

## **RUSTENBURG PLATINUM MINE V SOUTH AFRICAN EQUITY WORKERS ASSOCIATION OBO MEYER BESTER AND OTHERS**

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In May 2013, Rustenburg Platinum Mine (the mine) dismissed an employee, Mr Bester, on grounds of insubordination and the making of racial remarks. Briefly, the facts of the case are that, after a parking issue he tried to raise was ignored, Mr Bester interrupted a meeting where he referred to the owner of the vehicle concerned, as a “*swart man*” (black man), and in so-doing, contravened a workplace rule that prohibited the use of abusive and derogatory language at the mine. Bester was later charged with insubordination for interrupting the meeting, and with making racial remarks against a fellow employee. Following suspension and a disciplinary hearing, Bester was dismissed.

He approached the Commission for Conciliation, Mediation and Arbitration (CCMA) on the grounds of an allegedly unfair dismissal because he claimed he had not uttered the words. The CCMA held that the use of the term was racially innocuous because it had been used to identify someone whom he did not know by name. The CCMA held that ‘*swart man*’ had been used to describe a physical attribute and therefore, the dismissal was both procedurally and substantively unfair.

The mine appealed to the Labour Court, which drew attention to evidence from witnesses from the arbitration. The witnesses stated that they heard Bester use the words to describe Mr Tlhomelang and point aggressively at one of the other occupants of the room. The Labour Court applied a subjective test to the question of whether the words were racist and derogatory. It found that the CCMA had come to a conclusion that no reasonable law-maker could have reached, based on the context in which the words had been uttered. It further found the words to be racist and derogatory, worthy of a serious misconduct charge and dismissal, the appropriate sanction.

The South African Equity Workers Association (SAEWA) appealed the matter to the Labour Appeal Court (LAC), which found that the Labour Court had erred in applying a subjective test to determine whether ‘*swart man*’ was racist or derogatory. The LAC found the correct test to be an objective one, which considers the context of the utterances. Further, a reasonable court must be satisfied that the only reasonable inference from the utterances was that they were racist and derogatory, as well as that they were said with the intention to demean their target. The LAC said that ‘*swart man*’ could have been used to merely describe the driver of the vehicle whose name Bester did not know and found the dismissal substantively and procedurally unfair.

Before the Constitutional Court (the Court), the questions asked were whether referring to a fellow employee as a ‘*swart man*’ in the context of the case was racist and derogatory, whether the CCMA unreasonably found the term racially innocuous, and finally, should the term be racial and derogatory, whether dismissal was the appropriate sanction. The correct



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test was identified as being ‘whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory’.

The Court noted that Bester himself had not relied on the defence that ‘*swart man*’ had not been used in a derogatory or racist manner. He had in fact denied having used the words altogether. The CCMA Commissioner had relied upon this reasoning for his award solely because he himself had posited it. Therefore, the LAC’s reliance on this reasoning was unjustifiable and unreasonable.

Further, the Court found the Labour Court’s ruling that the words were neutral failed to recognise the legacy and impact of apartheid and racial segregation on South Africa’s racially-charged present. Attributing neutrality to the words creates a danger that the dominant and racial past’s view of what was normal and acceptable, could skew an objective enquiry today. The Court emphasised that one cannot ignore the past and institutionally entrenched racism in cases such as this. The LAC, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used were indeed derogatory. Both the LAC and the CCMA did not approach the matter in an unbiased manner. They did not consider ‘totality of circumstances’ in making their rulings. The Court found the utterances to be both racially charged and derogatory, but unreasonable of the LAC and CCMA to conclude otherwise.

Finally, the Court found that because Mr Bester had not shown any remorse and denied the allegations, even in the face of four witnesses, in addition to the failure to make any attempt to apologise to Mr Tlhomelang or demonstrate willingness to correct his conduct, the dismissal was indeed the appropriate sanction.

This judgment is important as before it, the Constitutional Court had not been faced with a matter concerning apparently neutral race descriptors, which are racially abusive or insulting. It speaks to the manner in which many statements are made with what, on the face of it, seems a racially-innocuous sentiment. Often, these apparently neutral descriptions, when one considers South Africa’s past and the use of such descriptors to impair the dignity of others, continue to do so today. By enunciating the above test, the Court reiterated the significance of ensuring the protection and promotion of non-racialism, human dignity and equality in society, as obliged by the Constitution.