RACISM IN THE WORKPLACE: AN APPRAISSAL OF THE EMPLOYER'S RESPONSIBILITY AND LIABILITY

BY

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SUMMARY

With the first democratic elections in South Africa in 1994, citizens of South Africa made a conscious decision to move forward and heal the inequalities of the past. Central to this is the sensitive issue of racism, which had, and still has, to be addressed and rooted out.

Despite the conscious decision, racism in South Africa is still very much alive. More specifically racism in the workplace, where employees spend a fair amount of time in the presence of people from different races, appears to be prevalent. A contentious point in this regard is whether an employee can be dismissed for racial conduct and if dismissal is the only sanction in cases of racism in the workplace.

Acts of racism in the work place do not only have negative consequences for the victim and the accused, but also for the employer. As the employer has a duty to reasonably prevent racism in the workplace, the employer can be held liable if he or she fails to prevent or effectively deal with racism in the workplace.

This dissertation considers discrimination in the form of racism within the workplace. Various case law are considered to illustrate some of the cases which constitute racism and reflect on how the courts dealt with racism. Furthermore, this dissertation considers the responsibility and possible liability of employers with regards to racism in the workplace.

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CHAPTER 1 INTRODUCTION

"*I have a dream that my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character"*
– Martin Luther King Jr

1.1 CONTEXTUAL BACKGROUND

Even though South Africa proclaims to be a democratic state founded on, amongst other values, the value of non-racialism,[1] race and racism still plays a role in South Africa, especially in the workplace. In this regard, Nicholson JA stipulates that "[r]acism is a plague and a cancer which should be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the employee in question."[2]

In a similar vein, Zondo JP remarked that

> "[t]he attitude of those who refer to or call, African's "kaffirs" is an attitude that should have no place in any workplace in the country and should be rejected with absolute contempt by all those in the country – black and white – who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard the courts must play their role and play it with conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect."[3]

In recent years, there have been various matters which dealt with racism in the workplace.[4] In most of the matters the employee with alleged racial conduct was dismissed and in only a few matters the guilty employee was not dismissed for the

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1 Section 1(b) of the Constitution of the Republic of South Africa, 1996.
2 *Crown Chickens Pty (Ltd) t/a Rocklands Poultry v Kapp and others* (2002) 23 ILJ 863 (LAC) para 24.
3 *Crown Chickens Pty (Ltd) t/a Rocklands Poultry v Kapp and others* para 37.
4 See Chapter, paras 2.5.1-2.5.7 below for a discussion on some of the most recent matters.

alleged racial conduct. There is also a responsibility on the employer to prevent incidents of racism and if such an event does indeed occur to deal with it in a strict manner. Failure to act appropriately could result in the employer being held liable.

The purpose of this dissertation is to identify what racism entails and when conduct of employees actually constitute racism. Furthermore, this dissertation considers when dismissal is a justifiable sanction in relation to racial conduct and whether it is the only appropriate sanction in matters pertaining to racism in the workplace. Lastly, it is considered to what extent employers will have a responsibility and be liable when an employee is guilty of racism in the workplace.

1.2 RESEARCH QUESTIONS

In light of above, I will consider and answer the following research questions in this dissertation:

(a) What constitutes racial discrimination?
(b) Is dismissal the only justifiable and reasonable sanction in matters of racial discrimination in the workplace?
(c) Does an employer have any responsibility to prevent racial discrimination in the workplace?
(d) Can any liability be ascribed to the employer in cases of racial discrimination in the workplace?

1.3 VALUE OF STUDY

Racial discrimination is something which needs to be erased at all cost in society, not only in the workplace. People must be made aware of the serious consequences which racism in the workplace can have for an employee and their employment if they make themselves guilty of racial discrimination in the workplace. Moreover, employers must be made aware of their responsibility and possible liability when dealing with matters of racial discrimination in the workplace.

1.4 RESEARCH METHODOLOGY

Various case law and legislation form the foundation of this study which is critically analysed. Articles and books are also considered.

1.5 CHAPTER OVERVIEW

This dissertation consists of 4 chapters. The chapter which follows the introductory chapter consider the meaning of discrimination and what constitutes racism. Recent court cases are also discussed in Chapter 2 to determine if racial discrimination in the workplace should always result in dismissal or if there are alternative sanctions which can be considered in cases of racial discrimination.

Chapter 3 considers the liability and responsibility of the employer in the workplace with regards to racial discrimination in the workplace. In addition, the different possible claims that can be instituted against employer when an employee has acted in a racist manner is discussed.

Chapter 4, the concluding chapter, provides a brief summary of the preceding chapters and answers the research questions posed in this chapter.

CHAPTER 2 THE MEANING OF RACISM AND APPROPRIATE SANCTIONS

2.1 INTRODUCTION

R-A-C-I-S-M. A five-letter word very easily used in the South African context considering the country's apartheid history and the all too often incidents and occurrences of racism. The oxford dictionary defines racism generally as a "[p]rejudice; discrimination or antagonism directed against someone of a different race based on the belief that one's own race is superior."[1]

[1] https://en.oxforddictionaries.com/definition/racism (accessed on 20 September 2018).

Other jurisdictions also define racism. In the United Kingdom, the Equality and Human Rights Commission defines racism as "unwanted conduct of a racial nature, or other conduct based on race affecting the dignity of women and men at work."[2] Whereas in Canada the Ontario Human Rights Commission[3] defines racism as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome."[4]

In South Africa, more specifically in the workplace, racism can take on various forms. A word or sentence which constitutes racism for one does not necessary constitute racism for another. The impact of an alleged racism incident can also vary in the degree of seriousness. It must be noted that racism can occur within and outside the workplace. Nonetheless, racist incidents outside the workplace can possibly be linked to the workplace and may also result in disciplinary actions against that employee.[5] Something that is certain in all cases of racism is that racist conduct will erode values contained in the Constitution of the Republic of South Africa, 1996 ("Constitution").[6]

Central to ascertaining what an employer's responsibility and liability in relation to racism in the workplace would be, is to consider what constitutes racism in workplace and also what the appropriate sanctions would be to impose in instances of racism.

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2 Pretorius, Klinck & Ngwena "*Employment Equity Law*" 17th edition (2017) Lexis Nexis para 6.5.2. See also https://www.equalityhumanrights.com/en (accessed 28 October 2018).

3 http://www.ohrc.on.ca/en/ontario-human-rights-code (accessed 28 October 2018). See also Ontario Human Rights Code.

4 Pretorius, Klinck & Ngwena (2017) para 6.5.2. See also http://www.ohrc.on.ca/en/ontario-human-rights-code (accessed 28 October 2018).

5 This was illustrated in the matter of *Dagane v SSSBC* (JR2219/14) (2018) 39 ILJ 1592 (LC), which is discussed in 2.5.7 below.

6 *SACCAWU obo Mabunza v Standard Bank* [1998] 9 BALR 1185 (CCMA) 1189.

2.2 MEANING OF RACISM

Discrimination, more specifically racial discrimination or racism, is defined in article 1 of the International Convention on the Elimination of 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."[7]

In the South African context, a similar meaning can be ascribed to racism. Section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act ("PEPUDA")[8] defines "discrimination" as:

> "Any act or omission, including a policy, law, rule practice, condition or situation which directly or indirectly –
> (1) imposes burdens; obligations or burdens on; or
> (2) withholds benefits, opportunities; or advantages from any person on one or more of the prohibited grounds."

In turn, "prohibited grounds" is defined as:

> (a) "race; gender; sex; pregnancy; marital status; ethnic or social origin; colour; sexual orientation; age; disability; religion; conscience; belief; culture; language and birth; or
> (b) any other ground where discrimination based on that other ground –
> (i) causes or perpetuates systemic disadvantage;
> (ii) undermines human dignity; or
> (iii) adversely affects the human enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)."[9]

The short title of PEPUDA, read with item 23(1)[10] of schedule 6 of the Constitution, stipulates that PEPUDA was enacted to give effect to section 9 of the Constitution. Accordingly, PEPUDA was enacted to prevent, eliminate and prohibit unfair discrimination, hate speech[11] and harassment in addition to promoting equality.

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7 South Africa ratified this convention on 10 December 1998. See http://bit.ly/2ISNm1O (accessed 13 October 2018) in this regard.

8 4 of 2000.

9 Section 1 of PEPUDA.

10 Item 23(1) provides that national legislation must be enacted within 3 years of the final Constitution coming into operation to give effect to section 9 (for the purposes of this dissertation); section 32 and section 33. Thus, PEPUDA and the Employment Equity Act 55 of 1998 ("EEA") were enacted to give effect to section 9 of the Constitution.

11 Section 10(1) of PEPUDA prohibits hate speech and states the following:
> "[S]ubject to the provisio in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to-
> (a) Be hurtful;

Section 12 of PEPUPA states the the following relating to "unfair discrimination" in general:

"No person may-

(a) disseminate or broadcast any information;

(b) publish or display any advertisement or notice that could reasonably be construed or reasonably be understood to demonstrate a clear intention to unfairly discriminate against any person. Provided that *bona fide* engagement in artistic creativity, academic and scientific inquiry, fair and accurate reporting in the public interest or publication of any information, advertisement or notice in accordance with section 16 of the Constitution[12] is not precluded by this section."

More specifically, section 7(a) of PEPUDA highlights that the disseminating of any idea or propaganda that advocates racial inferiority or superiority is prohibited.

When dealing with unfair discrimination in general it is important to ascertain whether unfair discrimination and hate speech are one legal concept or not. Botha and Govindjee[13] state that unfair discrimination and hate speech must be treated as two different legal concepts as they are dealt with in different sections in the Constitution.[14]

Support for this statement can be found in the fact that section 6 of the Employment Equity Act ("EEA")[15] and section 10 of PEPUDA differ substantially from each other. Firstly, the elements of the two legal concepts are not the same. Whilst unfair discrimination does not require intention, as it focuses rather on the discriminatory conduct, hate speech requires the words used to reflect a clear intention to be hurtful, harmful or incite hatred. Furthermore, PEPUDA clearly distinguishes between hate speech and discrimination as section 15 of the PEPUDA specifically excludes section 14[16] that is concerned with hate speech and harassment. Thirdly, the compensation payable when there was unfair discrimination based on race cannot be compared to the compensation that is payable in relation to speech which propagates hatred on a prohibited ground. Unfair discrimination and hate speech also have their own specific aims and requirements and considering these two legal

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(b) Be harmful or incite harm;

(c) Promote or propagate hared."

12 Section 16 of the Constitution provides for the right to freedom of expression.

13 Botha & Govindjee "*Hate speech provisions and provisos: A Response to Marais and Pretorius and proposals for reform"* (2017) (20) PER/ PELJ 6.

14 Section 9, equality, deals with unfair discrimination and section 16, freedom of expression, with hate speech. The two legal terms are also dealt with in different pieces of legislation, the EEA and PEPUDA, respectively.

15 55 of 1998.

16 This section applies to cases where a fairness determination needs to be made. See also Botha & Govindjee (2017) PER/ PELJ 7.

concepts to be one and the same could prevent some of these aims being achieved. However, it is possible that hate speech and unfair discrimination can emanate from the same conduct.[17]

Considering the two legal concepts from an international perspective, both the International Convention on the Elimination of All Forms of Racial Discrimination addressing racial discrimination and the International Covenant on Civil and Political Rights addressing hate speech[18] treat racism and hate speech as separate legal concepts. Thus, hate speech and unfair discrimination must be approached as two separate legal concepts that can be inter-related. Consequently, the facts of each specific matter would dictate whether the right to equality, dignity or freedom of expression, or all of them, have been infringed on. In turn, the specific right that has been infringed on would dictate whether it is hate speech or unfair discrimination based on race.

With regards to hate speech, The Prevention and Combating of Hate Crimes and Hate Speech Bill was recently published in the Government Gazette and tabled in the National Assembly of the Republic of South Africa.[19] The short title of the bill provides as follows:

> "[T]o give effect to the Republic's obligations in terms of the Constitution and international human rights instruments[20] concerning racism, racial discrimination, xenophobia and related intolerance, in accordance with international law obligations; to provide for the offence of hate crime and the offence of hate speech and the prosecution of persons who commit those offences; to provide for appropriate sentences that may be imposed on persons who commit hate crime and hate speech offences; to provide for the prevention of hate crimes and hate speech; to provide for the reporting on the implementation, application and administration of this Act; to effect consequential amendments to certain Acts of Parliament; and to provide for matters connected therewith."

The main purpose of this bill is to criminalise any form of discrimination based on racism, racial discrimination and xenophobia. It is my opinion that the introduction of this bill will not resolve the racial discrimination problems or harassment issues South Africa has. This is because South Africa already has legislation that

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17 Botha & Govindjee (2017) PER/ PELJ 8.

18 Adopted by the United Nations on 21 December 1965 and 16 December 1966 respectively. See https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx (accessed 15 November 2018) & https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx (accessed 15 November 2018). See also Botha & Govindjee (2017) PER/ PELJ 9.

19 Published in the Government Gazette 41543.

20 United Nation's International Convention on the Elimination of All Forms of Racial Discrimination.

criminalises these kinds of acts and a dedicated court dealing with these aspects, the equality court.[21] The problem is enforcing legislation in a correct, precise manner and not selectively. This bill could potentially unreasonably and unjustifiably limit the right to freedom of expression.

