REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2219/14

In the matter between:

Juda Phonyogo DAGANE **Applicant**

and

SSSBC **First Respondent**

COMMISSIONER JOYCE NKOPANE **Second Respondent**

MINISTER OF POLICE **Third Respondent**

Heard: **14 March 2018**

Delivered: **16 March 2018**

Summary: Racist remarks by member of SAPS on Facebook. Employee dismissed. Dismissal ruled to be fair by arbitrator. Application to review arbitration award dismissed with costs.

JUDGMENT

STEENKAMP J

Introduction

[1] A police officer made vitriolic racist comments on the Facebook page of the leader of the Economic Freedom Fighters (EFF), Mr Julius Sello Malema.[1] The South African Police Services (SAPS) dismissed the member, Warrant Officer Juda Phonyogo Dagane. He was unhappy and referred an unfair dismissal dispute to the Safety and Security Sectoral Bargaining Council (SSSBC). A panellist, Ms Joyce Nkopane, found that the dismissal was fair: Amongst Mr Dagane's comments were the following:

> "Fuck this white racist shit! We must introduce Black apartheid. Whites have no ROOM in our heart and mind. Viva MALEMA."
>
> "When the Black Messiah (NM) dies, we'll teach whites some lesson. We'll commit a genocide on them. I hate whites."

[2] Mr Dagane was legally represented at the arbitration by attorneys (Manugeni Incorporated) and by counsel (Adv Matimbi). Despite that, he seeks to have the arbitration award reviewed and set aside on the grounds that the arbitrator's conclusion is not one that a reasonable decision maker could have reached (i.e. the *Sidumo*[2] test). He was initially represented in the review application by Manugeni Inc and then by Sisa Nhlabati attorneys; but when the review application was argued, he appeared in person.

Background facts

[3] The facts are fairly straightforward. The vitriolic and racist comments quoted above were posted on Mr Malema's Facebook page, on the face of it, by Mr Dagane. Alarmingly, Malema did nothing about it. (There was no dispute in the arbitration or in the review application that the relevant Facebook page was that of Mr Julius Sello Malema, then ANCYL president and current EFF leader, and not a fake account or that of someone else bearing the same name).

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[1] At the time the comments were made on his Facebook page, Mr Malema was still the president of the African National Congress Youth League (ANCYL).

[2] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

[4] A reporter of *Beeld* newspaper, Ms Hilda Fourie, picked up the comments and the newspaper published an article titled “Ek haat wittes, sê polisielid op Facebook”. The then Divisional Commissioner of SAPS, Lieutenant General Khomotso Phahlane, received a complaint from the Parliamentary Portfolio Committee. He discussed it with Brigadier John Lambert who investigated the complaint and also appointed a departmental investigator, Lt Col Mngadi, to investigate it further.

[5] Brigadier Lambert initially did his own investigation. He was unable to directly access the applicant’s Facebook account as Dagane had restricted any access to it. Lambert however accessed the internet using the Google search engine and found extensive articles and information pertaining to the applicant’s comments on Facebook, including a copy of Dagane’s post on Malema’s Facebook page.

[6] Following the investigation SAPS instituted disciplinary charges against the applicant. He was charged with four counts of misconduct comprising him prejudicing the discipline and efficiency of the SAPS and contravening the SAPS Regulations, Code of Conduct and Code of ethics by unfairly and openly discriminating against others (whites) on the basis of race; through blatantly discriminatory racial remarks; by threatening the future safety and security of white persons; and by making uncalled for remarks on Facebook which amounted to hate speech .

[7] An internal disciplinary enquiry was conducted and the chairperson found that Dagane had committed the misconduct. SAPS dismissed him. Following an unsuccessful appeal, he referred a dispute to the SSSBC where he challenged his dismissal. This resulted in the arbitration award he now seeks to have reviewed and set aside.

Evaluation / Analysis

[8] Before I deal with the merits of the review application, Ms *Tilly* raised four points *in limine.*

Points in limine

[9] After SAPS had raised the preliminary points in its answering affidavit, Dagane filed an application for condonation for his non-compliance with clauses 11.2.2 and 11.2.3 of the Practice Manual of this Court.[3]

[10] In terms of these provisions, an applicant in a review application must file the record within sixty days of the date on which the applicant is advised by the Registrar that the record has been received. If the applicant fails to file the record within the prescribed period, the application will be deemed to have been withdrawn by the applicant, unless the applicant during that period requested the respondent's consent for an extension time and consent has been given.

