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EMPLOYMENT

Is the reference of “swart man” to a fellow employee racist and derogatory? If so, is a dismissal an appropriate sanction?

12 June 2018 *6 min read*

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ISSUE

Whether referring to a fellow employee as a “swart man” (black man), within a specific context, is racist and derogatory. If it is found to be racist and derogatory, whether the dismissal imposed by the employer was an appropriate sanction.

SUMMARY

The correct test in determining whether the phrase “swart man” is racist and derogatory is whether a reasonable, objective and informed person would, on the correct facts perceive “swart man” to be racist and derogatory. The Constitutional Court held that in light of the totality of the circumstances, as well as the institutional racism entrenched in South Africa, the phrase was racist and derogatory. The Constitutional Court held further that the dismissal was an appropriate sanction, given the lack of remorse.

COURT’S DECISION

In the case of *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13, the Constitutional Court (“CC”) had to determine whether referring to a co-employee as a “swart man” (black man) in the specific context, was racist and derogatory, and if so, whether a dismissal was an appropriate sanction. In *Rustenburg*, the applicant and employer in the matter, provided specified parking bays to certain employees. Mr Bester, who was represented by the first respondent in this matter, the South African Equity Workers Association (SAEWA), was allocated a parking bay. Mr Tlhomelang, an employee of a subcontractor at the employer, was allocated the adjacent parking bay. On the employer’s version, Mr Bester stormed into a meeting, pointed his finger at Mr Sedumedi and said, in a loud and aggressive manner that Mr Sedumedi must “verwyder daardie swart man se voertuig”. Mr Bester denied the employer’s version, and submitted that there was no meeting in progress, and that he had not uttered the aforementioned remark. The employer suspended Mr Bester pending the outcome of a formal disciplinary enquiry. The employer charged Mr Bester with two acts of misconduct, related to insubordination for disrupting a safety meeting, and for making racial remarks by referring to a fellow employee as a “swart man”.

At the disciplinary enquiry, the chairperson found Mr Bester guilty on both charges and recommended that Mr Bester be dismissed. The employer accordingly dismissed Mr Bester. Mr Bester then referred an alleged unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (“CCMA”), where the dispute was not resolved through conciliation and was referred to arbitration. The Commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair, as the Commissioner did not see how a phrase that referred to a physical attribute in order to identify a person could be classified as a racial remark. The Commissioner ordered that the employer reinstate Mr Bester and awarded him back pay.

The employer then made an application in the Labour Court (“LC”) to review and set aside the Commissioner’s award. The LC found that the evidence related to Mr Bester storming into the meeting and uttering “swart man” was correct. The LC held that the Commissioner’s failure to properly resolve the material dispute of fact resulted in factual findings that are entirely arbitrary. The LC found that there was no reason

why race might justifiably have served as an identifier. In considering whether Mr Bester's dismissal was an appropriate sanction the LC had regard to a memorandum circulated by the employer to all employees, wherein it was stipulated that abusive and derogatory language would not be tolerated at the workplace. The LC concluded that Mr Bester had committed an act of serious misconduct that warranted his dismissal, and thus the award stood to be reviewed and set aside.

Mr Bester then applied for leave to appeal at the Labour Appeal Court ("LAC"). The LAC noted that the test to determine whether the use of the words "swart man" was derogatory or abusive, and in contravention of the employer's disciplinary code, was an objective one. The LAC reasoned that, in order to determine whether the words are derogatory, the use of the words must be looked at in the context in which they were uttered. The LAC concluded that an inference could be drawn that Mr Bester uttered the words in the context, to describe Mr Tlhomelang, whose name he did not know. The LAC thus held that the LC erred in reviewing and setting aside the award of the Commissioner, and confirmed that the dismissal of Mr Bester was both substantively and procedurally unfair. The LAC did however note that a racist remark made in the workplace is a serious offence which warrants dismissal.

In the CC, the CC noted that Mr Bester's defence was never that he used the words "swart man" as a descriptor or that he did not mean to demean any person. Instead, Mr Bester denied using the words. The CC held that in applying the test, namely, whether a reasonable, objective and informed person would, on the correct facts perceive it to be racist or derogatory, the LAC, like the commissioner, made an error, as it failed to identify the facts and relied on evidence that had not been placed before it. The CC held further that the LAC's starting point that phrases are presumptively neutral ignores the impact of the legacy of apartheid. The CC held further that the LAC applied a test that was too strict, in that 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 had a racist meaning. The CC held that only Mr Bester could have given evidence that he uttered the words with no racist intent, but he failed to do so. The CC then went on to assess whether a dismissal was an appropriate sanction. The CC concluded that the dismissal of Mr Bester was an appropriate sanction, on the basis that Mr Bester lacked remorse, failed to apologise, attacked witnesses, and continuously denied uttering the racist words.

IMPORTANCE OF THIS CASE

The *Rustenburg* case highlights the seriousness of racism in the workplace. Both the LAC and the CC have held that racism in the workplace warrants a dismissal. The case provides a novel test when determining whether neutral statements are derogatory or racist, in light of the entirety of the circumstances and South Africa's entrenched institutional racism. The case further establishes that a Commissioner of the CCMA must base his decision on the evidence before him, rather than creating a defence that was not raised by a party.



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