Turning to unfair discrimination and more specifically the right to equality, in the matter of *Harksen v Lane NO & Others* (*"Harksen"*)[22] the court established a three-stage enquiry to conclude whether unfair discrimination is present.[23] Initially, it must be determined whether there is a differentiation between people. If answered in the affirmative, it must be established whether the differentiation has a legitimate government purpose. If a legitimate government purpose is lacking, the right to equality is violated[24] and it must then be ascertained whether the differentiation is reasonable and justifiable in terms of section 36 of the Constitution.

If there is a legitimate government purpose present, then the inquiry must proceed to the second stage.[25] A general example of what would constitute acceptable differentiation is differentiating between persons younger than 15 and persons older than 15 in terms of section 43 of the Basic Conditions of Employment Act ("BCEA").[26] Conversely, known defences for differentiating in the work place are provided for in section 6(2) of the EEA, namely affirmative action and inherent job requirements.

The second stage necessitates two questions. Does the differentiation constitute discrimination? If it constitutes discrimination, is the discrimination unfair? In relation to the first question, if the differentiation is based on a specified ground,[27] for

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[21] Ms Vicki Momberg was sentenced to 3 years imprisonment, which was suspended for 1 year after she was found guilty in the equality court after using the K-word towards police officers. See https://www.news24.com/SouthAfrica/News/vicki-momberg-sentenced-to-an-effective-2-years-in-prison-for-racist-rant-20180328 (accessed 16 November 2018). For another matter also see https://www.timeslive.co.za/news/south-africa/2018-09-20-back-to-jail-for-alleged-k-word-racist-kessie-nair-for-now/ (accessed 16 November 2018).

[22] 1998 (1) SA 300 (CC). See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit *Principles and Practice of Labour Law* 34th edition (2018) Lexis Nexis para 135.

[23] *Harksen v Lane NO & Others* para 54. See also *Shoprite Checkers (Pty) Ltd v Samka & Others* (2018) 39 ILJ 2347 (LC) for a more recent example of the application of the test.

[24] *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 25. The rationality requirement must be met meaning there must be a rational relationship or connection between differentiation and its purpose. See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 135.

[25] *Harksen v Lane NO & Others* para 53(a).

[26] 77 of 1997. Van Niekerk and Smit (eds) *Law@work* 4th Edition (2018) LexisNexis 119.

[27] See section 9(3) of the Constitution in this regard.

instance race, then discrimination is established. If the differentiation is not on a specified ground, then it must be considered if the differentiation, objectively considered, is based on attributes and characteristics which have the potential to impair the fundamental human dignity of a person or persons as a human being or human beings or to have an adverse affect in a comparably serious manner.[28]

Once it has been established that there is in fact discrimination present, it must be considered if it constitutes unfair discrimination. In the event of the discrimination being on (a) ground(s) listed in section 9(3) of the Constitution, a presumption of unfairness applies.[29] For discrimination based on other grounds, unfairness must be proven by showing the impact of the discrimination on the complainant and persons who are similarly situated.[30] If the discrimination is found to be unfair, then it must be considered if the unfair discrimination can be justified under section 36 of the Constitution, known as the limitation clause.

Discrimination can either be direct or indirect. A form of direct discrimination will be when an individual is discriminated on based on a listed ground as it will fall nothing short of intentional discrimination.[31] In contrast, indirect discrimination is when it seems that an individual is treated differently because of certain "objective" or "unintentional" requirements but indirectly it still constitutes discrimination.[32] It follows that intention or acting in bad faith is not required for discrimination to be present.[33] Intention and motive is only considered when an applicable remedy is looked at.[34]

Although the South African history pertaining to racism is unique, the fact that there is no statutory set test to determine (racial) discrimination is not unique to South Africa. In the United States of America ("USA"), where any form of employment discrimination based on colour, race, religion, sex and national origin is prohibited[35] and the Equal Employment Opportunity Commission ("EEOC")[36] was established,

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28 *Harksen v Lane NO & Others* para 53(b).
29 In terms of section 9(5) of the Constitution.
30 *Harksen v Lane NO & Others* para 53(b).
31 Grogan *Workplace Law* 12th Edition (2017) Juta 86.
32 Grogan (2017) 86. See also *Swan v Canadian Armed Forces* TD 15/94.
33 *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para 3.
34 Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 119.
35 Civil Rights Act of 1964, Title VII ("CRA").
36 https://www.eeoc.gov/laws/statutes/titlevii.cfm (accessed 16 November 2018).

each matter is also decided on the merits of the case. The test for racial discrimination in the workplace in the USA, which emanated from *Harris v Forklift Systems, Inc. ("Harris"),*[37] is applied. This test requires there to be a hostile environment created by an incident that is sufficiently severe or persuasive enough to change the conditions of the complainant's employment and create an abusive work environment. This is an objective standard as a hostile abusive environment, which a reasonable person will find abusive and hostile and the subjective perception of the complainant that the environment is abusive.[38]

The discussion that follows considers the development in dealing with racism. For this discussion, a distinction is made between the position before the Constitution and after the Constitution.

2.3 POSITION BEFORE 1994

In South Africa problems of racial discrimination have been present from as early as 1652 when the Dutch Settlers set foot to the shores of South Africa mainly because of the different races that met at the same time.[39] Apart from the master servant position, which included the majority of slavery,[40] it was evident the relations based on collective bargaining was created along racial lines.[41] As the labour legislation, such as the Black Labour Regulations Act[42] and the Mines and Works Act,[43] provided rights either that protected black people or white people respectively it created a continuous racial undertone in the workplace.[44] The labour legislation did not provide for any justified differentiation such as affirmative action or inherent job requirements. Therefore, employers and/or employees could not justifiably discriminate against each other.

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37 510 US 17 21 (1993). See also *Meritor Savings Bank, FSB v. Vinson* 477 U.S 57.

38 See *Meritor Savings Bank, FSB v. Vinson* 477 U.S 57. See also https://supreme.justia.com/cases/federal/us/510/17/ (accessed 16 November 2018).

39 Nel, Kirsten, Swanepoel, Erasmus & Jordaan *South African Employment Relations: Theory and Practice* 8th edition (2016) Van Schaik 127.

40 See the Masters and Servants Act 15 of 1856.

41 Nel, Kirsten, Swanepoel, Erasmus & Jordaan (2016) 127. This was most prevalent for the period of 1652 – 1870. See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 10.

42 15 of 1911.

43 12 of 1911.

44 Nel, Kirsten, Swanepoel, Erasmus & Jordaan (2016) 127. This was most prevalent for the period of 1871 – 1924. See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 11.

The Industrial Conciliation Act[45] was in operation during the period of 1925-1956. Although the Industrial Conciliation Act was aimed at providing protection when settling disputes and creating trade unions and employers' organisations, it allowed for further racial divide as all "Bantu's" were excluded from the workings of the Act and no further unions of mixed colour could be registered.[46] In 1977, the Black Labour Relations Amendment Act[47] was enacted to give black employees more rights, such as the right to take part in trade union activities. The Commission of Inquiry into Labour Legislation chaired by Professor Nicholas ("The Wiehahn Commission") was also created[48] and it submitted a report with the most prominent suggestion being that existing labour policies and machinery in the South African Labour Law be amended to be more inclusive for all employees.[49] During the period of 1980 to 1993 the Industrial Conciliation Act and the Black Labour Relations Regulations Act were repealed and replaced by the Labour Relations Act ("LRA").[50]

It is thus clear that from 1652, there was racial segregation in South Africa, especially in workplaces. The Wiehahn commission laid the ground work for the new labour policies after 1994.

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45 11 of 1924.

46 Bendix *Industrial Relations in South Africa* 5th edition (2010) Juta 69. See also Jordaan & Ukpere *"South African Industrial Conciliation Act of 1924 and current affirmative action: An analysis of labour economic history"* (2011) Vol 5(4) African Journal of Business Management 1094; Nel, Kirsten, Swanepoel, Erasmus & Jordaan (2016) 133 in this regard.

47 84 of 1977.

48 The mandate of the commission was to "investigate and make recommendations in connection with the existing labour legislation with reference to: (a) the adjustment of the existing system of labour relations in order to provide more effectively for changing needs; (b) the adjustment of existing procedures for the prevention and settlement of disputes; and so forth." See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 11.

49 The report made a substantial amount of recommendations in 2 phases. In phase one, during 1979, the following recommendations were made: "(a) trade union rights should be granted to black workers; (b) more stringent requirements were needed for trade union registration; (c) job reservation should be abolished; (d) a new industrial court should be established; (e) a national manpower commission should be appointed. In phase two, 1980 & 1981, the following recommendations were made: (a) labour laws and practices should correspond with international conventions and codes; (b) statutory requirements and procedures for registration of trade unions should be revised; (c) urgent attention should be given to specific defects of the industrial court; (d) bargaining rights of workers' councils should be laid down by statute; (e) the position of closed shop agreements should be clarified; (f) basic labour rights should be extended to the public sector; (g) specific legislation should be adopted regarding unfair labour practices; (h) the Wage Act should be retained but amended; and (i) conditions of employment and working circumstances of female employees should be revised in various aspects." Nel, Kirsten, Swanepoel, Erasmus & Jordaan (2016) 133. Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 11.

50 28 of 1956.

2.4 POSITION AFTER 1994

2.4.1 International Labour Organisation

South Africa was one of the founding members of the International Labour Organisation ("ILO") in 1919. However, South Africa left the ILO in 1964 due to passed resolutions and political pressure as a result of apartheid in South Africa.[51] South Africa was re-admitted to the ILO, a specialised agency of the United Nations that focusses on the equal and fair employment standards,[52] on 26 May 1994.[53] On 5 March 1997 South Africa ratified the ILO's Discrimination (Employment and Occupation) Convention C111 and it is still in force.[54] This convention confirms that any form of discrimination is a violation of human rights as entrenched in the Universal Declaration of Human Rights.[55] In addition, Article 1 of the Universal Declaration of Human Rights confirms that all people are equal in rights and dignity.

2.4.2 The Constitution

2.4.2.1 General

From this discussion it will become apparent that not only the international arena demanded non-discriminatory practices, but also the Constitution. With the implementation of the Interim Constitution in 1994, South Africa became a constitutional state where the Constitution is the supreme law.[56] The Interim Constitution, as suggested by its title, was only operational until the (final) Constitution was enacted on 4 February 1997.[57] Similarly, section 2 of the Constitution stipulates that in South Africa the Constitution is the supreme law. As

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51 Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 40.

52 https://www.ilo.org/global/about-the-ilo/lang--en/index.htm (accessed 20 October 2018). See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 40.

53 https://www.ilo.org (accessed on 22 September 2018). See also Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 24.

54 https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312256 (accessed 20 October 2018). See also Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 123. In terms of section 231(4) of the Constitution any conventions ratified by South Africa is not automatically incorporated in legislation and will it only be included "when it is enacted into law". The ILO plays an important role in the regulations of international labour relations.

55 https://www.ilo.org (accessed on 22 September 2018). See also "*Racial Discrimination in the World of Work."* International Labour Organisation (20 April 2009); See also https://www.un.org/en/universal-declaration-human-rights/index.html (accessed on 22 September 2018).

56 Section 4(1) of the Interim Constitution 200 of 1993. See Currie & De Waal *The Bill of Rights handbook* 6th edition (2013) Juta & Co Ltd 8 for further reading regarding constitutional supremacy.

57 Schedule 7 of the Constitution provides that the Constitution repealed the Interim Constitution.

such law or conduct must be in line with the values and rights espoused in the Constitution.

Section 1 of the Constitution stipulates that the founding values[58] of the Constitution are:

> "(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms
> (b) Non-racialism and non-sexism
> (c) Supremacy of the constitution and the rule of law
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

Although all of these values are essential in a constitutional dispensation, for the purpose of this dissertation the first two values are of significance. These values are given effect to in Chapter 2 of the Constitution, the Bill of Rights. Firstly, the Bill of Rights highlights the importance of equality and human dignity in section 7(1) of the Constitution as it affirms these values as the cornerstone of the Bill of Rights. Secondly, section 39 (1) of the Constitution provides that when the Bill of Rights is interpreted, it must be interpreted to "promote the values that underlie an open and democratic society based on human dignity, equality and freedom". Thirdly, section 9 and section 10 of the Constitution establishes everyone has the right to equality and human dignity.

The right to equality, in terms of section 9 of the Constitution, entails that:

> "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
> (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
> (3) State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
> (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
> (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."[59]

[58] Pretorius, Klinck & Ngwena (2017) para 2.
[59] Section 9 of the Constitution.

There are two broad approaches or dimensions to equality, namely formal and substantive equality. Formal equality[60] is where everyone is seen as equals, like be treated alike, without considering statuses of groups or a person and the past and present social conditions of groups. Thus, everyone is treated in the same manner without bearing in mind any possible differences. This results in the notion of procedural justice rather than any substantive outcome. The starting point in the approach is that everyone is neutral wherein any form of preference or prejudice is ignored. The problem with this approach to equality is that possible past social disadvantages are not redressed.[61]

In contrast, substantive equality considers the past statuses of a group and/or person in relation to their social and economic conditions. The meaning of equality in the Constitution resonates with substantive equality as opposed to formal equality. In this regard in *President of the Republic of South Africa v Hugo ("Hugo")*[62] the court remarked the following

> "[w]e need to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth…we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved."[63]

The other right in the Bill of Rights that highlights the importance of equality and human dignity is section 10 of the Constitution. This section provides that "[e]veryone has inherent dignity and the right to have their dignity respected and protected."

