MANAGING RACISM IN THE WORKPLACE

OPSOMMING

Die bestuur van rassisme in die werkplek

Rassisme is 'n voortdurende probleem in Suid-Afrika. Die Konstitusionele Hof het onlangs in verskeie sake die probleem onder die vergrootglas geplaas. Die probleem kom veral voor in die werkplek. Die konteks waarin sekere woorde gebruik word is belangrik. Woorde kan rassisties of neerhalend gebruik word. Alle werkgewers moet sisteme en praktyke in plek stel ten einde die probleem aan te spreek en dit duidelik te laat blyk dat rassisme nie in die werkplek geduld word nie. Werknemers wat hulself skuldig maak aan rassistiese optrede handel in stryd met hul verpligting tot goeie trou. Indien werkgewers nie rassisme aanspreek nie kan dit hul moontlik aan aanspreeklikheid blootstel.

1 Introduction

Racism remains prevalent in post-apartheid South Africa. In *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* 2017 1 SA 549 (CC) ("*SARS*"), the Constitutional Court commented on the problem of racism as follows:

> "South Africa's special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us" (para 2).

The Republic of South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of rights and freedoms" (s 1 of the Constitution of the Republic of South Africa, 1996). Section 9(1) gives expression to these values and provides not only that everyone is equal before the law but also has the right to equal protection and benefit of the law. It is important to note that equality "includes the full and equal enjoyment of all rights and freedoms" (s 9(2)). In this context it should be observed that everyone has the right to have their inherent dignity respected and protected (s 10; see also *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 126 where Sachs J stated that "[t]he focus on dignity results in emphasis being placed simultaneously on context, impact and the point of view of the affected persons"). Section 39(1)(a) of the Constitution provides that when interpreting the Bill of Rights, a court, tribunal or forum "must promote the values that underlie an open and democratic society based on human dignity, equality and freedom".

The Constitutional Court, further, emphasised in *Rustenburg Platinum Mine v SAEWA obo Bester* [2018] ZACC 13 ("*SAEWA*") that our Constitution is the embodiment of the values, both moral and ethical, which bind us as a nation and which we strive to achieve and that the Constitutional Court is obliged, as a custodian of the Constitution, "to ensure 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" (para 37) and that the Constitution "is the conscience of the nation" (*SARS* para 12). The court emphasised that

> "[t]he past may have institutionalised and legitimised racism but our Constitution constitutes a '*radical and decisive break from that part of the past which is unacceptable*'. Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by '*strife, conflict, untold suffering and injustice*'. Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regard to race but it can also be seen with reference to gender discrimination. In both instances, such prejudices are evident in the workplace where power relations have the ability '*to create a work environment where the right to dignity of employees is impaired*' . . . Gratuitous references to race can be seen in everyday life, and

> although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society" (paras 52–53; emphasis added).

In recent years, a number of instances that had racist overtones took place in South African workplaces and on social media. Race still plays a prominent role in post-apartheid South Africa; whether it is for purposes of classification, empowerment or the advancement of equity. The now well-known comments by Penny Sparrow who described black beachgoers on Facebook as "monkeys" in an apparent reaction to the litter left behind after New Year celebrations sparked huge public outcry. She was found guilty of hate speech in the Equality Court and ordered to pay R150 000 to the Adelaide and Oliver Tambo Foundation (see https://www.news24.com; https://city-press.news24.com (accessed 1 July 2017).

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) deals with the prohibition of unfair discrimination in other spheres of life and the Prevention and Combating of Hate Crimes and Hate Speech Bill was published on 28 March 2018 to address, *inter alia,* hate crimes and hate speech. (PEPUDA and the Hate Crimes and Hate Speech Bill fall outside the ambit of this note). See, for example, *Dagane v SSBC* [2018] ZALCJHB 114 where a police officer made vitriolic racist comments on the Facebook page of the leader of the Economic Freedom Fighters (EFF), Mr Julius Sello Malema. The South African Police Services (SAPS) dismissed the member, Warrant Officer Juda Phonyogo Dagane. He was unhappy and referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council (SSSBC). The Labour Court confirmed that the employee not only used disgraceful and racist language constituting hate speech, but that he also did so in his capacity as a police officer, and he did so on "a quasi-public forum accessible to potentially thousands of Facebook users" (para 49). The court added that there was no altercation between two individuals; it was aimed at a racial group generally and, therefore, there can be no doubt that dismissal was a fair sanction (para 49).

