contain a definition of racial conduct and also provide detailed guidelines on how to handle incidents of racism in the workplace. Creating awareness and having detailed guidelines available, may minimise incidents involving racism.

5. **CONCLUDING REMARKS**

After considering the abovementioned case law discussed in chapter 4, one cannot conclude that the courts have a biased approach when it comes to the issue of racism. The courts do not specifically rule in favour of one race. It has been made clear that racism will not be tolerated, irrespective of the race of the victim or perpetrator. The courts follow an objective approach, considering the context of each incident. It can subsequently be concluded that context plays a central role in determining whether an employee is guilty of racism.

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