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60 Consistency equality or equality of opportunity.

61 See *R v Turpin* [1989] 1 SCR 1296 where the court used a contextual approach.

62 1997 (4) SA 1 (CC). See also *Brink v Kitshoff NO* 1996 (SA) 197 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Others 2004* (7) BCLR 687 (CC), *City Council of Pretoria v Walker* 1998 3 BCLR 257 (CC) and *Minister of Finance & another v Van Heerden* [2004] 12 BLLR 1181 (CC). See also *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) paras 61-62 where the court stated that "[i]t is insufficient for the Constitution to merely ensure, through the Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time even indefinitely. Like justice, equality delayed is equality denied." See also Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 52; Pretorius, Klinck & Ngwena (2017) para 2.6.

63 *Hugo* 710.

As substantive equality is sought in South Africa, human dignity has become integral in ensuring equality. This is highlighted in *Hugo*[64] where the court stated that "[a]t the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new 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".

Consequently, when dealing with (substantive) equality, the extent to which a person or group of persons' human dignity was impaired must be considered.[65] Discrimination always harms an individual or group's dignity because of the different treatment that is based on characteristics or perceived characteristics.[66]

In *Prinsloo v Van der Linde & Another ("Prinsloo")*[67] the court emphasised the relationship between equality and human dignity as follows:

> "Given the history of this country we are of the view that 'discrimination' has acquired a particular pejorative meaning relating to the *unequal* treatment of people based on attributes and characteristics attaching to them. We are emerging from a period of our history during which the humanity of the majority of the inhabitants of this country was denied. They were treated as not having inherent worth; as objects whose identities could be arbitrarily defined by those in power rather than as persons of infinite worth. In short, they were denied recognition of their inherent dignity."[68]

As racism is a form of discrimination, it is submitted that to ensure that the founding value of non-racialism is adhered to, the rights to equality and human dignity must be respected.

2.4.2.2 The Employment Equity Act

Measures, as alluded to in section 9(2) of the Constitution, have been designed to promote the right to equality. For purposes of this dissertation the focus will be on

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64 1997 (4) SA 1 (CC).
65 Pretorius, Klinck & Ngwena (2017) para 2.
66 Pretorius, Klinck & Ngwena (2017) para 2.6. See also *Independent Municipal & Allied Workers Union & another v City of Cape Town* (2005) 26 ILJ 1404 (LC). See also *Dlamini & others v Green Four Security [*2006] 11 BLLR 1074 (LC).
67 1997 (3) SA 1012 (CC).
68 *Prinsloo* para 31. Own emphasis added.

EEA[69] as it deals specifically with equality in relation to employment.[70] Botha and Govindjee remark that in addition to giving effect to the constitutional guarantee of equality, the EEA ensures that South Africa is transformed in society in the form of a "remedial human rights statute."[71]

The EEA has two distinct purposes – to eradicate unfair discrimination and to implement affirmative action measures in the workplace to achieve equity in the workplace.[72] Section 6(1) of the EEA gives effect to the first purpose,[73] which is important for purposes of this dissertation, by stipulating that

> "[n]o person may unfairly discriminate, either directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race,[74] gender,[75] sex,[76] pregnancy,[77] marital status,[78] family responsibility,[79] ethnic or social origin,[80] colour, sexual orientation,[81] age,[82] disability,[83] religion,[84] HIV status,[85] conscience,[86] belief,[87] political opinion,[88] culture,[89] language,[90] birth[91] or any other arbitrary ground."

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69 See also the preamble of the EEA; Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 123 in this regard.

70 Although PEPUDA was also enacted to give effect to the right to equality, as contained in section 9 of the Constitution, it deals more generally with discrimination in public and not specifically with discrimination in the workplace.

71 Botha & Govindjee (2017) PER/ PELJ 4.

72 Section 2 of the EEA.

73 Pretorius, Klinck & Ngwena (2017) para 6.

74 This ground is the ground which will be discussed in text for the purposes of this dissertation.

75 See *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (JS296/09) [2010] ZALC – The employer wanted the employee to hide that she was a transsexual.

76 See *Atkins v Datacentrix (Pty) Ltd* (2010) 31 ILJ 1130 (LC) – The employer was happy with the male applicant and offered employment. Once the male informed the employer that he was going to have his sex changed the employer refused to employ the employee.

77 See *Woolworths (Pty) Ltd v Whitehead* (CA06/99) [2000] ZALAC 4 – Alleged discrimination against applicant while being pregnant. See also *Wardlaw v Supreme Mouldings (Pty) Ltd* (2007) 28 *ILJ* 1042 (LAC).

78 See *Western Cape Education Department & another v George* (1996) 17 ILJ 547 (LAC) – The employee did not qualify for the benefits in terms of the house owner allowance scheme on the ground that she was a married woman and that her husband is not medically unfit to obtain paid employment.

79 See *Co-operative Workers Association v Petroleum Oil & Gas Co-operative of SA* [2007] 1 BLLR 55 (LC) – The discrimination was about employees with family responsibilities who received more remuneration and/or benefits than those employees who did not have any family responsibilities.

80 See *Chizunza v MTN (Pty) Ltd and Others* (2008) 29 ILJ 2919 (LC) – Cannot be discriminated against based on your nationality or ethnic origin. In this case the allegation was that the employer discriminated against the employee based on the fact that he was an Zimbabwean national.

81 See *Allpass v Mooiplaas Equestrain Centre* (2011) 32 ILJ 1637 (LC) – Dismissal of a gay man with HIV. See also *Strydom v Nederduitse Gereformeerde Gemeente Moreleta Park* (26926/05) [2008] ZAGPHC 269 – This was a discrimination matter in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000 (hereafter referred to as "PEPUDA"). In last mentioned matter the complainant, Mr. Strydom, alleged that the Respondent, the Nederduitse Gereformeerde Gemeente Moreleta Park, unfairly discriminated against him based on his homosexual orientation.

82 See *SA Airways (Pty) Ltd v Jansen van Vuuren* (2014) 35 ILJ 2744 (LAC) – Older airline pilots received less remuneration than their younger counterparts.

83 See *Smith v The Kit Kat Group (Pty) Ltd* [2016] 12 BLLR 1239 (LC) – Employee with a disfigurement was told by his employer to stay away from work because he was "cosmetically unacceptable".

84 See *Mbhele and Fidelity Security Services Ltd* (2016) 37 ILJ 1935 (CCMA) – Consideration was given on the basis that if the employer policy for clean shaven employee was a justifiable limitation on its employees' religious beliefs.

The catch-all phrase - any other arbitrary ground - was only included in the EEA as of 1 August 2014.[92] This phrase was a controversial topic as it was uncertain what "any other arbitrary ground" exactly meant. Nonetheless, the courts have since its inclusion dealt with a few cases based on "any other arbitrary ground". Some of these arbitrary grounds were found to be disqualifying fixed term employees for employment of senior positions,[93] expressing views on extra marital affairs,[94] citizenship,[95] tertiary teaching and research experience,[96] and mental health.[97] In my opinion mental health will play a more prominent role in the future. The reason for this is that more and more employees are experiencing mental health problems and

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85 See *Hoffmann v SA Airways* (2000) 21 ILJ 2357 (CC) – Confirming that employee who is fit but with the status of HIV/Aids cannot be discriminated against.

86 See *Jansen v Minister of correctional Services of the Republic of South Africa* (2010) 31 ILJ 650 (LC) – The employee alleged that he was discriminated against by his employer, based on conscience, because of the views expressed by the employee. See also Singlee "*Conscience Discrimination in the South African Workplace"* (2014) ILJ 1581.

87 See *Naude v MEC, Department of Health, Mpumalanga* (2009) 30 ILJ 910 (LC) – An employee cannot be discriminated against based on his convictions or beliefs which he/she has. The employee supported an eviction process against the employer based on the employees' beliefs.

88 See *Walters v Transitional Local Council of Port Elizabeth* (2000) 21 ILJ 2723 (LC) – Cannot be discriminated against based on your political association with a certain political party.

89 See *Department of Correctional Devices & another v Police & Prisons Civil rights union & others* [2011] 32 ILJ 2629 (LAC) – Allegation of unfair discrimination by employees based on the fact that they were requested to cut their dreadlocks by the employer. The employees contented that cutting the dreadlocks will infringe on their religion and/or culture which they practice.

90 See *Stokwe v MEC Department of Education Eastern Cape Province & another* (2005) 26 ILJ 927 (LC*)* – assumption of proficiency in a certain language deemed unfair discrimination.

91 See *Mangena & others v Fila South Africa (Pty) Ltd & others* [2009] 12 BLLR 1224 (LC) – This matter dealt with the possibility of the employee who was paid less as a result of the employee's birth and/or family relations in comparison to NEWU membership.

92 See Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 136. See also Grogan (2017) 89.

93 See *McPherson v University of KwaZulu-Natal & another* (2008) 29 ILJ 674 (LC) – Complainant was not appointed as head of the School of Physics because of his employment status. The court found that there was unfairly discriminated against him.

94 See *Zabala v Gold Reef City Casino* [2009] 1 BLLR 94 (LC) – The complainant alleged that she was unfairly discriminated against as she disapproved of extra-marital affairs. The court acknowledged this ground as a listed (belief) and unlisted (arbitrary) ground.

95 See *Larbi-Odam v Members of the Executive Committee for Education (North-West Province) & another* 1998 (1) SA 745 (CC) – Complainant was unfairly discriminated against because he was not a South African citizen and therefore was not considered for permanent employment by the department.

96 See *Stojce v University of KZN (NATAL) & another* [2007] 3 BLLR 246 (LC) – the complainant alleged that he was discriminated against, by not being appointed in the engineering faculty, due his race (being white); on his language (English not being his primary language); and then on tertiary education and research experience. The complainant's matter was dismissed with costs.

97 See *Marsland v New Way Motor & Diesel Engineering (Pty) Ltd* [2009] 30 ILJ 169 (LC) – The court found that mental illness is an arbitrary ground and that the employer did discriminate based on mental illness. In *EWN v Pharmaco Distribution (Pty) Ltd* (2016) 37 ILJ 449 (LC) – The complainant suffered from bi-polar disorder but maintained that it was under control. The employer demanded that the complainant undergo psychiatric testing, which the complainant refused. The complainant was subsequently dismissed. The court found that the employer unfairly discriminated against the complainant.

are disclosing their mental health problems to their employers as opposed to the past where they did not want to say anything as it was seen not to be a real illness.[98]

It must be noted that the *Harksen* test is also applied in cases based on other arbitrary grounds. The complainant who alleges unfair discrimination on an unlisted ground must show that his or her dignity was infringed on because of the conduct of the party who discriminated against him or her.[99]

As section 6(1) of the EEA provides that "no person" may unfairly discriminate against an employee, no discrimination based on race may occur between the employer and employee(s) or amongst employees.[100] The EEA must be interpreted in such a way that it complies with the Constitution and the international obligations of South Africa.[101]

It is not only the EEA that deals with unfair discrimination in the workplace. The LRA makes provision for an automatic unfair dismissal when an employee is discriminated against on a listed and/or arbitrary ground,[102] similar to that of section 6(1) of the EEA. However, if a matter is referred to be adjudicated in terms of the LRA for an unfair dismissal in terms of section 187(1)(f), the compensation is limited to 24 months. In contrast, if a matter is adjudicated in terms of the EEA the remedy could be compensation and/or damages and the amount is not limited.[103]

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98 See *Ockert Jansen v Legal Aid South Africa* (2018) 39 ILJ 2024 (LC) – judgment: 16 May 2018. Complainant was dismissed as a result of his mental illness. Complainant was open about his mental illness with the employer during his employment. The court found that the complainant was unfairly discriminated against.

99 See *Mothoa v SA Police Service & others* (2007) 28 ILJ 2019 (LC). See also Grogan (2017) 89.

100 For a discussion on the employer's responsibility and liability refer to Chapter 3 of this dissertation.

101 In particular, the ILO convention 111 as discussed above. See also *SA Airways (Pty) Ltd v Jansen van Vuuren* (2014) 35 ILJ 2744 (LAC) para 29 which stated that "The provisions of the EEA, including, in particular, section 6, are clearly based on the basic tenets of the equality provision in the Bill of Rights of the Constitution as well as, *inter alia,* the International Labour Organisation's [ILO] No 111 of 1958 concerning discrimination in respect of employment and occupation, which the Republic of South Africa ratified in 1997. Accordingly, in the case of a claim based on section 6 of the EEA, material guidance is to be derived from the equality analyses that were conducted under the Constitution and the Interim Constitution. Similarities between, for example section 8(2) of the Interim Constitution and section 6(2) of the EEA, as well between section 9 of the Constitution and section 6 of the EEA, are obvious." See also Pretorius, Klinck & Ngwena (2017) para 6.

102 Section 187(1) determines that –

> "(1) A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 or, if the reason for dismissal is – …
>
> (f) that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility."

See Van Niekerk and Smit (eds) (2018) 284; Grogan (2017) 193.

