

How just one derogatory word can get you fired...

 By Jonathan Goldberg

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Using derogatory language is an issue that has been in the public domain quite frequently. The Constitutional Court (CC) has confirmed that this type of conduct is completely unacceptable. In *Rustenburg Platinum Mine v Saewa Obo Meyer Bester & Others* (CC), a senior training officer was dismissed for insubordination, for making derogatory remarks and using the words "swart man" when addressing an issue.



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In this case, the senior training officer (employee A) complained of another employee's (employee B) vehicle causing challenges in the parking area. The employer's evidence was that the employee A had stormed into a management meeting and whilst raising his voice, said "*verwyder daardie swart man se voertuig*".

Employee A disputed that it was a meeting that he interrupted or that he uttered those words. He was dismissed and referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) where the Commissioner held that Employee A's dismissal was substantively and procedurally unfair.

The Commissioner awarded retrospective reinstatement and compensation. The Commissioner found that, on a balance of probabilities, the employee had used the term "*swart man*" to describe someone he had never met but that he did not find this to be a racist remark.

The employer took the matter on review to the Labour Court. The LC found that the Commissioner disregarded the evidence of other witnesses as being consistent with the safety officer's version that a meeting had taken place and the remark was made.

The LC further took note of evidence which showed that a memorandum was issued in the workplace that stipulated abusive or derogatory language would not be tolerated. The LC therefore found that the dismissal was fair in the circumstances as the employee had committed serious misconduct. The award was therefore reviewed and set aside.

On appeal, the Labour Appeal Court (LAC) had to determine whether the use of the words "*swart man*" was derogatory and whether, objectively, it was a breach of the employer's rules. The LAC found that the use of the words in the context could not be said to be intended to be a racist remark. The LAC found that Commissioner's award was reasonable and that the dismissal was unfair. The matter was referred to the CC on appeal.

The CC noted that the LAC held that the words uttered ("*swart man*") must be looked at in the context in which these were used. The Court considered the evidence of all the witnesses. It was noted that the employee had denied making the statement and did not rely on the defence that there was no intention for the remarks to be racist.

The Commissioner had accepted the employee's evidence. The Court held that the LAC had misdirected itself in finding in favour of the employee in respect of an articulated defence that was not supported by the evidence.

The Court noted that the LAC failed to recognise the impact of apartheid and racial segregation that has left society with a racially charged state of affairs. The test was whether objectively the words were capable of bearing a meaning that was deemed to be a racial remark.

The CC noted the fact that the employee was dishonest in denying that he made the statement as all the other witnesses were consistent in their version. The Court held that the employee had not separated himself from the apartheid past and that an acknowledgement of wrongdoing by the employee would have gone a long way in rehabilitation. The Court therefore found that the dismissal was appropriate in the circumstances. The appeal was dismissed and there was no order as to costs.

It seems now clear, from the highest court in the land, that these types of remarks are derogatory and racist and warrant dismissal.

ABOUT JONATHAN GOLDBERG

Jonathan Goldberg is a leading voice in space Labour Law and Employee Relations. As the joint-CEO of Global Business Solutions, Jonathan has made the company into the foremost labour law, human resources and industrial relations consultancy.

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