Recently, the Constitutional Court had to grapple with the issue of whether the use of the words "swart man" (black man) by one employee against another was racist and derogatory and, should it be derogatory, whether it justified dismissal as an appropriate sanction (see *SAEWA*). The context of the utterance thus becomes relevant in determining whether it was made in a racist or derogatory manner (see, eg, *Afri-Forum v Malema* 2011 6 SA 240 (EqC) paras 41 99 where the court stated that words may have different meanings to different people).

In light of the above the purpose of this note is to evaluate racism in the context of the workplace and to suggest ways in which employers may wish to manage instances of racism.

2 Managing racism in the workplace

2 1 Employment equity

Race relations in the South African workplace have been under the spotlight since the inception of the Interim Constitution of the Republic of South Africa 200 of 1993 and the Constitution of the Republic of South Africa, 1996 as well as labour laws. There have been calls by some to evaluate labour legislation through the lens of Critical Race Theory (CRT). CRT in part is concerned with

the "intersection of race, law and power" and asks us "to go beyond what appears to be progressive legislation to interrogate the difference such legislation makes in the lives and opportunities of all South Africans" (Rycroft and Le Roux "Decolonising the labour law curriculum" 2017 (38) *ILJ* 1484).

Race relations are important in labour law and the workplace as issues such as formal and substantive equality are at its core (see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC); *Minister of Finance v Van Heerden* [2004] 12 BLLR 1181 (CC); *Brink v Kitshoff* 1996 4 SA 197 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) regarding substantive equality). The Employment Equity Act 55 of 1998 ("EEA") is designed to promote equity in the workplace and recognises in its preamble disparities in employment, occupation and income in the national labour market. The EEA further recognises that there are disparities which cannot be redressed by repealing discriminatory laws only and aims, amongst other goals, to promote equality, to eliminate discrimination in employment and to achieve a workforce representative of people (ss 5 6). Section 5 provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 contains the 19 prohibited grounds of unfair discrimination and states that no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground. "[A]ny other arbitrary ground" was included by the Employment Equity Amendment Act 47 of 2013 to extend the prohibition against unfair discrimination in section 6(1). Section 6(3) extends the definition of discrimination to include harassment on any of the grounds on which unfair discrimination is expressly prohibited (see *Gumede and Crimson Clover 17 (Pty) Ltd t/a Island Hotel* 2017 *ILJ* 702 (CCMA) where an employer's treatment was regarded to be irrational and constituted unfair discrimination on arbitrary grounds because the employer informed him that he was unclean, smelly, untidy and had a bad odour. The employer's defence that the employee lacked good personal hygiene, which was a requirement as the employee served food and beverages to patrons, was rejected).

Section 6(2) establishes two specific defences against discrimination claims, namely, affirmative action and inherent job requirements which go beyond the scope of this note. Even in cases of affirmative action courts are still faced with challenges to employment equity plans in order to address the injustices of apartheid towards Africans, Indians and Coloureds and how their representation should be addressed in the workplace (for a detailed discussion see Van Niekerk and Smit (eds) *Law@work* (2017) 124–160). Apartheid has left South Africa with a largely-racially defined class structure. A broad overlap between race and class, therefore, creates a situation in which affirmative-action strategies with class objectives would have the effect of addressing historical racial disparities without reinforcing racial identities and aggravating racism (Dupper "Affirmative action: Who, how and how long?" 2008 *SAJHR* 442). Rycroft and Le Roux point out that it could be argued that the government in the last two decades "has attempted to avoid the 'colour blindness' associated with the liberal approach to transformation and in fact has adopted, through the EEA and black economic

empowerment, a robust and deliberate approach to transformation" and "if the 'basic objective of CRT is to use the law to effectuate racial equality', one could say that the legislative programme in South Africa has clearly demonstrated that intent. But CRT would claim that legislation is simply a declaration of intent" (Rycroft and Le Roux 2017 (38) *ILJ* 1486). Rycroft and Le Roux point out that CRT "would interrogate whether the EEA is an obstacle rather than an agent for change in that the legal right not to be unfairly discriminated against deflects attention from the persistence of white privilege" (*ibid*).