103 See section 194(3) of the LRA. See also Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 288.

When an employee alleges dismissal based on section 187(1)(f) of the LRA then they must be able to prove that there is a link between the dismissal and the ground which the employee was dismissed on. There are two specific defences which can be used in the LRA when the matter is referred for an unfair dismissal based on discrimination – inherent job requirements[104] and when the employee has reached the age of retirement or agreed age of retirement.[105] Consequently, the LRA does not make provision for the defence of affirmative action like the EEA.

2.5 CASE LAW - RACISM IN THE WORKPLACE

There have been numerous recent reported cases on incidents of racism in the workplace. Nonetheless, racism in the workplace is not always a clear-cut case, especially pertaining to the appropriate sanctions thereof. A constant theme that will emerge from the cases that are discussed below is when it will be reasonable to dismiss an employee for a racism incident and what factors would be relevant in reaching such a decision.

2.5.1 *Duncanmec (Pty) Ltd v Gaylard NO*

On the 13th September 2018 the Constitutional Court gave a judgment in the matter of *Duncanmec (Pty) Ltd v Gayland N.O ("Duncanmec")*[106] wherein the court had to decide whether employees who sang a racially offensive struggle song during a peaceful strike should be dismissed.

In this matter, the employees sang struggle songs during an unprotected strike. They were singing "climb on top of the roof and tell them that my mother is rejoicing when we hit the boer". After the strike the employees were charged with misconduct because they sang racially offensive songs while on duty and participating in an unlawful strike.[107] Nine of the employees were found guilty during the disciplinary

[104] See *Department of Correctional Services and another v Police and Prisons Civil Rights Union & others* [2013] 7 BLLR 639 (SCA).
[105] Section 187(2) of the LRA. See *Rubin Sportswear v SACTWU & others* [2004] 10 BLLR 986 (LAC).
[106] (CCT 284/17) [2018] ZACC 29 – Date of Judgment: 13 September 2018.
[107] The employees received a final written warning for participating in an unlawful strike.

hearing and dismissed as the employer was of the opinion that the employment relationship has irretrievably broken down. The National Union of Mineworkers of South Africa ("NUMSA"), on behalf of the dismissed employees, referred the matter to the bargaining council.[108]

The commissioner at the bargaining council found that although the song was inappropriate, caused hurt and was offensive, it did not constitute racism. She further indicated that the history of the struggle song must be considered and that a distinction must be made between singing the song and actually referring to someone in a racial manner. The commissioner ruled that the dismissal was not a justifiable sanction, as in her opinion the employment relationship did not break down. Accordingly, she ruled that the dismissed employees must be reinstated with a maximum 3 months' compensation. However, as she disapproved of the song that was sung a final written warning was found to be appropriate.

The employer then referred the matter to the Labour Court[109] for review as the employer alleged that the commissioner came to a conclusion that no other reasonable decision-maker would have come to. In opposing the review, NUMSA, indicated that the singing of the song did not constitute hate speech or incite violence and it was done in a peaceful manner. NUMSA further contended that the singing was done in solidarity to show unity against the employer's authority. The court indicated that the employer did not prove that the employees contravened any rule in the workplace by singing the song. As such, the court found that the decision of the commissioner was not unreasonable since the conduct of the employees were not violent as employees often sing struggle songs during strikes in support of their demands. After the employer unsuccessfully petitioned to the Labour Appeal Court,[110] the matter was referred to the Constitutional Court.[111]

The Constitutional Court had to decide on the appropriate reasonable sanction in this case – dismissal or reinstatement with a final written warning. Hence, the court was

[108] Metal and Engineering Industries – MEIBC. See *Gaylard NO and Others v Duncanmec* (2014) MEIBC case number: MEGA40212/2014.
[109] *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2016) LC case number: JR1111/2014.
[110] *Duncanmec (Pty) Ltd v Gaylard NO and Others* (2016) LAC case number: JA95/17.
[111] *Duncanmec (Pty) Limited v Gaylard NO and others* [2018] JOL 40405 (CC).

not tasked with establishing whether the commissioner's award was reasonable but rather if the commissioner's approach was correct. The court noted that in general in cases where an employee is found guilty of racism in the workplace a pattern has been created in terms whereof a dismissal will automatically follow. Instead of automatically reaching the conclusion that dismissal is appropriate, the court first considered the commissioner's thought process, i.e. the employees had no disciplinary record and it was a short and non-violent strike. In light of this, the court found that the reasoning for the commissioner's finding was reasonable and rational. The court unanimously upheld the commissioner's finding.[112]

The court declared that the use of the word "boer" in itself was not racist but in this context, it was offensive. Also, racism in the workplace must be seen in a very serious light, but it does not mean that dismissal would always be the appropriate sanction. As such, each matter, especially the circumstances in which the racist conduct has occurred, must be carefully considered. According to Jafta J the appropriate approach would be to deal with racism firmly, whilst treating the perpetrator fairly.[113]

2.5.2 *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*

In the matter of *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* ("*Rustenburg Platinum mine"*)[114] the main issue before the Constitutional Court was if the use of the word "swartman" in the work place was racist and if so whether that would justify a dismissal[115] based on the breaking down of the employment relationship.[116]

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[112] The court applied the test as set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and other* 2008 (2) SA 24 (CC).

[113] *Duncanmec (Pty) Limited v Gaylard NO and others* [2018] JOL 40405 (CC) para 48.

[114] (CCT 127/17) [2018] ZACC 13 – Date of Judgment: 17 May 2018.

[115] Every employee has the right not to be unfairly dismissed or subjected to an unfair labour practice as stipulated in terms of section 185 of the LRA. It must then also be considered what is a fair / unfair dismissal. In terms of section 188 of the LRA a dismissal is "unfair if the employer fails to prove (1)(a) that the reason for dismissal is a fair reason – (i) related to the employee's conduct or capacity; or (ii) based on the employer's operational requirements; and (b) that the dismissal was effected in accordance with a fair procedure. See also Grogan (2017) 206 for a further discussion on substantive fairness. "(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act". The code of good practice which is applicable in this instance is in schedule 8 of the LRA and is it known as the Code of Good Practice: Dismissal. Fair procedure mainly refers to the process followed before the dismissal was done for example a disciplinary hearing was held. Fair reason considers the substantive reason for dismissal which in cases of racism will relate to the conduct of the party and being dismissed for

In this matter an employee, Mr. Bester, arrived at work and struggled to park his vehicle in his allocated parking bay as a big 4 x 4 vehicle parked adjacent to his bay. The parking bay where the vehicle was parked was marked for Mr. Solly Tlhomelang. Mr. Bester had raised this parking issue with the mine's chief safety officer, Mr. Sedumedi, on previous occasions but it was allegedly ignored.

On the relevant day in question, the employer avers Mr. Bester interrupted a safety meeting by pointing to Mr. Sedumedi and saying "verwyder daardie swartman se voertuig". The version of the employee was that Mr. Sedumedi said to him that "jy wil nie langs 'n swartman stop nie…dit is jou probleem". The employee allegedly then told Mr. Sedumedi that he must not turn this into a racial thing and that he will also take the matter further with management.

The employee was then charged with insubordination and making racial remarks for referring to a fellow employee as a "swartman". Mr. Bester was subsequently found guilty at a disciplinary hearing and dismissed. Thereafter, Mr. Bester referred the matter to the Commission for Conciliation, Mediation and Arbitration ("the CCMA").

During the CCMA hearing the CCMA noted that Mr. Bester and Mr. Tlhomelang, to whom was referred, did not know one another prior to the specific incident. The commissioner opined that it would have been highly probable that the applicant, Mr.

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misconduct as one of the justifiable grounds for dismissal in the workplace. If there is a disciplinary code or other work policies applicable at the relevant workplace then that will also be considered which will contribute to the decision of the fairness of dismissal. In the *Sidumo and Another v Rustenburg Platinum Mines Ltd and other* 2008 (2) SA 24 (CC) the court also set identified factors which can be considered if a dismissal is fair or not. The court indicated that these factors are not a closed list and must the weight to each factor be given depending on case to case. These factors were "(i) the importance of the rule breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee's challenge to the 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." Other factors which can also be considered is the disciplinary record of the employee at the employer and the history of the relationship between the employer and the employee. Another factor that is considered, as was seen in the *Rustenburg Platinum Mine*, is remorse. Remorse which is intended sincerely and where the employee does not continue to defend his racial conduct will also tip the scale in favour of possible further employment. The court must be satisfied that the misconduct was of such a nature that the employment relationship was considered to be intolerable. See also *De Beers Consolidated Mines Ltd v Commissioner for Conciliation, Mediation and Arbitration* (2000) 21 ILJ 1051 (LAC) where it was ruled that "dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise". See also *Edcon Ltd v Pillemer NO & others* (2009) 30 ILJ 2642 (SCA) where the court stated that a dismissal will be unfair if the employment relationship has not broken down.

[116] See also *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 97 (CC) discussed under 2.5.3.

Bester, might have used the term “swartman” to identify the person who parked next to him as he did not know the other person’s name at that time. Importantly, the commissioner stated that he cannot see how using a phrase that is referring to a physical attribute of a person to identify that specific person could be classified as a racial remark. To illustrate this point, the commissioner compared this to someone coming into the CCMA office not knowing the commissioner’s name and asking for him by stating “die witman” who for instance parked next to the entrance gate. The commissioner said that he will not take offence to this even if the person is talking in a loud voice in front of everyone present at the CCMA.

The CCMA found in favour of Mr. Bester and ordered reinstatement and back pay as the dismissal was procedurally and substantially unfair. In my opinion, with all respect to the commissioner, why was and is it necessary to describe a person, considering the history of this country, by a certain race?

The employer then referred the matter to the Labour Court.[117] The Labour Court found that by applying a subjective test, the use of the word “swartman” was racist and derogatory and that it was reasonable and justified that the employee was dismissed for his conduct. In making this finding, the court also took into consideration that there was, shortly before the incident, a notice sent to all employees, including Mr. Bester, that the employer will not tolerate abusive and derogatory behaviour. Furthermore, the court remarked that as Mr. Bester stormed into a meeting that was in progress, acted aggressive and belligerent, pointed his finger at Mr. Sedumedi and in a loud voice made the demand to remove the “swartman se voertuig”, those present in the meeting were offended by the conduct of Mr. Bester. The court concluded that Mr. Bester clearly did not intend to merely ascribe a physical attribute in order to identify a person and that Mr. Bester’s description was racist and derogatory.

Subsequently, the South African Equity Workers Association (“SAEWA”), on behalf of the employee, referred the matter to the Labour Appeal Court.[118] In this court it was found that the Labour Court made an error in applying a subjective test to

[117] *Rustenburg Platinum Mine v SAEWA obo Bester and Others* (JR130/14) [2016] ZALCJHB 75.
[118] *SAEWA obo Bester v Rustenburg Platinum Mine and another* (JA45/16) [2017] ZALAC 23.

determine if the use of the word "swartman" is racist and derogatory. Hence, the Labour Court order was set aside. Importantly, the court held that an objective test should be applied in relation to the context within which the words were used. When considering a case such as this one, a court must be satisfied that the words used was indeed racist and derogatory and that it was used to demean. This must be the only inference a court can draw. Regarding the specific facts under consideration, the court pointed out that

> "[w]hile it is clear on the evidence that Mr Bester had no reason to denigrate either Mr Sedumedi or Mr Tlhomelang, he did have a need to identify Mr Tlhomelang – a person whose name, rank and division were unknown to him – and he used race as a descriptor in doing so. He may have been unwise to opt for this descriptor but his lack of wisdom is not the point in issue."[119]

As such the dismissal was found to be procedurally and substantially unfair. Thereafter, the matter was referred to the Constitutional Court for consideration. The Constitutional Court held that the correct test[120] is whether a reasonable, objective and informed person on the facts would perceive the use of the word, alternatively hearing the word, "swartman" as racist and derogatory.

The Constitutional Court observed that the commissioner based his entire reasons for the CCMA finding on the defence that the term "swartman" was not used in a derogatory or racist manner, yet Mr. Bester never relied on or raised this defence. In fact, Mr. Bester denied that he used the term "swartman" and it was common cause between the employer and employee that that if words were used such as alleged within the workplace, it will justify dismissal.

The Constitutional Court held that the CCMA and Labour Appeal Court were incorrect as they did not regard all the circumstance of the case and their conclusion was unreasonable in the circumstances. Thus, the test was incorrectly applied as the correct facts include reflecting on the past - the legacy of apartheid[121] and racial segregation which have led to a racially charged present. Thus, phrases cannot be

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[119] *SAEWA obo Bester v Rustenburg Platinum Mine and another* (JA45/16) [2017] ZALAC 23 para 27.

[120] In the *Sindani v Van der Merwe* [2002] 1 All SA 311 (A) the court applied an "objective test, namely what the reasonable reader of ordinary intelligence would attribute to the words read in the context of the article as a whole. In applying this test, it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply". See also Botha "*Managing Racism in the Workplace"* (2018) THRHR 677.

[121] Not considering racial descriptors in post-apartheid South Africa.

presumably neutral in all circumstances. Whilst the test must be objective, the fact that the past was entrenched with racism cannot be ignored. Accordingly, an enquiry in the present of whether a statement is racist and derogatory, or not, cannot start from a presumption that the context is neutral. Consequently, the Labour Appeal Court's approach could only have been appropriate if the country's history with racism did not exist. As a result, the Labour Appeal Court decision was set aside.

