

EMPLOYMENT

Red Carded For Playing The Race Card

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The issue of race and racial discrimination is well-recognised in South Africa as a problem area for the various interactions, which take place societally on a daily basis. In the context of employment, there is by now little doubt that any conduct in the workplace that demonstrates racism, or discrimination on the basis of race, is a material factor in leading to the breakdown of the employment relationship. Taking into account the historical injustices perpetrated in South African society, adopting a zero tolerance approach to racism is recognised as not only fair, but a requirement for transitioning to a more egalitarian society. Any employee who uses racial epithets in the workplace is well deserving of being dismissed. However, since the race issue is so sensitive, it is less well-known that being accused of being racist, when this is not true, is equally deserving of sanction. Taking into account the damage that can be done to a person's reputation, particularly given the ease of publication by means of social media platforms, and the inevitable public ire that results from being accused of racism, our courts have started to develop a line of jurisprudence, which deals with false allegations of racism, and the consequences of making such a false allegation, for the person who spreads this falsehood.

In the recent case of *Legal Aid SA v Mayisela & others (2019) 40 ILJ 1526 (LAC)*, in which judgement was handed down on February 2019 and released in July 2019, the court had to deal with a situation in which Mayisela had alleged that his supervisor had exhibited racist conduct, by having given him a negative performance rating. Although the Labour Court originally found that any employee is entitled to bring an allegation of racist conduct, and that it then becomes the duty of the employer to investigate these allegations. The mere accusation could not, the Labour Court found, amount to misconduct. On appeal however, the Labour Appeal Court agreed with the Labour Court's position, but held that when it was demonstrated to the employer that the allegations were in fact false, Mayisela was guilty of misconduct.

The Labour Appeal Court found that an employee's subjective feelings of being subjected to racist conduct are not sufficient to warrant making a claim of racism; instead, there must be "persuasive objective information leading to a compelling and legitimate inference" that racism has taken place. Especially taking into account the fact that Mayisela's allegations were levelled against his superior, the Labour Appeal Court found that:

"Unfounded allegations of racism against a superior by a subordinate subjected to disciplinary action or performance assessment, referred to colloquially as 'playing the race card', can illegitimately undermine the authority of the superior and damage harmonious relations in the workplace. Moreover, false accusations of racism are demeaning, insulting and an attack on dignity, more so when the person attacked, by reason of a previously disadvantaged background, probably has suffered personally the pernicious effects of institutional and systemic racism."

This case brings a much needed balance to the race issue in the workplace; as much as employees must be protected from racism, it is equally unacceptable for allegations of racism to be levelled against innocent parties. Playing the race card in this case, can lead to dismissal.



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