2 2 Duty of good faith and racism

Employees owe a duty of good faith to their employers which includes the obligation to further their employer's business interests. At common law employees stand in a position of trust and confidence towards their employer. This entails that an employee must act in good faith and the relationship therefore is fiduciary in nature. In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168 177 the court held that:

> "Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty." (See also *Volvo (Southern Africa) (Pty) Ltd v Yssel* 2009 6 SA 531 (SCA).)

In *Council for Scientific & Industrial Research v Fijen* [1996] 6 BLLR 685 (A) the court stated that it is well established that the relationship between employer and employee is "in essence one of trust and confidence". If the conduct is inconsistent (at common law) with it, it entitles the "innocent" party to cancel the agreement (691). Good faith duties of an employee, according to the court, simply flow from the "*naturalia contractus*" rather than being an implied term (692; see also *SA Maritime Safety Authority v McKenzie* [2010] 5 BLLR 488 (SCA) with regard to the development of the common law and the use of tacit and implied terms in contracts of employment). It is also evident from *Phillips v Fieldstone Africa (Pty) Ltd* [2004] 1 All SA 150 (SCA) that conflicts of interest cover not only actual conflicts but also those that are possible in real terms. A fiduciary will have limited defences available to him. Only the free consent of the principal after full disclosure will suffice. The court added:

> "Because the fiduciary who acquires for himself is deemed to have acquired for the trust . . . once proof of a breach of a fiduciary duty is adduced it is of no relevance that (1) the trust has suffered no loss or damage . . . (2) the trust could not itself have made use of the information, opportunity etc . . . or probably would not have done so . . . (3) the trust, although it could have used the information, opportunity etc has refused it or would do so . . . (4) there is no privity between the principal and the party with whom the agent or servant is employed to contract business and the money would not have gone into the principal's hands in the first instance . . . (5) it was no part of the fiduciary's duty to obtain the benefit for the trust . . . (6) the fiduciary acted honestly and reasonably" (para 161).

It therefore important is to note that racism is regarded as a form of misconduct. In this instance dismissal would be a possible sanction for the employer to impose after disciplinary proceedings which might in turn remedy the situation at work for the employee whose dignity had been violated because of the discrimination or harassment. If an employee makes racist comments in the public domain, the actions of the employee may foreseeably negatively affect the business of his employer or the working relationship between him and his employer or colleagues. If such statements are made it will be a breach of the employee's

duty of good faith and will be regarded as misconduct which will amount to a dismissible offence. The employee's freedom of expression, therefore, will be limited as this will have a negative impact on the business of the employer. Dismissal will be imposed for a first offence if the circumstances so warrant and the employee's behaviour destroys the employment relationship (*SAEWA* para 56; see also discussion under para 2 4 below). It should also be noted that the employer has a responsibility to make sure that there a processes and procedures in place to combat racism in the workplace as the employer could possibly be liable for unfair discrimination or harassment in terms of the EEA (see discussion in 3 below).

2 3 Examples of racism

Examples of racism in the workplace abound. A dismissal was upheld where an employee distributed an email containing anti-Semitic remarks (*Dauth v Brown & Weirs Cash and Carry* [2002] 8 BLLR 837 (CCMA)). In *City of Cape Town v Freddie* [2016] 6 BLLR 568 (LAC) an employee was fairly dismissed due to the unjustified claim that was deemed tantamount to racism which accused a coloured manager of being "worse than Verwoerd" and of victimising him because of his race. In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC) the court upheld a dismissal in the context of a reference to a "kaffer" by a white supervisor whereas in *Oerlikon Electrodes SA v CCMA* [2003] 9 BLLR 900 (LC) a dismissal was upheld where a black worker had called a white colleague a "Dutchman". The courts have held further that accusing somebody falsely of being a racist may constitute grounds for disciplinary action and dismissal (*SACWU v NCP Chlorchem (Pty) Ltd* [2007] 7 BLLR 663 (LC)). A black employee who informed his supervisor that he "hated white people" was dismissed (*NUM v CCMA* 2010 (31) *ILJ* 703 (LC))) and so was an employee who said that "we need to get rid of whites" during a staff meeting (*Modikwa Mining Personnel Services v CCMA* 2013 (34) *ILJ* 373 (LC)).

Teichner states:

> "Words 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, the can injure, and they can exclude" ("The hate speech provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: The good, the bad and the ugly" 2003 *SAJHR* 349).