With regards to the sanction, the Constitutional Court indicated that employees cannot act in a manner that will destroy a harmonious working environment with the employer and other colleagues.[122] Mr. Bester's conduct points towards disrespect for his black colleagues and not having moved on from the apartheid past to embrace the new democratic order that embodies the principles of equality, justice and non-racialism. In addition, the employee showed no remorse and made no attempt to apologise. As a consequence, the court found that the dismissal was an appropriate sanction.

This matter highlights the importance of considering all the circumstances. When considering all the circumstances in this specific matter it is clear that "swartman" is not a gentle and kind descriptor, but rather a descriptor with racist connotations.[123]

[122] See *Erasmus v BB Bread Ltd* (1987) 8 ILJ 737 (IC).

[123] The use of "swartman" is not the only term that has racist connotations. In the matter of *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 1112 (LAC) after using the word "bobbejaan" an employee was dismissed. Another racially charged in relation to black people was "houtkop", which in essence means that you are uneducated and stupid. Racially charged words that are still present today which have a strong resemblance by the era before 1994 is where coloured people were called "hotnot"; "mixed breed"; "kaffir boeties". In the cases of Indian people words were used like "koelie". In the cases of white people, they were called words like "whities"; "rooi-nek". Recently we also saw big backlash against the international clothing brand, H & M, where they advertised a hoodie worn by a black boy with the words printed on it "coolest monkey in the jungle". H & M received critisism from all over the world - https://www.fin24.com/Companies/Retail/hm-racist-ad-adds-to-companys-woes-20180114 (accessed 23 October 2018). See also Grogan (2017) 232 for a further discussion on racist language used. See also *Kendrick and Nelson Mandela Metropolitan University* (2018) 39 ILJ 2383 (CCMA) – The employee worked for the Nelson Mandela Metropolitan University. The employee sent an e-mail to the ward counsellor wherein the employee complained about a possible muslim prayer centre in the area and making disparaging remarks about muslim people in general. The e-mail was distributed to other recipients and then made its way to social media where the employer received a complaint from Mr. Davids, representing the Muslim community indicating that the contents of the e-mail infringed on the right of human dignity, constituted defamation, harassment, incitement to cause harm and advocated hate speech. The employee was charged with "grossly offensive behaviour and/or direct unfair discrimination and/or hate speech bringing the university name into disrepute". The employee immediately apologised in writing, before her disciplinary hearing, without any reservations, to the muslim community of which the apology was accepted – the employer however persisted and dismissed the employee, after the employee pleaded guilty. The employee referred the matter to the CCMA not disputing the merits but the sanction of dismissal being unfair. The employee's one witness testified that no real damage was done by the incident and that the muslim community had accepted the employee's apology and did not want her to be dismissed. The employee had a clean service career of 26 years and was not suspended before her hearing where she pleaded guilty to her conduct. Although the employer's disciplinary code was breached there was no evidence given that the rule breached had a zero-tolerance approach by the employer. It was evident that

Also, the Constitution requires that "that the values of non-racialism, human dignity and equality are upheld and in doing so it has a responsibility to deliberately work towards the eradication of racism."[124]

2.5.3 *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration*

Another matter dealing with racism in the workplace is the *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* ("*SARS*") matter.[125] In this matter the word "kaffir" was used in the workplace and the Constitutional Court had to clarifying whether such conduct justifies the termination of an employment relationship due to the relationship becoming intolerable and whatever the remedy of reinstatement is not an option.

In this matter an employee, Mr. Kruger, called his team leader, Mr. Mboweni, a "kaffir" and there was also a second similar incident involving Mr. Kruger. In light of the court's *dictum* in *Rustenburg Platinum Mine*, the history of words must be

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disciplinary code was a mere guideline and was there alternative suggested possible sanctions. The employer did not suffer any reputational damages or could it be seen that the employee's views reflected the employer's views or represented the employer in any way. No evidence was led that the employment relationship has irretrievable broken down and the fact that the employee continued to work until her hearing showed that there was still a trustworthy and healthy employment relationship. The commissioner found that the factors presented weighed heavily in favour of the employee and found that an appropriate sanction would be reinstatement without any backpay due to her misconduct.

[124] *Rustenburg Platinum Mine* para 37. See Botha (2018) THRHR 673.

[125] (2017) 38 ILJ 97 (CC). See also *Commission Staff Association on behalf of Roeber-Madubanya and Commission for Conciliation, Mediation & Arbitration* (2018) 39 ILJ 2357 (CCMA) where the employee was employed as a case management officer. The employee was accused and dismissed for using racially offensive language towards a co-worker. In this matter, the personal assistant of the convening senior commissioner sent an e-mail to the employee requesting that the employee retrieve certain files from her office. The employee then went to the office of the personal assistant and asked her "Are you too white to bring the files to them?" The employee did not deny that she made the statement but argued that the sanction of dismissal was unfair. During the arbitration at the CCMA the employer emphasized that they do not tolerate any form of racism in the workplace. The employer conceded that the employee had a long-standing employment record but that her disciplinary record was not clean as she received a verbal warning arising out of a complaint from a client. The employee indicated that she was offended by the instruction given to her by the personal assistant. The employee further indicated that the reason behind everything that she did not know about the new process in the workplace. The employee apologized to the personal assistant and did the personal assistant accept the apology. It was also common cause that the employee attended diversity training and anger management classes. The commissioner stated that it must be considered in which context the remark was used as the normal referral of "white" or "black" would not necessarily constitute racism. The commissioner found that the remark was used to demean and violate the dignity of the personal assistant and that our court made it clear that any form of racism must be rooted out in the workplace. The commissioner subsequently found that the sanction of dismissal was fair. The commissioner stated that the employee's reaction was unprovoked and that her long standing employment counted against her as she knew the work policies. The apology did not render the conduct as acceptable. The employee clearly had anger issues and was her previous disciplinary action taken into account.

considered when establishing whether it was racist. Therefore, it is necessary to first consider the history behind the word "kaffir" before discussing the matter of *SARS.*

In *Thembani v Swanepoel* ("*Thembani"*)[126] the court remarked that even though the term "kaffir" originated in Asia, in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. The word "kaffir" is meant to inflict the worst kind of verbal abuse on another person.[127]

Returning to the matter of *SARS,* during the disciplinary hearing, which was held in terms of a collective agreement, Mr. Kruger pleaded guilty to using the word "kaffir" and the chairperson accepted this plea. The chairperson's recommended that Mr. Kruger's receives a final written warning valid for 6 months, suspension without remuneration for 10 days and that he attends counselling. The commissioner from SARS did not agree with this recommendation and rather dismissed Mr. Kruger. Subsequently, Mr. Kruger referred the matter to the CCMA as he contended that the dismissal was unfair as it was neither procedurally nor substantially fair.

At the CCMA Mr. Kruger indicated that the commissioner of SARS did not have the authority to alter the recommendation of the chairperson. Whilst the commissioner presiding over the matter at the CCMA found that Mr. Kruger did commit the alleged conduct, the commissioner from SARS did not have the authority to alter the recommendations of the chairperson. Accordingly, the commissioner at the CCMA ruled that Mr. Kruger must be reinstated at his employer, SARS, as per the recommendations of the chairperson.[128]

SARS, dissatisfied with the CCMA ruling, referred the matter to the Labour Court.[129] At the Labour Court SARS argued that reinstatement of Mr. Kruger was inappropriate as the employment relationship has become intolerable. SARS

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[126] 2017 (3) SA 70 (ECM).
[127] *Thembani* paras 12-13.
[128] See section 193 of the LRA. When considering remedies in an unfair dismissal matter re-instatement or re-employment must first be considered. If it is not possible that the employee is to be re-instated or re-employed then compensation must be considered. Each matter and which remedy must be applied must be considered on its own merits.
[129] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and others* [2015] 5 BLLR 531 (LC).

contended that the conduct of Mr. Kruger was abusive, racist, derogatory and insubordinate. Mr. Kruger, on the other hand, argued that the ruling of the CCMA was reasonable because the commissioner of SARS did not have the authority to change the recommendation of the chairperson at the disciplinary hearing. The Labour Court found in favour of Mr. Kruger.[130]

Thereafter, SARS proceeded to the Labour Appeal Court where the parties submitted similar arguments as in the Labour Court and this led to the same result: an order in favour of Mr. Kruger. Still dissatisfied, SARS referred the matter to the Constitutional Court. At the Constitutional Court SARS argued that the commissioner of the CCMA acted improperly by ruling that Mr. Kruger must be reinstated and in view of that the ruling was reviewable as no reasonable commissioner at the CCMA could reach a similar conclusion. Although the dismissal was procedurally unfair, SARS still argued that Mr. Kruger cannot be reinstated as the employment relationship has become intolerable as a result of his conduct. In turn, Mr. Kruger argued that SARS should be unsuccessful since there was no evidence presented that the employment relationship has become intolerable or irretrievable broken down.

The court expressed its concern with the use of the word “kaffir” as it is a very egregious, derogatory and humiliating word to use. The court stated that using the word “kaffir” amounts to hate speech, which must be eradicated. The court, after considering the seriousness of the misconduct and the evidence led on the breakdown of the employment relationship, concluded that the dismissal was unfair. As such, it held that the just and equitable remedy in this instance would be compensation and each party to pay their own costs.

2.5.4 *City of Cape Town v Freddie*

In *City of Cape Town v Freddie and Others* (“*Freddie”),*[131] the employee’s offensive conduct occurred via e-mails to his manager. The employee’s manager guided the employee in drafting a report and directed the employee to also seek assistance

[130] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] 3 BLLR 297 (LAC).
[131] (2016) 37 ILJ 1364 (LAC).

from other employees. The employee sent numerous e-mails to the manager wherein he described the manager as incompetent and a failure. He further copied various other employees into the e-mails. When the manager requested the employee to cease with his conduct, the employee accused the manager of being a racist and comparing him to "Hendrik Verwoerd"[132] and indicating that the manager was "even worse than Verwoerd". The e-mail of the employee stated that

> "You can fool everyone in that office, pretending as if you care about black people. I have been with you for a long time Irwin, I know you back and front, you are a racist of the highest order, the way I look at you are even more than Verwoerd. I was born at the height of apartheid, you cannot fool me about racism. You are a racist Irwin, if you have never been told who you are, today you are getting it from me. I am telling you your true colours and I am wondering as to how did you chose to be an advocate, while at the same time being a party to oppression by the imperialists, it's just contradictions, maybe you should attempt to practice your profession, so that you know exactly what it means."[133]

The employee was dismissed for his conduct. The employee attempted to justify his conduct by indicating that the manager insulted him in front of other employees and that the manager was a racist. This matter is of specific interest as both the employee and manager were coloured persons – thus people of the same race.

After being dismissed the employee referred the matter to a bargaining council. The commissioner at the bargaining council also found that there was no proof that the manager was racist as it was only the subjective view of the employee. The employee in this matter did show remorse but only after he was advised by his attorney to do so. The commissioner ruled, considering the employee's length of service, the size of the company and that the employment relationship was not irretrievably broken down, the dismissal of the employee was unreasonable. Thus, guilt was established but the original sanction was too severe.

The employer then took the matter on review to the Labour Court.[134] The Labour Court approved the ruling of the bargaining council and found that there were convincing mitigating factors such as the employee who showed remorse.

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[132] Interestingly, the manager was a coloured person and Verwoerd was white.
[133] *Freddie* para 24.
[134] *City of Cape Town v Freddie and Others* (2016) 37 ILJ 1364 (LAC).

This decision was taken on appeal to the Labour Appeal Court to determine whether a dismissal was the appropriate sanction in the given circumstances. The court found that the misconduct of the employee was common knowledge. Moreover, the court found that the commissioner erred in finding that the employee was remorseful as it was at a late stage and at the advice of his attorney. As the employee did not take responsibility for his conduct and showed no remorse, it was held that his dismissal was substantially fair. Considering the decision made by the commissioner, the court held that it was not a reasonable decision given the circumstances.

The court reflected on the history and the comparing the manager to "Hendrik Verwoerd". The court stated that as Hendrik Verwoerd, known as the architect of apartheid, implemented a system of laws which segregated different races in South Africa and allowed actions against certain identified races[135] this comparison was "an offensive racial insult, absolutely unacceptable for any employee to use against any other employee in the workplace, irrespective if that accuser is white or black."[136]

The court confirmed that acts of racism is seen as hate speech and clearly prohibited by the Constitution and other laws in South Africa. Reference was made to the matter of *Crown Chickens Pty (Ltd) t/a Rocklands Poultry v Kapp and others* ("*Crown Chickens*")[137] where Zondo AJ declared that

> "[w]ithin the context of labour and employment disputes this Court and the Labour Court will deal with acts of racism very firmly. This will not only show this Court's and Labour Court's absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace particularly."[138]

From the matter of *Freddie,* it is clear that the courts will act firmly against acts of racism and that employees and employers have a duty to eliminate any acts of racism in the workplace. Employers must also adopt and implement strategies and policies in order to identify and eliminate racism in the workplace. The court

[135] For further reading in this regard, see https://sahistory.org.za/people/hendrik-frensch-verwoerd (accessed 20 October 2018).
[136] *Freddie* para 55.
[137] (2002) 23 ILJ 863 (LAC). See 2.5.5 below for a discussion of this case.
[138] *Crown Chickens* para 38.

confirmed that accusing someone else of racism is racist and that people of the same race can be racist towards each other.[139]

2.5.5 *Crown Chickens Pty (Ltd) t/a Rocklands Poultry v Kapp*

In the *Crown Chickens* matter the court also had to deal with an instance where the word "Kaffir" was used in the work place.[140] The employee, a black male, was injured during a night shift and it was necessary to take him to hospital for medical treatment. When the white supervisor was informed about the injury, he did not seek assistance and said that they must "los die kaffir-laat vrek".[141] The word "vrek" is generally used when you referring to an animal dying and not for a human being.

