

**NO TOLERANCE FOR RACISM IN OUR CONSTITUTIONAL DEMOCRACY: *SOUTH AFRICAN REVENUE SERVICE V COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION AND TWO OTHERS***

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In a unanimous judgment delivered by the Chief Justice Mogoeng, the Constitutional Court reinforced the founding values of our Constitution, which is built on human dignity and the achievement of a non-racial South Africa. This judgment sends a clear message to all employers and employees that racism will not and cannot be condoned in the workplace.

The matter was heard on appeal from the Labour Appeal Court (LAC) and concerned the dismissal of a South African Revenue Service (SARS) employee in 2007 after a dispute where he referred to his senior colleague as a “k\*\*\*\*r” and stated that “a k\*\*\*\*r must not tell me what to do”. In terms of a collective agreement between SARS and the unions, SARS conducted a disciplinary hearing and the employee pleaded guilty to the use of abusive and derogatory language towards his senior. The sanction imposed by the independent Chairperson, which was agreed to by all parties at the disciplinary hearing, was a final written warning valid for six months, as well as suspension without pay for 10 days. The employee was also directed to undergo counselling. The SARS Commissioner (the Commissioner) unilaterally changed the final written warning to a dismissal, without affording the employee the opportunity to make representations and effectively going against a sanction approved by the SARS representative who attended the disciplinary hearing. The aggrieved employee referred the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) on the ground of unfair dismissal.

The ground for unfair dismissal was primarily based on the question of whether the Commissioner was restricted in terms of the collective agreement to unilaterally amend the sanction to dismissal of the employee. The employee argued that he was not afforded the opportunity to make any representations in this regard, rendering the procedure substantively and procedurally unfair but also that the Commissioner waived his common-law power to reverse the sanction. The Arbitrator at the CCMA agreed that the Commissioner waived his common-law power to reverse the sanction in terms of the collective agreement and awarded a reinstatement of the employee on the conditions set out in the earlier sanction. SARS then appealed to the Labour Court and subsequently to the LAC on the basis that the Arbitrator’s finding that the collective agreement prohibited the Commissioner to amend the Chairperson’s sanction was flawed and that SARS’s disciplinary code allowed the amendment of the sanction. The appeal failed.

On appeal to the Constitutional Court, an interesting point the Court had to consider was whether it could hear this matter on appeal despite SARS indicating clearly that it had no intention to appeal the matter initially. The Court was faced with the question of whether broader policy considerations override ‘peremption’, i.e. conduct which unequivocally indicates the waiver of one’s constitutional right to appeal. The Court found that despite

SARS's initial conduct the "choice would not advance the interest of justice" and that the appeal should be heard.

Only the reasonableness of the reinstatement part of the award in terms of sections 193(1) and (2) of the *Labour Relations Act* (the Act) was under review. The SARS case rested on the contention that as the employee was found guilty of racism, his continued employment at SARS would be intolerable and therefore the Arbitrator should never have considered reinstatement as a remedy in terms of section 193(2)(b) of the Act. In its answering affidavit, the employee stated that SARS failed to show that his conduct destroyed the "trust relationship" between an employer and employee which was found by the Constitutional Court to be at odds with the evidence before the Arbitrator. SARS stated the nature of the offence strikes at the "heart of the employment relationship" and since SARS is an Organ of State it is also bound to eliminate racial conduct in the workplace.

The Chief Justice carefully analysed the historical nature of the use of the word "k\*\*\*\*r" and the deep hurt the word holds for black South Africans and stated that " ...the word k\*\*\*\*r was meant to visit the worst kind of verbal abuse, on another person". The use of the word "k\*\*\*\*r" falls squarely within the meaning of hate speech in terms of section 10 of the *Promotion of Equality and Prevention of Unfair Discrimination Act of 2009* (PEPUIDA). The Chief Justice expressed his concern that the word is still used after so many years into our new democratic society and he stated that more needs to be done by all South Africans to eradicate racism. There is also a specific duty on judicial officers to consider racial litigation objectively and to set all personal sentiments aside and uphold our constitutional democracy.

Serious criticism was levelled against the Arbitrator for not carefully considering whether in the circumstances this would have been a situation that would precluded the remedy of reinstatement of the employee. The Chief Justice found that the seriousness of the misconduct and the fact that no remorse was shown by the employee, coupled with the effect his words would have on all his African co-employees at SARS, does not justify reinstatement of the employee. However, the Chief Justice was very clear that this judgment should not be interpreted to mean that the use of such offensive language would automatically mean that reinstatement of such employee would always be precluded but much more evidence will need to be given showing that the relationship of trust can be restored.

The Chief Justice also considered whether compensation had to be awarded by SARS for the unfair dismissal and whether the compensation awarded is 'just and equitable' as required in terms of section 194(1) of the Act. SARS had offered to pay compensation for six months. The Court found the fact that dismissal has a serious consequence on the livelihood of the employee: the fact that SARS made various procedural errors, despite having access to legal advice, which caused financial burden on the employee in defending the litigation, had to be weighed up against the seriousness of the violation of human dignity in order to decide on the justification of compensation in this regard. It is significant that the Court found that

compensation would be appropriate in the circumstances but that the employee's serious misconduct and especially his conduct afterwards would in the Court's view not justify compensation to the extent that SARS offered to pay and was considered by the Court to be very generous. In conclusion, the Court set aside the LAC and Labour Court judgments in regard to the reinstatement of the employee and made SARS's offer for compensation for six months an order of the Court.

This judgment is a serious warning to all South Africans to take active steps to eradicate racism, which can never be justified in our new constitutional democracy. It also highlights the seriousness of racism in the workplace and the extent to which employers and employees need to ensure that they comply with upholding the constitutional values of a non-racial society. The matter also brings to light the question of whether enough is done in the workplace to properly ensure that racism is eliminated. This judgment further sets an unwavering precedent on judicial officers to uphold the foundational values of our Constitution when considering racial discrimination litigation.