Rights such as freedom of expression (s 16 of the Constitution) and association (s 18) have also been in the fore in general context, the workplace and race relations. O'Regan J, for example, stated in *SANDU v Minister of Defence* 1999 4 SA 469 (CC) that "[t]he Constitution recognises that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters" (para 7). In *Case v Minister of Safety and Security* 1996 3 SA 617 (CC) the court's sentiments in this regard were as follows:

> "Freedom of expression is one of a 'web of mutually supporting rights' in the Constitution. It is closely related to freedom of religion, belief and opinion (s 15), the right to dignity (s 10), as well as the right to freedom of association (s 18), the right to vote and to stand for public office (s 19) and the right to assembly (s 17). These rights taken together protect the rights of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions" (para 27).

However, freedom of expression is not limitless. In terms of the limitation clause (s 36 of the Constitution) the following factors have to be taken into account: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose (see *S v Makwanyane* 1995 3 SA 391 (CC) in this regard).

In *SARS* the court had to grapple with the use of the term "kaffir" in a workplace and a more assertive insinuation that African people are inherently foolish and incapable of providing any leadership worthy of submitting to. In this case the court stated that in order to give some context and shed light on the correct attitude to adopt in dealing with the term kaffir, it is necessary to flesh out its history, meaning and implications. The court referred to Baderoon "The provenance of the term 'Kafir' in South Africa and the notion of beginning" 1 6–7 (available at https://bit.ly/2LwVA0w) who stated that "kaffir" is "the most notorious word in South African history, known most pointedly for its license of violence towards Blacks during apartheid, but first used and elaborated during the colonial period" (para 3; see also *S v Puluza* 1983 2 PH H150 (E) and *Plunkett v Media 24* [2017] 2 BALR 164 (CCMA) in this regard). Freedom of expression has its limits as only freedom of expression that is free from hate speech and racism is allowed. The court in *SARS* reiterated that the use of the term "kaffir" captures the heartland of racism, its contemptuous disregard and calculated dignity-nullifying effect on others and that "[c]onduct of this kind needs to be visited with a fair and just but very firm response by this and other courts as custodians of our constitutional democracy, if we ever hope to arrest or eliminate racism" (para 56). The court referred with approval to the sentiments articulated by Zondo JP in *Crown Chickens* regarding the seriousness of the misconduct in this type of a case:

> "The attitude of those who refer to, or call, Africans 'kaffirs' is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our 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 proper role and play it with the conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will 'give expression to the legitimate feelings of outrage' and revulsion that reasonable members of our society – black and white – should have when acts of racism are perpetrated" (para 37).

Recently the Constitutional Court in *SAEWA* had to determine whether the use of the words "swart man" was derogatory or racist. An employee (Mr Bester) of Rustenburg Platinum Mine allegedly interrupted a safety meeting and demanded the removal of a car parked next to his. He allegedly pointed a finger at another employee (Mr Sedumedi) and said in a loud voice "verwyder daardie swart man se voertuig", and threatened to take the matter further by approaching management. He was then charged with insubordination for disrupting a safety meeting and was charged with making racial remarks for referring to a fellow employee as a "swart man". He was subsequently suspended and was dismissed after being found guilty on both charges at a disciplinary hearing. The court accepted that the test to determine whether the use of the words is racists is objective: that is, whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory (para 38). In *Sindani v Van der Merwe* [2002] 1 All SA 311 (A) para 11 the court held that

> "[t]he test to be applied is an objective one, namely what meaning 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".

The Constitutional Court stated that the Labour Appeal Court made a fundamental error (like the commissioner) as it failed to identify the correct facts and relied on evidence that had not been placed before it when it applied the test, namely, whether a reasonable, objective and informed person would, on the "*correct facts*", perceive it to be racist or derogatory (*SAEWA* para 47). The court added that the Labour Appeal Court's decision "sanitised the context in which the phrase 'swart man' was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in post-apartheid South Africa" (para 48). The court added that not only was "'swart man' as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise". The test was not whether they were correct in the context of the statement to have understood it as being racist; "the test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase has a racist meaning" (paras 49–50). In *Lebowa Platinum Mines Ltd v Hill* 1998 (19) *ILJ* 1112 (LAC) the Labour Appeal Court stated that dismissal is justified in the instance when an employee calls another employee a "bobbejaan" as it had a racist connotation. Kroon JA stated that the use of racist remarks or conduct in the workplace should be considered in light of the highly-charged racial or political atmosphere inherent in certain workplaces and that the use of racist remarks in such workplaces may have the effect of destroying working relationships and being disruptive of the employer's business (para 12; see also *Mangope v Asmal* 1997 4 SA 277 (T), *Strydom v Chiloane* 2008 2 SA 247 (T), *South African Pelagic Fisherman's Union obo AF Mouton v Lucky Star Operations (A Division of Lucky Star Ltd)* [2017] 3 BALR 332 (CCMA) in this regard).