Even though it was alleged that the supervisor on a previous occasion called the specific employee a "kaffir", the supervisor denied uttering those specific words and that he actually said that someone could die due to the lack of medical training. As an excuse, he indicated that he never received training in human relations or how to treat black people. Furthermore, he was never warned to not refer to employees in this specific way. The supervisor was dismissed after the disciplinary hearing.

In the ensuing CCMA matter the commissioner rejected the version and testimonies of the witnesses of the employer because of a contradiction. Consequently, the commissioner found that the dismissal of the supervisor was unfair and that the employer must pay the supervisor compensation. A subsequent review to the Labour Court was unsuccessful purely based on the fact that the presiding officer did not want to interfere with the decision of the commissioner.[142]

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[139] See *SACWU v NCP Chlotchem (Pty) Ltd* (2007) 28 ILJ 1308 (LC) where the court indicated that to falsely accuse a fellow employee of racism is as "deplorable as racism" itself. See also *SACCAWU obo Sikhundla and Radison Blu Hotel Waterfront* (2010) 31 ILJ 1500 (CCMA) where the false accusations of racism resulted in a fair dismissal.

[140] See also *Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration* (JR1904/2010) [2012] ZALCJHB 61. In this matter, the employee said at a meeting "that we should get rid of all the whites". There were previous incidents of racism in the workplace and a zero-tolerance policy against racism. The employee was subsequently charged with making racist remarks or using racial slurs. A disciplinary hearing was held where the employee was found guilty and dismissed. The CCMA found in favour of the employee. However, the Labour Court found that the commissioner was bias and that the commissioner made a decision which no other reasonable decision-maker would have made given the same set of facts. The court ruled in favour of the employer and set aside the CCMA ruling. The court held that with racist matters that the court must take into consideration the social, political and historical context of racism.

[141] Translated as "Leave the kaffir-let him die like an animal."

[142] *Crown Chicken* para 4.

The matter was then referred to the Labour Appeal Court by the employer. The court rejected the excuses of the supervisor and found that the supervisor did in fact make racial remarks and that dismissal was the appropriate sanction.[143] The court held that the commissioner did make a reviewable mistake by not considering the witness testimonies of the employer.

The court stated that the use of racial slurs should lead to dismissal if found guilty of the misconduct charge. Moreover, the use of the word "kaffir" is internationally known as being racist and offensive because of South Africa's history, especially when a white person uses the word towards black people. In support of this view, the court referred to a 1976 matter where court declared that the word "kaffir" refers to "uncivilized, coarse and uncouth" person.[144] The court stated already then that the word violates a black person's dignity and is derogatory.[145]

In the present matter, the court recognised that the injustices referred to in the preamble of the Constitution include racial slurs and remarks. This means that all courts in South Africa must guard against any racism, racial discrimination and racial abuse. The court continued that this abusive and derogatory word should not be present in the workplace and in my opinion, it has no place in society at all. As such, courts must act firmly to ensure that the values of dignity and equality is promoted.

2.5.6 *South African Breweries (Pty) Ltd v Hansen*

South African Breweries (Pty) Ltd v Hansen and Others ("*South African Breweries*")[146] dealt with the onus of proof where serious derogatory comments were made. The court indicated that when derogatory and racial language is used in the workplace, the employer bears the onus to proof that the language used by the

[143] See also *JAMAFO obo Nero and Pick and Pay* (2007) 28 ILJ 688.
[144] *Ciliza v Minister of Police and* another 1974 (4) SA 243. See also *Mbatha v Van Staden* 1982 (2) SA 260.
[145] The court refers to other cases wherein the court states that there are still people in South Africa using and making abusive racial remarks and that racially motivated conduct, especially with a constitution, must be seen and treated in a very serious light – See *S v Salzwedel and others* 2000 (1) SA 786 (SCA); *S v Lee Anderson and others* case 112/200, Free State High Court (unreported); *S v Smith and others* case no CC 158/01, Transvaalse Provinsiale Afdeling (unreported); *S v Terblanche* case no 470/200, Supreme Court of Appeal (unreported); *S v Van Wyk* 1992 (1) SACR 147 (Nm).
[146] (2017) 38 ILJ 1766 (LAC).

employee was objectively derogatory. It was alleged by the claimant employee (Booysen) that the employee was dismissed (Hansen) said to him (Booysen) that "[j]ulle kaffirs is almal donnerse ewe onnosel". Booysen then asked Hansen "Wie is jou kaffir?"

This allegedly all happened when Hansen stopped Booysen to inspect his truck and informed Booysen that his truck load was not sealed in accordance with South African Breweries' delivery protocols. A third party confirmed Booysen's version.

Hansen denied uttering the racially derogatory statement at Booysen and also that there were any witnesses present when the altercation between them took place. Hansen alleged that the altercation took place as Booysen used indecent and foul language which pertained to the dignity of Hansen's deceased mother.

Hansen was charged with misconduct concerning the words he uttered. A disciplinary hearing was held for Hansen and was he dismissed. On appeal the dismissal was upheld.

At that point Hansen referred the matter to the CCMA and placed the substantive and procedural fairness of his dismissal in dispute. During arbitration the commissioner ruled that Hansen's dismissal was procedurally fair but substantially unfair and stated that Hansen must be reinstated retrospectively. The commissioner's ruling was based on the evidence given by Booysen. The commissioner indicated that Booysen's testimony lacked credibility and there was good reason for him to fabricate his version of events. The commissioner further stated that the employer could not discharge the onus of proving that Hansen's dismissal was substantially fair as the versions of the parties were "equally probable".

Subsequently, the employer referred the matter to the Labour Court where the CCMA ruling was upheld.[147] The court stated that in viewing the evidence before the court and the CCMA holistically, the ruling of the CCMA was reasonable and another

[147] *South African Breweries (Pty) Ltd v Hansen and others* [2016] JOL 36076 (LC).

commissioner would not reach a different conclusion based on the same set of facts. The court stated that the commissioner formed her own probabilities on the evidence before her and confirmed that the test is whether the conclusion reached by the arbitrator is so unreasonable that no other arbitrator could have reached the same conclusion - not whether the court would come to a different conclusion.

The employer then appealed to the Labour Appeal Court. Here the court again considered the test that was applied in the *Sidumo,* namely that a decision is reviewable if the decision reached by the arbitrator was one that a reasonable decision-maker could not reach. Put differently - the court must consider if the decision under review is one that a reasonable decision-maker could not reach on the evidential material available.[148]

The employer contended that if the test as prescribed in the *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and other (*"*Gold Fields*")*[149] was applied, the Labour Court would have concluded that the award made at the CCMA was unreasonable as it was completely unsupported by the evidence. The *Gold Fields'* test refined the test of the *Sidumo* matter by introducing a two-step enquiry. Firstly, the applicant must have established an irregularity. Secondly, it must be considered whether the irregularity is material to the outcome showing that the outcome would have been different having regard to the evidence before the arbitrator. The award will thus be reasonable if there is a material connection between evidence and the result. The court in *South African Breweries* agreed with the employer's argument and found that the dismissal of the Hansen was substantially and procedurally fair.[150]

[148] See *Andre Herholdt v Nedbank Limited, (Congress of South Africa trade Unions as amicus curiae)* [2013] 11 BLLR 1074 (SCA).
[149] [2014] 1 BLLR 20 (LAC).
[150] See *National Commissioner of the South African Police and Another v Nienaber N.O. and Another* (2017) 38 ILJ 1859 (LC) where the employee used the word "Ek is nie god van kafferland nie". The employee was dismissed.

2.5.7 *Dagane v SSSBC*

The judgement in the matter of *Dagane v SSSBC and Others* ("*Dagane*")[151] was given on the 16th of March 2018. In this matter the employee, a police officer, posted racist comments on facebook. Some of the comments made by the employee was "Fuck this white racist shit! We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva Malema. When the Black Messiah (NM) dies, we'll teach whites some lesson. We'll commit a genocide on them. I hate whites".[152] A disciplinary hearing[153] was held and the employee was dismissed. The employee then referred the matter, after an unsuccessful internal appeal, to the Safety and Security Sectoral Bargaining Council (SSSBC), where the commissioner found that the dismissal was fair.

The employee then took the matter on review to the Labour Court as he opined that the SSSBC's conclusion was not one that a reasonable decision-maker could have reached. The Labour Court disagreed and also referred to *Crown Chickens* as the *locus classicus* in this regard. Moreover, the court referred to the matter of *Hotz and*

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[151] (JR2219/14) (2018) 39 ILJ 1592 (LC). See *NUM v CCMA* (2010) 31 ILJ 703 (LC) where a black employee informed his supervisor that he "hated white people". See also *Oerlikon Electrodes SA v CCMA* [2003] 9 BLLR 900 (LC) where a black employee called a fellow white employee a "Dutchman". In this matter, the court confirmed that racist expressions and remarks apply to all races. The court stated that the use of "Dutchmen" associated labelling of white persons as "white supremacists" constituted a racial remark and it could lead to dismissal. In relation to racist remarks that apply to all races, see *CEPPWAWU obo Evens v Poly Oak* (2003) 24 ILJ 2204 (BCA). See also *Blue Financial Services Limited v CCMA and Others* (JA 53/11, JR 2819/09) [2014] ZALAC 129 where the complainant was called a Bush bunny / bush cat in an office environment. The employee was dismissed. Another matter where an employee forwarded an e-mail which depicted a black person as a gorilla was also dismissed – see *Cronje v Toyota Manufacturing* (2001) 22 ILJ 735 (CCMA). See also *Gordon v National Oilwell Varco* [2017] 9 BALR 935 for further reading relating to racial comments by an employee on social media. In the matter of *Vodacom v Commissioner R Byrne NO* [2012] 8 BLLR 848 (LC) when the employee was informed that disciplinary action was to be taken against him he told all his subordinates that the department manager was a bloody racist who hates blacks. The employee was dismissed for his racist remarks even though he alleged the statement was a "mishap" and apologised. The matter was then referred to the CCMA and the commissioner found that to accuse someone else of racism is not racist and the employee was only guilty of disrespect. The commissioner ordered reinstatement of the employee. In the subsequent review the court dismissed the application because the commissioner's conduct was seen as being reasonable. Interestingly, it was found that using the so-called race card will not always result in conduct not being seen as racism, it will depend on the circumstances. The court in *City of Cape Town v Freddie and Others* (2016) 37 ILJ 1364 (LAC) found that accusing another of racism is indeed a form of racist behaviour.

[152] *Dagane* para 1.

[153] The charges brought against the employee were: "four counts of misconduct comprising him prejudicing the discipline and efficiency of the SAPS and contravening the SAPS regulations; Code of Conduct and Code of ethics by unfairly and openly discriminating against others (whites) on the basis of race; through blatantly discriminatory racial remarks; by threatening the future safety and security of white persons; and by making uncalled for remarks on Facebook which amounted to hate speech."

others v University of Cape Town ("*Hotz*").[154] In *Hotz*, the court dealt with racial utterances during the #feesmustfall protests such as "kill all whites" and "fuck all whites". Some of these slogans were publicly displayed on t-shirts or at bus stops. Although the court acknowledged freedom of speech to express for example hurt and anger, there is also a limit to these expressions. Where these expressions become expressions of hatred based on race; incitement of violence or to cause harm then that freedom must be curtailed.[155]

In the present matter under discussion, the court rejected the employee's application to review the matter. Considering the context wherein the expression was made, the court indicated that the employee showed no remorse and that instead of upholding the law and Constitution as an officer of the South African Police Service, he rejected the Constitution. The employee persisted with his unacceptable conducting by accusing the South African Police Service; the bargaining council and the commissioner of corruption, fraud and fabrication of facts. In conclusion, the court held the employment relationship has completely broken down.

2.6 CONCLUSION

In this chapter, it has become apparent that unfair discrimination by way of racism, intended or unintended, occurs in the workplace. Everyone must understand that the words that he or she utters may be subjectively fitting for him or her, but it may not be so objectively. It is clear from the above court cases that an objective test is applied in the cases of racism and not only the context and the feelings of the wrongdoer are considered as the court must follow a holistic objective approach. From the *SARS* case it has transpired that to place the racial conduct or utterance in context, the history, meaning and implications of the conduct must be considered. It is also evident from the discussed cases that each case must be decided on its own merits.

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[154] [2016] 4 All SA 723 (SCA).

[155] Another instance is also where a person does something to merely "provoke". In the *Numsa obo Motha v Stack Door Cooperation (Pty) Ltd* [2008] 2 BALR 128 the wrongdoer wrote an extract of a piece relating to former State President, PW Botha, on a blackboard in the staff canteen. He wrote the following: "We whites want to live our own White life. We are not pretending that we like Blacks like other Whites. Blacks are not human being (sic). The fact is that Blacks look like human and act like human (sic). Blacks are a (sic) raw material of White man". See also Botha (2018) THRHR 679.

