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Struggle songs in the workplace

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ISSUE

Is the singing of struggle songs in the workplace racist and if so, does it justify the dismissal of an employee?

SUMMARY

The singing of struggle songs in the workplace, depending on the meaning of the words and the context in which it is sung, may not constitute racism. It may, instead, constitute inappropriate behaviour, the conduct of which may be subject to a disciplinary hearing. In the event that the singing of struggle songs in the workplace constitutes racism, it does not automatically follow that an employee may be dismissed.

COURT'S DECISION

In *Duncanmec (Pty) Limited v Gaylard N.O and Others* [2018] ZACC 29, the Constitutional Court was tasked with assessing the reasonableness of an award issued by an arbitrator related to the dismissal of nine employees by Duncanmec ("the employer") who were found guilty of racially offensive misconduct. The employees were members of the National Union of Metal Workers of South Africa (NUMSA).

On 30 April 2013, the employees participated in an unprotected strike at the employer's premises, during which they danced and sang struggle songs. The lyrics they sang in isiZulu were translated as "Climb on top of the roof and tell them that my mother is rejoicing when we hit the boer".

The employees refused to end the strike and resume work. The employees were charged for two acts of misconduct, the first being their participation in an unprotected strike and the second for singing racial songs in an offensive manner.

A disciplinary hearing was held in May 2013, where the chairperson concluded that the employees were guilty of both charges. In considering the penalty of the first charge, the chairperson held that the employees should be issued with a final written warning rather than being dismissed, as the same sanction was imposed on the other workers who participated in the strike. In relation to the second charge, the chairperson held that the singing of the song and the dancing amounted to racism. The chairperson held that the employees' racist misconduct affected the relationship between all the employees at the workplace and thus recommended that the employees be summarily dismissed.

The employees and NUMSA challenged the chairperson's decision in the Bargaining Council. An arbitration hearing was held in May 2014. The arbitrator concluded that although the singing of the song was inappropriate, it did not constitute racism. The arbitrator reasoned that a distinction must be drawn between singing this song and referring to someone with a racist term. Further, the arbitrator noted that the song is a struggle song, with a historical significance in South Africa. The arbitrator disagreed with the chairperson and employer's view regarding the breakdown of the relationship between the employer and its employees and found that the employees' conduct was not violent and that the strike was peaceful and short-lived. The

arbitrator found the employees' dismissal to be substantively unfair and ordered that the employees be reinstated with compensation of three months remuneration.

The employer brought a review application, requesting that the arbitrator's decision be set aside by the Labour Court. The employer argued that the arbitrator did not properly, rationally and justifiably apply her mind to the facts, law, and evidence before her. NUMSA argued that the singing of the lyrics did not constitute hate speech or incitement to commit violence on white people, as the song was an old struggle song which was sung by workers during apartheid. Further, NUMSA submitted that the singing of struggle songs during a strike encourages other workers to unite against the authority of the employer.

The Labour Court held that in the context of a strike, the singing of struggle songs is a common practice, and it cannot thus be said that the arbitrator's award was so unreasonable that no arbitrator could have made it. The Labour Court confirmed the arbitrator's distinction between other racist cases and the current scenario. Further, the Labour Court took note of the peaceful nature of the strike and confirmed the arbitrator's submission that the singing of the song did not compromise the relationship between the employer and the employees. The Labour Court dismissed the employer's application and made the arbitrator's award an order of court.

The employer brought an application for leave to appeal. The application was rejected by the Labour Court and later the Labour Appeal Court. The employer then sought leave to appeal from the Constitutional Court.

The Constitutional Court was tasked with assessing whether the conduct of the employees in singing the struggle song constituted racism and whether the arbitrator's award was unreasonable. In respect of the question of racism, the Constitutional Court held that the word to which the employer objected to, namely "boer", is not an offensive racist term, as, depending on the context, the term may mean farmer or a white person. The Constitutional Court held that none of these meanings are racially offensive. The employer argued, however, that it was the context in which the word was uttered which rendered the singing a racist act.

The Constitutional Court noted that the arbitrator held that the song was inappropriate and not that the song contained racist words. The arbitrator's findings was accepted by the employer in their affidavit filed in the Labour Court. Further, NUMSA did not contest the finding that the singing of the song at the workplace was inappropriate and offensive. The Constitutional Court thus approached the matter on the basis that the employees were guilty of a racially offensive conduct, and assessed whether the arbitrator's award was unreasonable.

In support of the submission that the arbitrator's award was unreasonable, the employer argued that the arbitrator failed to consider the breakdown of the trust relationship, the existence of dishonesty, the possibility of progressive discipline, the existence of remorse, the job function, and the employer's disciplinary code and procedure. The Constitutional Court held that the arbitrator gave due regard to all of these factors and some of the factors, including dishonesty and a failure to account for the employer's disciplinary code and procedure, had no bearing on whether the employees' dismissal was fair.

The Constitutional Court found that even if the singing of the song amounted to uttering racist words, the dismissal of the employees could not simply follow as a matter of course, as there is no principle in our law that necessitates a dismissal to automatically follow in the case of racism. The employer, after realising no such principle in our law exists, urged the Constitutional Court to establish such a rule in order to eliminate racism in the workplace. The Constitutional Court found it unnecessary to establish such a rule. The Constitutional Court concluded that that the arbitrator's award was not unreasonable in the circumstances.

IMPORTANCE OF THIS CASE

An employer should take note that an employee's act of racism does not automatically justify his or her dismissal. The employee's conduct must be assessed in light of the totality of the circumstances.

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