2 4 Sanctions against racism

In terms of section 188 of the Labour Relations Act 66 of 1995 ("LRA") an employer may dismiss an employee for a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements. The dismissal must also be effected in accordance with a fair procedure. The use of racial epithets should lead to dismissal of employees who are found guilty of such misconduct (*Crown Chickens* and *City of Cape Town v Freddie* [2016] 6 BLLR 568 (LAC)). It has been stated that it is in order for the employer to satisfy the onus of proof that the sanction of dismissal was fair, it is incumbent on it to lead evidence to establish a breakdown in the trust relationship (*Edcon Ltd v Pillemer NO (Reddy)* [2010] 1 BLLR 1 (SCA) para 5). It is not necessary to lead evidence relating to the effect of misconduct on the trust relationship where the gravity of the misconduct speaks for itself. It is only required to lead such evidence in cases where conduct is less serious (*Woolworths (Pty) Ltd v Mabija* [2016] 5 BLLR 454 (LAC); see also Smit "How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct" 2011 *De Jure* 49–73).

An employee may also be dismissed where the intention is mischievous to provoke strong reaction. In this instance the employee wrote an extract of a

speech attributed to former State President PW Botha on a blackboard in the staff canteen which read as follows:

> "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" (*Numsa obo Motha v Stack Door Cooperation (Pty) Ltd* [2008] 2 BALR 128 (MEIBC)).

In *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC) the Constitutional Court listed a number of factors that a commissioner must consider when deciding on the fairness of a dismissal. The court emphasised that the factors do not represent a closed list and that the weight to be attached to each factor would differ from case to case. The factors are: (i) the importance of the rule that was breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee's challenge to the 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 (para 78). In *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration* (2000) (21) *ILJ* 1051 (LAC) the court held that

> "[a]n employee who has long and faithfully served his employer has shown that he has little propensity for offending. That historical experience may persuade an employer to accept the risk of continuing to employ him now that it is known that he is not as honest as had been thought. Depending on the circumstances, long service may be a weighty consideration. But the risk factor is paramount. If, despite the *prima facie* impression of reliability arising from long service, it appears that in all circumstances, particularly the required degree of trust and the employee's lack of commitment to reform, continued employment of the offender will be operationally too risky, he will be dismissed" (para 17).

The courts have made it clear that racism cannot be tolerated and confirmed that employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues (*SAEWA* para 56; *Erasmus v BB Bread Ltd* 1987 (8) *ILJ* 737 (IC)). Where an employee demonstrates lack of remorse for his actions and persists with a defence of complete denial and fails to recognise that he had behaved badly this count against him as an acknowledgement of wrongdoing would have gone a long way in evidencing the possibility of rehabilitation. This will include an assurance that the employee will not repeat similar misconduct in future (see *SAEWA* paras 59–60). It would be difficult for an employer to re-employ an employee who has shown no remorse as an acknowledgment of wrongdoing would be a first step towards rehabilitation. An employee cannot hope to re-establish the trust which he has broken in the absence of a recommitment to the employer's workplace values (*De Beers Consolidated Mines* para 17). The court in *Sidumo* stated that "[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal" (para 117), and when an employee is dishonest in denying making a racist or derogatory statement it weighs heavily against him when considering a sanction (*SAEWA* para 61). In this context it should be noted that the fact that an employee who is guilty of racist conduct apologised, admitted wrongdoing and demonstrated a willingness "to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity" may be a relevant factor in determining whether dismissal was an appropriate sanction (*SARS* para 45).

It should further be noted that an employer may dismiss an employee even when an employee makes racist expletives on social media. The fact that it was not made in the workplace is immaterial because anyone, including black employees of the employer, may access the social media page and therefore such an employer has a right and duty to take strong action for racist expletives as failure to do so may have a potential to cause disharmony in the workplace (*Gordon v National Oilwell Varco* [2017] 9 BALR 935 (MEIBC) paras 56–58).