It must be remembered that racism does not have to be directed at anyone specific for it to constitute racism. In a workplace, racial conduct can impact on various employees when the racial statement is aimed at that specific group of employees. This in turn could lead to a hostile work environment.

Although everyone has the right to freedom of expression[156] that right also have limitations. Teichner aptly states that

> "[w]ords carry considerable power. Indeed, it is for this reason that we should so jealously guard against the right to freedom of expression. Words can be used to effect revolution and expose stereotypes. Yet words can also be used in a negative sense. Words like sticks and stones, can assault, they can injure, and they can exclude."[157]

Thus, the freedom of expression must be free of hate speech and racism, otherwise it unreasonably and unjustifiably infringes on the victim's right to dignity and equality as provided for in the Constitution.

In most of the matters discussed it was not in dispute if the employee was indeed guilty of the misconduct but whether the employment relationship can continue and if dismissal of the employee was the proper form of sanction in the circumstances.[158] It is difficult to imagine that in the discussed cases the employment relationship could have continued after the incidents. In my opinion if a court was to order reinstatement in any of these cases the animosity in the workplace would have been unbearable.

Nonetheless, I agree that not all cases of discrimination warrant dismissal as one of the LRA's purposes is to foster the employment relationship between employers and employees as well as employees and employees. In determining what the appropriate sanction should be, the circumstances of the case and all possible factors, past and present, should be reflected on. Also, the employer has a duty to consider the well-being of his other employees and the impact it might have, if the

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[156] In the *SANDU v Minister of Defence* 1999 (4) SA 469 (CC) the court commented that "the constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters. See also *Case and another v Minister of Safety and Security* 1996 (3) SA 617 (CC) for further reading on freedom of expression.

[157] Teichner *"The hate speech provisions of Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The good, the bad, the ugly"* (2003) SAJHR 349. See also Botha (2018) THRHR 676.

[158] Smith "How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct" (2011) De Jure 1.

employee, who made a racist comment in the workplace, remains employed with the employer. In a large firm, such a SARS, it could be a possibility to transfer the wrongdoer to another branch to ensure that the parties do not work together.

CHAPTER 3 RESPONSIBILITY AND/OR LIABILITY OF THE EMPLOYER

3.1 INTRODUCTION

In the previous chapter, it was seen that employees can be dismissed for racial comments and slurs where they infringe on a fellow employee or employer's right to equality and dignity. This type of conduct will not only result in emotional trauma for the complainant but will also result in financial loss for the employee who is dismissed.

An employer's duty to eliminate unfair discrimination in the workplace encompasses more than simply seeking to protect business interests and ensure ethical behaviour towards all its stakeholders.[1] The employer has a common-law obligation to provide safe working conditions, both in a physical and a psychological sense.[2] The employer also has an implied common-law duty to act in good faith towards his or her employees, which results in reciprocated duty of trust and confidence.[3] In addition, section 5 of the EEA provides for a statutory duty in this regard as it stipulates that "[e]very employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."

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1 Rossouw & Van Vuuren *Business Ethics* 6th edition (2017) Cape Town: Oxford University Press Southern Africa.

2 Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 98. See also *Media 24 Ltd & another v Grobler* [2005] 7 BLLR 649 (SCA) – Claim by employee for damages against the employer for sexual harassment by another employee. In this matter it was held that the "employer create and maintain a safe working environment and that the employers' failure to take reasonable and practicable steps to prevent sexual harassment of its employees is a negligent breach of that duty and can the employer be held vicariously liable.

3 Bosch *"Implied Term of Trust and Confidence in South African Labour Law"* (2006) 27 ILJ 28.

In this chapter it will be considered what the employer's duty is if the employer is aware of any racism incidents. It will further be considered if the employer can be held liable in any way if the employer neglects to take any action if there was any contravention in terms of the EEA.

3.2 EMPLOYER'S RESPONSIBILITY AND LIABILITY

3.2.1 Employment Equity Act

Section 6(1) of the EEA prohibits unfair discrimination as it provides that

> "[n]o 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."[4]

The EEA places a duty on the employer when there is a contravention in terms of the EEA and the employer is aware of the contravention or made aware thereof. As soon as the employer is aware of the contravening conduct, the employer must take active steps to consult with all involved parties to eradicate the alleged conduct and comply with the EEA.[5] If the employer fails to take active steps and it is found that the employer knew about the contravention of the EEA, then the employer is also deemed to have contravened the EEA.[6] If the employer can show that he or she did

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[4] Own emphasis added. This prohibition coupled with the employer's positive duty to eliminate unfair discrimination in terms of section 5 of the EEA, raises the question whether there would always be unfair discrimination if there is differentiation on the grounds listed above. Section 6(2) of the EEA provides two grounds of justification, meaning that when one of these grounds are present the differentiation would not be unfair discrimination. Firstly, affirmative action measures in line with the purpose[4] of the EEA (See Chapter 2, para 2.4.2.2 in this regard) and secondly, differentiating on the basis of an inherent job requirement would not be considered to be unfair discrimination.

[5] Section 60(1) of the EEA – "If it is alleged that an employee, while at work, contravene a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer." and section 60(2) of the EEA – "The employer must consult all the relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act." See also Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 156; Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) para 137. For further reading on the application of section 60(1) of the EEA, see *Piliso v Old Mutual Life Assur* 2007 ILJ 897 (LC) *& Makoti v Jesuit Refugee Service SA* 2012 ILJ 1706 (LC). For further reading on the application of section 60(2) of the EEA, see *Ntsabo v Real Security CC* 2003 ILJ 2341 (LC); *Mokoena v Garden Art* 2008 ILJ 1196 (LC)*;* and *FSAWU v Fedics* 2015 ILJ 1079 (LC).

[6] Section 60(3) of the EEA – "If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision." For further reading on the application of section 60(3) of EEA, see also *Biggar v City of Johannesburg, Emergency Management Services* [2011] 6 BLLR 577 (LC). In *Biggar v City of*

everything in his or her power to prevent the employee from contravening the Act, then the employer will not be held liable.[7]As such, it is expected of the employer to take active steps in the prevention and elimination of unfair discrimination in the workplace, which includes incidents of racism. Otherwise the employer is liable in terms of the EEA.

One of the first cases where the employer was held liable due to its failure to take active steps as required in the EEA, is the matter of *Ntsabo v Real Security CC ("Ntsabo").*[8] In this matter the court awarded damages, R50 000.00 for general damages and R20 000.00 for future medical costs in terms the EEA as the employer did not act after it was informed of the alleged sexual harassment.

The matter of *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another ("Finca")*[9] dealt with an incident of racism in the workplace as a white employee refused to have her workstation close to black co-workers. The court held that the employer failed to prevent the alleged racism, which constituted unfair discrimination, and accordingly the employer was ordered to pay compensation to the victim of this incident.

In another matter[10] the employee was discriminated against by the employer as the employer called the employee "unclean, smelly, untidy and having a bad odour". The employer argued that the employer lacked good personal hygiene and this was problematic because the employee served food and beverages.

The matter of *Ngwabe and Imvula Quality Protection (Pty) Ltd ("Ngwabe")*[11] serves as an example of where the employer took the necessary steps to address a

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Johannesburg, Emergency Management Services the racial incident took place between employees at a residential premises provided by the employer. The employer was liable in terms of the EEA, although the incident did not take place at the workplace, as the employer did not address the problem at the "root" or in a "proactive" fashion.

7 Section 60(4) of the EEA – "Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act." For further reading on the application of section 60(4) of the EEA see also *Solidarity obo De Vries v Denel (Pty) ltd t/a Denel Land Systems* [2009] 11 BALR 1141 (MEIBC) & *Moatshe v Legend Golf and Safari Resort Operations* 2015 ILJ 1111 (LC).

8 [2004] 1 BLLR 58 (LC). In essence the matter dealt with statutory liability of an employer for unfair discrimination or harassment of employees against other employees.

9 [2006] 9 BLLR 737 (LC).

10 *Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel (*2017) 38 ILJ 702 (CCMA).

11 (2017) 38 ILJ 724 (CCMA).

problem and therefore adhered to the requirements of the EEA. In this matter, an employee referred to the other employee as "one-eye" because he had one eye. This was done in a way to identify the employee or alternatively as a joke. The employer addressed the matter promptly and the accused employee offered an apology and showed remorse in this regard. As a result, the employee only received a written warning in this regard.

In the *Shoprite Checkers (Pty) Ltd v Samka & Others ("Samka")*[12] the employee alleged that the employer's policies and practices in the workplace were racist towards black cashiers like herself. The employee further alleged that she was victimised and bullied by the employer because of grievances she raised previously. Lastly, she alleged that the employer failed to protect her when a customer made racist remarks towards her. The employee referred the matter to the CCMA based on section 60 of the EEA and the commissioner found in favour of the employer. The reason for this ruling was that the employer made satisfactory attempts to address the grievances made by all the cashiers and the grievances did not relate to racial discrimination. The commissioner further found that even if several managerial employees had "bullied" the employee, the insults were not based on race but rather because the managers believed that the employee's complaints and grievances were petty and frivolous.

Nevertheless, the employee received some validation as the commissioner found that the employer did not do enough to protect the employee against the racial abuse by a customer who discriminated based on race by calling the employee a "stupid kaffir."[13] It was ruled that the employer could have addressed the racial abuse by forbidding the customer to enter the shop again. The commissioner awarded R75 000.00 in compensation for the employee to be paid by the employer.

However, this validation was short lived as the employer then took the matter on appeal to the Labour Court in terms of section 10(8) of the EEA. The employer

[12] (2018) 39 ILJ 2347 (LC) – judgment: 29 November 2017.

[13] The court referred to the matter of *Thembani v Swanepoel* 2017 (3) SA 70 (ECM) with regards to the term "kaffir" and stated that it cannot be used without the being reminded of the obvious derogatory and abusive connotations associated with the term. "[C]onsidered objectively, the use can only be an expression of racism with a clear intention to be harmful and to promote hatred towards the person of whom it is used or to whom it is directed" (para 3).

argued that section 60 of the EEA only applies to employers when the incident occurs in the workplace. While the court, like previous courts, acknowledged the racial incidents in the workplace must be dealt with in serious and firm way, it held that it does not mean the employer can be held liable for the conduct of customers.[14] The court found that section 60 of the EEA clearly showed that the employer will be held liable if the discrimination incident was between employees and not a customer and an employee. Although the employee could not hold the employer liable in terms of the EEA, the employee did have an ordinary civil claim and a claim in the equality court in terms of PEPUDA against the customer, Mr. Price.

In *Mokoena & another v Garden Art (Pty) Ltd & another ("Mokoena")*[15] the court detailed the requirements that have to be met in order for the employer to be held liable in terms of section 60 of the EEA. The requirements considered and applied were as follow:

> "-the conduct must be by an employee of the employer;
> -the conduct must constitute unfair discrimination … ;
> -the conduct must take place while at work;
> -the alleged conduct must immediately be brought to the attention of the employer;
> -the employer must be aware of the conduct;
> -there must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA; and
> -the employer must show that it took (sic: did) all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA."

Although these requirements are mere guidelines, it provides a useful yard stick to determine the liability of the employer.

3.2.2 Common Law

It must also be considered if the the employer can be held liable in terms of common law by way of vicarious liability.[16] Vicarious liability means that the employer can be held liable for the actions of the employee without any fault on the side of the employer. In order for vicarious liability to be present the following three requirements must be met:

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[14] The court referred to the *South African Breweries* case where it was confirmed that "our courts have taken a firm stand on the use of racial language in the workplace, in particular, the use of the word "kaffir" visiting on such misconduct the sanction of dismissal."

[15] (2008) 29 ILJ 1196 (LC). See also *Potgieter v National Commissioner of the SA Police Service & another* (2009) 30 ILJ 1322 (LC).

[16] See Van Niekerk and Smit (eds) (2018) 156.

1. There must have been an employment relationship between the employee, who committed the unacceptable conduct, and the employer;
2. The employee must have committed a delict; and
3. The act must have taken place in the course and scope of employment.[17]

When considering the first requirement, the existence of an employment relationship between the employer and employee, it is crucial to establish whether a person is indeed an employee. If he or she is not, the "employer" cannot be vicariously liable for the employees' racist actions. In terms of section 213 of the LRA an employee is defined as:

> "(a) any person, excluding an independent contractor, who works for any person or for the state and who receives, or is entitled to receive, any remuneration; (b) any other person who in any manner assists in carrying on or conducting the business of the employer."

Importantly, "an independent contractor" is excluded from the definition of employee.[18] As such it is essential to determine whether a person is considered to be an employee or an independent contractor. In this regard, two main points must be considered. Firstly, whether or not the employer and employee concluded an employment contract, verbal or in writing, as this is necessary to establish an employment relationship. In this regard it must be noted that simply referring to a contract as an "employment contract" does not mean that it is an employment contract. Rather, the substance of the contract must be considered to establish whether it is an employment contract.