[11] In this case the applicant filed the record well outside the sixty days. The applicant delivered the review application on 15 October 2014. The Bargaining Council filed the record (with a CD of the arbitration proceedings), it appears, two days later, on 17 October 2014. The applicant only filed the transcribed record on 26 September 2016. The record was thus filed approximately one year and ten months after he had launched the review application and after the record had been filed.

[12] After the Minister had raised the points *in limine* the applicant filed an application for condonation for non-compliance with these provisions and, although not directly stated, also seeking condonation for his failure to comply with section 145(5) of the Labour Relations Act 66 of 1995 ("LRA"), which placed an obligation on him to apply for a date for the matter to be heard within six months of delivery of his review application, which was on 15 October 2014.

[13] As Ms *Tilly* correctly conceded, the filing of an application for condonation is competent.[4] However, she submitted, unless condonation is granted the

[3] At a pre-enrolment hearing in this Court on 30 May 2017, some 9 ½ months ago, where Mr Dagane was present, Lagrange J made the following order:

1. Condonation and review application is enrolled on the opposed roll in Johannesburg on 14 March 2018.
2. No order is made as to costs.

[4] *Minister of Correctional Services v Mashiya* [2015] ZALCJHB 68 (5 March 2015); *Tadyn Trading t/a v Tadyn Consulting Services v Steiner* (2014) 35 *ILJ* 1672 (LC).

review application is deemed withdrawn and should be dismissed with costs. Alternatively, it should be struck from the roll, as set out in *Ralo v Transnet Port Terminals*[5] . She submitted that condonation should not be granted for non-compliance with clauses 11.2.2 and 11.2.3 of the Practice Manual. The principles in this regard are trite.[6] She argued that condonation should not be granted for the following reasons:

13.1 The delay in serving the record – one year and ten months - is inordinate;

13.2 The applicant failed to set out a satisfactory or reasonable explanation for his default, seeking to blame his erstwhile attorney. It is trite that a litigant cannot hide behind the tardiness of his representative. He has also not provided convincing proof of his allegations that he made follow up requests with the attorney. He only gave proof of a bank statement that purportedly demonstrated that he paid the erstwhile attorney. Even this does not support his contention that he paid the attorney as it merely states “external transfers” and the sum does not correlate with the figure stated by the applicant. The applicant’s conduct is dilatory and should not be condoned;

13.3 The applicant has no prospects of succeeding in his review application as the Award by the Commissioner is one that a reasonable decision-maker would have reached in relation to the totality of evidence that was before him

13.4 The applicant’s conduct and delay in prosecuting the review application clearly prejudices the SAPS insofar as the incurring of unnecessary costs the effluxion of time .

[14] Although I share Ms *Tilly*’s concerns about the applicant’s non-compliance, I take into account that, at these proceedings, he was no longer represented by any legal representatives. At the arbitration he was represented by Manugeni Incorporated attorneys and by Adv Matimbi. It

[5] [2015] 12 BLLR 1239 (LC).

[6] *Melane v Santam Insurance Co. Ltd* 1962 (4) SA 531 (A); *Foster v Stewart Scott Inc*.(1997) 18 *ILJ* 367 (LAC); *SA Broadcasting Corporation v CCMA and Others* (2003) 24 *ILJ* 995 (LC).

appears that those attorneys delivered the application for review on 15 October 2014; but nine months later, in July 2016, Manugeni informed him that he was no longer practising law. Manugeni had done nothing to have the record transcribed or to pursue the review application. He then instructed new attorneys, Sisa Nhlabati, who pursued the matter further and signed all the pleadings until shortly before this hearing. On the day of the hearing, Mr Dagane represented himself (although, in his heads of argument, he still gave the address of Sisa Nhlabati attorneys).

[15] The applicant appears to have been badly served by two firms of attorneys. He does, of course, have other methods of recourse against them; but I do not think it is in the interests of justice to deprive him of a hearing at this stage. Condonation is granted for the late filing of the record.