3 Possible liability of an employer in terms of section 60 of the EEA

Section 60(1) of the EEA provides that when an employee contravenes a provision of the EEA or engages in any conduct that, if engaged in by his or her employer would constitute such a contravention, the conduct must immediately be brought to the attention of the employer (see *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC)). An employer must further consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA (s 60(2) of the EEA). This will include implementing measures to prevent recurrence of the discrimination and instituting disciplinary proceedings against the perpetrator (Du Toit *et al Labour relations law: A comprehensive guide* (2015) 713). Where an employer fails to take the necessary steps and if it is proved that the employee has indeed contravened the provision concerned, the employer must be deemed also to have contravened that provision (s 60(3)). An employer will avoid liability for the conduct of the employee if it is "able to prove that it did all that was *reasonably practicable* to ensure that the employee would not act in contravention" of the Act (s 60(4); emphasis added). Du Toit *et al* 713 point out that reasonably practicable is borrowed from health and safety legislation and "involves balancing the severity of the hazard or risk, the state of knowledge, the suitability of means to remove the risk and the cost of doing so". An employer may escape liability for the conduct of its employees if it can prove that reasonable steps were taken to ensure that an employee would not contravene the EEA in a particular instance, which will include racial discrimination or racism (Van Niekerk and Smit 156).

It has been held that an employer discriminated against an applicant employee by failing to take necessary steps to protect him against racism in the workplace where a white employee had refused to have her workstation close to that of black co-employees. An employer's failure to take proper steps to prevent the perpetration of racism at the workplace by certain of its employees constitutes direct and unfair discrimination against the victim. The courts have ordered such an employer to pay compensation to the victim of the incident of racism (*SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd* [2006] 8 BLLR 737 (LC) para 45). Du Toit *et al* 714 point out that although section 60 is "often described as creating a form of vicarious liability". It has been suggested that it in fact establishes direct liability of the employer based on its failure to take the required steps and thus in context of unfair discrimination non-compliance will expose it to direct liability for a violation of section 6(1) perpetrated by its employee (*ibid*; Botha and Millard "The past, present and future of vicarious liability in South Africa" 2012 *De Jure* 225–253). It appears that the wording of section 60 of the EEA does not compel a restrictive meaning and only applies where discrimination is perpetrated by an employee against an employee of the same employer (Du Toit *et al* 714; see also *Ntsabo v Real Security CC* 2003 (24) *ILJ* 2341 (LC) for liability of an employer for failure to comply with the requirements of s 60 of the EEA).

4 Concluding remarks

South Africa is a country in transition and is facing on-going challenges with regard to ways in which to generate and maintain processes that restore dignity and create political and economic equality and promote a culture of human rights (sometimes in racially-charged environments). Responsible employers are not only tasked with creating organisations that advocate and practice social justice, but also with introducing behavioural policies in terms of which the offence of racial abuse could attract a sanction of dismissal, even for a first offence due to the seriousness of the misconduct (*SAEWA* para 57; *Lebowa Platinum Mines*). Employers must address instances of racial harassment and racial discrimination which must be viewed in a serious light as racist behaviour goes against not only values of dignity and equality, but is intended to humiliate and offend the target. A zero-tolerance approach should thus be adopted when dealing with racism in the workplace. No Code of Good Practice is currently in place (like in sexual harassment cases) which provides for racism in the workplace (Thabane and Rycroft "Racism in the workplace" 2008 (29) *ILJ* 43). It is time to address the seriousness of such behaviour in the workplace and the fact that it should not be allowed. A Code of Good Practice can assist in creating workplaces where racism will not be tolerated and assist in eradicating the heritage of apartheid in post-apartheid South Africa (*Crown Chickens;* Du Toit *et al* 703). All employers, therefore, should not only update their disciplinary codes and grievance procedures but also their social media policies in order to make it clear that racism would be dealt with the harshest sanctions that can possibly be imposed. In this context, it should be emphasised that employers and employees should embrace principles of dignity, equality, justice and non-racialism to remove the shackles created by apartheid which divided not only workplaces on the basis of race but a society where some (still today) opt to embrace conduct that reinforces elements of a pre-apartheid South Africa.

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