Secondly, it must be considered if the relationship between the parties to the contract qualifies as an employer-employee relationship. In this respect the employee's annual income must be borne in mind. Section 6 of the BCEA sets a

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[17] For further reading concerning vicarious liability in general, see Neethling, Potgieter & Visser "*Law of Delict"* 7th Edition (2014) Lexis Nexis. See also Le Roux, Rycroft & Orleyn "*Harassment in the Workplace: Law, Policies and Processes"* (2010) Lexis Nexis. For the purposes of this dissertation vicarious liability will not be discussed in further detail.

[18] See Millard & Botha *"The buck stops … Where, exactly? On outsourcing and liability towards third parties"* (2013) Vol 3 Obiter 476. "Independent contractor" is also excluded in the definition of an employee in the BCEA; COIDA, Unemployment Insurance Act, 63 of 2001 (The "UIA"); and Skills Development Act, 97 of 1998 (The "SDA). See also Van Niekerk and Smit (eds) (2018) 62.

statutory threshold that is determined by the Minister of Labour from time to time in the Government Gazette.[19]

If the employee earns less that the prescribed threshold then there is a rebuttable presumption that the person is an employee of the employer. Consequently, the onus of proof would be on the employer to show that the employee is an independent contractor and not an employee. When the annual earning is less than the threshold, then the factors contained in section 200A of the LRA must be considered.[20] The more of these factors present, the greater the chances are that the person is an employee of the employer. These factors are:

> "(a) the manner in which the person works is subject to the control or direction of another person;
> (b) the person's hours of work are subject to the control or direction of another person;
> (c) in the case of a person who works for an organisation, the person forms part of that organisation;
> (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
> (e) the person is economically dependant on the other person for whom he or she works or renders services;
> (f) the person is provided with tools of trade or work equipment by the other person; or
> (g) the person only works for or renders service to one person."[21]

When a person earns more than the prescribed threshold, the presumption does not apply and the common-law test, the dominant impression test, must be used.[22] In such an instance the onus is on the employee to proof that he or she is an employee and not an independent contractor. The factors as provided for in section 200A is not

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[19] The last threshold determination, in terms of Government Gazette No 37795, of R205 433.30 per annum was determined on 1 July 2014.

[20] The Code of Good Practice: Who is an Employee contained in schedule 8 of the LRA may also assist in ascertaining who qualifies to be an employee.

[21] These factors were recently applied in *Uber South Africa Technological Services (Pty) Ltd and NUPSAW (National Union of Public Service and Allied Workers) and SATAWU (South African Transport and Allied Workers Union) obo Tshepo Morekure, Derick Organsie and Lee Stetson Carl De Olivei* [2017] ZACCMA 1 (7 July 2017) Case number: WECT 12537-16. where the CCMA had to consider whether Uber drivers are employees or not. The "employer" raised a *point in limine* contending that the drivers for Uber are not employees. After applying the factors in terms of section 200A, the CCMA found that Uber drivers are indeed employees. This matter was taken on review and subsequently set aside by the Labour Court (*Uber South Africa Technological Services (Pty) Ltd v NUPSAW and SATAWU obo Tshepo Morekure and others* 2018 (LAC) (12 January 2018) Labour Court, Cape Town - Case number: C449/2017.

[22] For a discussion of what this test entails and its application, see *South African Broadcasting Corporation v Mckenzie* [1999] 1 BLLR 1 (LAC) *("Mckenzie"*); *State Information Technology Agency (SITA) (Pty) Ltd v CCMA* [2008] 7 BLLR 611 (LAC) (*"SITA") and Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) ("*Smit*").

[22] See *Denel (Pty) Ltd v Gerber* [2005] 9 BLR 849 ("*Denel"*).

totally irrelevant when a person earns more than the threshold as it still be considered and used as a guide.[23]

There are certain factors[24] that can be considered, irrespective if the employee earns below or above the threshold. These factors are as follows:

- The person is under the control or direction of another;
- If the person works for an organisation that he forms part of that organisation;
- The person has worked for the same person for at least 40 hours per month for the last 3 months;
- The person is economically dependant on the person who she or he works for or renders a service;
- The person is provided with the necessary equipment or tools of trade by the person he or she works for; and
- The person only works for or renders his or her service to one person.

Only once it is established that a person is indeed an employee, the other two requirements of vicarious liability can be considered, namely (i) whether the employee committed a delict,[25] (ii) in the scope of his employment. It has been a point of contention what constitutes to be within the scope of employment. The court have developed the "deviation principle" to assist in determining if a party acted within the scope of employment.[26] A matter that illustrates this is *Minister of Safety & Security v Jordaan t/a Andre Jordaan Transport ("Jordaan*")[27] where the court stated that:

> "[i]n each case, whether the employer is to be held liable or not must depend on the nature and extent of the deviation. Once the deviation is such that it cannot be reasonably held that the employee is still exercising the functions to which he was appointed or still carrying out some

[23] See *Denel* in this regard.

[24] These factors were mainly derived from the indicators as mentioned in the ILO's Employment Relations Recommendation, 2006 (No R198). See also Van Niekerk, Smit, Christianson, McGregor & Van Eck (2018) 66; Millard & Botha (2013) Obiter 481.

[25] A detailed discussion of what constitutes a delict and the forms it can take do not fall within the scope of this dissertation. Consult Neethling, Potgieter & Visser (2014) in this regard.

[26] Millard & Botha (2013) Obiter 482. Botha & Millard "*The past, present and future of vicarious liability in South Africa"* (2012) De Jure 227.

[27] (2000) 21 ILJ 2585 (SCA). For further reading in this regard, see *Minister of Police v Rabie* 1986 (1) SA 117 (A) 134 *& K v Minister of Safety & Security* 2005 (6) SA 419. See also Millard & Botha (2013) Obiter 482; Botha & Millard (2012) De Jure 231.

instruction of his employer, the latter will cease to be liable. Whether that state has been reached is essentially a question of degree."

For that reason, an employer will not always be held liable for the actions of an employee, there must be a sufficient link between the employee's conduct and what the employer authorises.[28] Thus, it is clear from the above that each matter must be decided on its own merits when considering if an employer can be held liable in terms of vicarious liability.

There are several matters where the employer was held vicariously liable based on a form of discrimination in the workplace. One such a matter is *Grobler v Naspers Bpk & another ("Grobler")*.[29] The employee, Gasant Samuels, manager in training and head of a department at the employer, sexually harassed another employee, Ms. Sonja Grobler, over a period of six months. The harassment took place at the workplace and once near her flat. As a result of the harassment Ms Grobler suffered from emotional problems, which rendered her unable to do her work effectively.

The High Court held that the employer and Mr. Samuels were jointly and severally liable for general damages, medical costs and compensation towards Ms. Grobler to the amount of R776 814.00. On appeal the Supreme Court of Appeal upheld the judgment made by the High Court.[30] The court indicated that the employer has a common-law duty to take reasonable care of the employees' safety and protect them from harm such as in this matter.[31] The court held that the test in terms of section 60 of the EEA is less strict than that of vicarious liability. Moreover, the court remarked that in cases of racial discrimination, it could also amount to a defamation claim and be dealt with as an ordinary civil claim.[32] A claim in terms of the Compensation for

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28 Millard & Botha (2013) Obiter 484.

29 [2004] 5 BLLR 455 (C).

30 See also *Media 24 Ltd & another v Grobler* [2005] 7 BLLR 649 (SCA). Media 24 Ltd replaced Naspers Bpk as employer. See also *NK v Minister of Safety & Security* (2005) 26 ILJ 1205 (CC) – The Constitutional Court remarked that the common-law principles of vicarious liability must be expanded to conform with the values of the Constitution. In this matter, a group of police officers, without authority and instructions, had given a female a lift and then raped her. The state was held liable for this conduct of the police officers. See also *Erasmus Ikwezi Municipality & another* (2016) 37 ILJ 1799 (ECG) for further reading on vicarious liability of the employer where there was sexual harassment in the workplace by one employee towards another.

31 *Media 24 Ltd & another v Grobler* [2005] 7 BLLR 649 (SCA). See also Van Jaarsveld, Bakker, Dekker, Le Roux, Olivier, Prinsloo & Smit (2018) 153.

32 See also *Sindani v Van der Merwe and others* 2002 (2) SA32 (SCA) and *Shoprite Checkers (Pty) Ltd v Samka & Others* (2018) 39 ILJ 2347 (LC).

Occupational Diseases and Injuries Act ("COIDA")[33] was not possible as the sexual harassment does not fall under the definition of a "injury" at the workplace.

This matter sets the tone for strict liability of employers in matters of discrimination against employees. The court rejected the employer's argument that the employee was acting with his own personal agenda, not in the course and scope of his employment and not in the best interest of the employer the employer should not be held liable for the actions of the employee.

3.3 CONCLUSION

This chapter has shown that an employer can be held liable for the conduct of other employees, not only in terms of common law, but also in terms of statutory law. Whilst vicarious liability and section 60 of the EEA are fairly similar, section 60 actually creates a direct liability of the employer when the employer is aware of the discrimination and does not take active measures to investigate and stop the discrimination. Further, section 60 of the EEA places a duty on the employer to put in place policies in the workplace to pro-actively prevent any form of discrimination in the workplace. Section 60 of the EEA adds a further responsibility - to immediately take steps to investigate any allegations of discrimination in the workplace and attempt to resolve the problem.

From the discussed cases, it has transpired that employers have a responsibility towards his/her employees to not expose them to any type of harassment in the workplace, including racism. The employer must act in a pro-active manner and implement policies against any form of racism. If the employer does not take the necessary steps to either prevent or deal with racism incidents in the work place then the employer can be held liable. Liability for the employer is not only possible in terms of the EEA and common law but could even in some instances be established in terms of COIDA.

[33] 130 of 1993.

CHAPTER 4 CONCLUSION AND RECOMMENDATIONS

4.1 INTRODUCTION

With the first democratic elections in South Africa in 1994, citizens of South Africa made a conscious decision to move forward and heal the inequalities of the past. Central to this is the issue of racism, which despite the conscious decision to move forward, is still very much alive when considering the plethora of case law concerning racism, specifically in the workplace.

4.2 MEANING OF RACISM AND APPROPRIATE SANCTION

Chapter 2 of this dissertation firstly established what the term racial discrimination or racism entails.[1] Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination encapsulates the essence of this term by defining it 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."

This chapter highlighted that whilst legislation before 1994 exacerbated racial divides, the Constitution demands that all people are treated in an equal and dignified manner. Thus, racism in any form is not acceptable and must be completely rooted out, not only in the workplace but also within society.[2]

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1 Racism and racial discrimination are the same thing and are used interchangeably depending on the context in which it is used.

2 *Crown Chickens Pty (Ltd) t/a Rocklands Poultry v Kapp* para 24.

Furthermore, Chapter 2 addressed whether dismissal is the only justifiable and reasonable sanction in matters pertaining to racism in the workplace. Although racism and discrimination were hallmarks of apartheid,[3] it does not mean that any incidents of racism would automatically justify dismissing the employee. There needs to be a value judgment in each and every individual matter where the context and factual circumstances must be considered.

Granting that the majority of cases discussed in Chapter 2 led to the employee's dismissal, it would still not always be a justified sanction. The discussed cases were instances of particularly serious racism. Consequently, the merits of each matter must be carefully considered and the presiding officer should not simply rubber stamp a dismissal based on previous rulings or case law.

4.3 RESPONSIBILITY AND/OR LIABILITY OF THE EMPLOYER

Chapter 3 addressed two questions: Firstly, does an employer have any responsibility to prevent racial discrimination in the workplace? and secondly, can any liability be ascribed to the employer in cases of racial discrimination in the workplace?

With regard to the first posed question, it became clear that employers do have an active responsibility, especially in terms of section 60 of the EEA, to prevent racism in the workplace. When an employer cannot prevent a racist incident, once such an incident has occurred it must be resolved in a swift and precise manner.

Considering the second posed question, employers can be held liable for damages if they do not act on racism in the workplace. This liability can stem from the EEA, common law principles[4] and possibly COIDA.

[3] http://www.polity.org.za/article/duncanmec-pty-limited-v-gaylard-no-and-others-cct28417-2018-zacc-29-2018-09-13 (accessed 21 October 2018).

[4] Vicarious liability and breach of contract.

4.4 CONCLUDING REMARKS

This dissertation has shown that for people in South Africa to move forward and heal the inequalities of the past, much need to be done by all. Firstly, employees should treat fellow employees in an equal, dignified manner by refraining from racial discrimination. Failure to do so could result in dismissal. Secondly, employers have an active duty to ensure that the workplace is eradicated of all racism. Failure to do so could result in damage awards against the employer.

I suggest that employers must actively implement clear and unambiguous policies in the workplace relating to all types of discrimination in the workplace. Furthermore, I suggest that employers must hold regular workshops on discrimination in the workplace to inform employees of their rights and what remedies they have. Moreover, employers must have dedicated human resources personal and counsellors whom employees can approach. Also, the employer must ensure that employees know what the disciplinary code of the employer states with regards to discrimination and the consequences when employees subject them to that kind of behaviour. In my view, not all types of discrimination should lead to a dismissal, it would depend on the facts of the matter. Even so, it must be treated in a very serious light at all times as there is no place in South Africa for any sort of discrimination especially not racial discrimination taking into account the past of South Africa – in any environment.

Only by all role players committing to heal the inequities in this manner can the dream that "my four little children will one day live in a nation where they will not be judged by the color of their skin but by the content of their character"[5] ring true.

[5] Martin Luther King Jr.

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