[16] The applicant and his attorneys have also been dilatory in pursuing his review application. The review application was instituted on 15 October 2014. As set out above, they filed the full record and Rule 7A(8)(b) notice some one year and ten months later. Ms *Tilly* further submitted that he should be barred from proceeding further until he tenders a satisfactory explanation for the delay. But in this regard also, the Court has sympathy for the fate of an employee who has been let down by his erstwhile legal representatives. In my view, it is in the interests of justice that the application be heard on the merits.

[17] The filed transcribed record is incomplete. The evidence of the applicant in cross-examination is not transcribed. Whilst this is so, both parties agreed the review application can be determined on the basis of the record as it stands. I proceeded accordingly.

<u>The merits</u>

[18] Although Mr Dagane's counsel disavowed any reliance on procedural unfairness at the beginning of the arbitration proceedings, he did argue at the end of the arbitration that his client's dismissal was procedurally unfair. And in this application, Mr Dagane persisted with an argument that the arbitrator unreasonably concluded that the dismissal was procedurally fair.

Procedural fairness

[19] At the outset of the arbitration the following interaction took place between the Commissioner, Ms Joyce Nkopane, the employee's counsel, Adv Matimbi, and the employee, Mr Dagane:

> "Applicant's representative [Adv Matimbi]: Yes, I understand, yes we would like to submit that procedural fairness, we are not going to challenge anything.
>
> Commissioner: Okay.
>
> [Adv Matimbi]: Only the substance.
>
> Commissioner: so can I then note it, that the dismissal was then procedurally fair?
>
> [Adv Matimbi]: That is correct.
>
> Commissioner: Is that correct sir?
>
> Mr Juda Dagane: Yes."

[20] Despite this, the applicant and his legal representative made a *volte-face* at the end of the arbitration and insisted on arguing about procedural fairness as well. The arbitrator, despite the earlier assurance to the contrary by Mr Dagane and his counsel, nevertheless considered the argument and dealt with it fully in her award.

[21] The main issue that the applicant raised was that the "charge sheet" [*sic*] was not adequate, as it did not set out the date, time and place where the misconduct occurred. He persisted with that argument in this Court, despite the fact that he told the arbitrator at the outset that he knew what the employer's complaint was.

[22] The arbitrator dealt with this complaint fully. She had regard to the old case of the former Industrial Court cited by Mr Dagane, viz *Mkhize v Chapelot Industries (Pty) Ltd*[7] and distinguished it on the basis that, in the case before her, Mr Dagane had not raised the issue until later in the

[7] 1989 (10) *ILJ* 903

proceedings. She then considered what was the minimum procedural requirements as set out in the well-known case of *Avril Elizabeth Home*[8]*:*

> "The rules relating to procedural fairness introduced in 1995 do not replicate the criminal justice model of procedural fairness. They recognise that for workers, true justice lies in a right to an expeditious and independent review of the employer's decision to dismiss, with reinstatement as the primary remedy when the substance of employer decisions are found wanting. For employers, this right of resort to expeditious and independent arbitration was intended not only to promote rational decision making about workplace discipline, it was also an acknowledgement that the elaborate procedural requirements that had been developed prior to the new Act were inefficient and inappropriate, and that if a dismissal for misconduct was disputed, arbitration was the primary forum for determination of the dispute by the application of a more formal process.
>
> The balance struck by the LRA thus recognises not only that managers are not experienced judicial officers, but also that workplace efficiencies should not be unduly impeded by onerous procedural requirements. It also recognises that to require onerous workplace disciplinary procedures is inconsistent with a right to expeditious arbitration on merits. Where a commissioner is obliged (as commissioners are) to arbitrate dismissal disputes on the basis of the evidence presented at the arbitration proceedings, procedural requirements in the form that they developed under the criminal justice model are applied ultimately only for the sake of procedure, since the record of a workplace disciplinary hearing presented to the commissioners at any subsequent arbitration is presented only for the purpose of establishing that the dismissal was procedurally fair. The continued application of the criminal justice model of workplace procedure therefore results in a duplication of process, with no tangible benefit to either employer or employee.
>
> The signal of a move to an informal approach to procedural fairness is clearly presaged by the explanatory memorandum that accompanied the draft Labour Relations Bill. The memorandum stated the following:

[8] *Avril Elizabeth Home for the Mentally Handicapped v Commissioner for Conciliation, Mediation & Arbitration & Others* (2006) 27 *ILJ* 1644 (LC) par

> "The draft Bill requires a fair, but brief, pre-dismissal procedure …(It) opts for this more flexible, less onerous, approach to procedural fairness for various reasons: small employers, of whom there are a very large number, are often not able to follow elaborate pre-dismissal procedures; and not all procedural defects result in substantial prejudice to the employee."
>
> On this approach, there is clearly no place for formal disciplinary procedures that incorporate all of the accoutrements of a criminal trial, including the leading of witnesses, technical and complex 'charge sheets', requests for particulars, the application of the rules of evidence, legal arguments, and the like."

[23] Having considered the authority of this Court, the arbitrator reasonably concluded that Mr Dagane had been provided with an opportunity to state his case and that there was substantial compliance with the procedure. This is reasonable in relation to the totality of evidence before her and the applicable authorities of this Court.

[24] She also considered the applicant's complaint that the charges did not contain particulars such as date, time and place. She found that this complaint did not hold any substance as the applicant did not give evidence that he was unable to plead because he did not know the time and the commission of the alleged misconduct. This is also in line with the totality of evidence before her. The applicant understood the nature of the alleged misconduct and was able to address it, both at the internal disciplinary hearing and again at arbitration. The Commissioner's evaluation that he could address the allegations was also in line with the authority that an employer's failure to inform the employee of the precise details in its charge sheet is not in itself sufficient to render dismissal procedurally unfair as employers are not required to draft charges with the specificity required in criminal indictments. It is sufficient that an employee understands the nature and import of the charges that is required to answer.[9] .

[9] *Mutual Construction Company Tvl (Pty) Ltd v Ntombela NO & others* [2010] 5 BLLR 513 (LAC).

[25] The review ground on procedural fairness – belatedly raised at arbitration despite the undertaking to the contrary initially given by Mr Dagane and his counsel – must fail.

Substantive fairness

[26] Mr Dagane argued that the arbitrator did not apply her mind to the evidence before her and came to a conclusion that another reasonable arbitrator could not have arrived at.[10]

[27] A perusal of the transcript and an evaluation of the Commissioner's findings point to the contrary. In considering the main dispute before her – whether the dismissal was for a fair reason -- she first looked at whether a rule existed in the workplace that governed conduct or outlawed the making of the remarks such as the ones that Dagane had made. She considered the Constitution of the Republic of South Africa, the SAPS Code of Ethics and the SAPS Code of Conduct, all of which prohibit discrimination and exhort the citizens of our democracy to treat everyone with equal respect and to create a safe and secure environment for all South Africans. This is in line with the evidence presented during the arbitration, the Constitution and the laws of our democracy. The Commissioner found that there was a rule within the workplace that governed SAPS members' conduct and outlawed discrimination based on race. This was not only reasonable, but correct. There is no basis for the argument that the Commissioner misdirected herself by finding that this rule existed.

[28] The Commissioner also considered the applicant's argument that there was no policy regarding social media within the workplace. She noted that it was common sense that people should be careful about what is said on social media as such utterings would be in the public domain. This too is a reasonable evaluation by the Commissioner and one that any reasonable decision maker could have arrived at.

[10] i.e. the test set out in *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC) and *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA) and further clarified by the LAC in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* [2014] BLLR 20(LAC).

[29] The Commissioner furthermore found the rule to be valid as it gave effect to the prescripts that are contained in the Constitution. This is also a reasonable conclusion.

[30] The Commissioner thereafter pertinently considered whether the applicant had breached this rule. In so doing the Commissioner admitted the evidence submitted by Brigadier Lambert which comprised print-outs from Google (which *inter alia* incorporated the applicant's Facebook postings and comments). The applicant complained – both at arbitration and in these proceedings – that it was inadmissible hearsay evidence.

[31] The Commissioner carefully considered whether it was hearsay evidence. She found that it was. She then reasonably assessed whether it was nevertheless admissible in terms of section 3(c) of the Law of Evidence Amendment Act, 16 of 1988 which conferred on her a discretion to admit hearsay evidence if it is in her opinion that it was in the interest of justice to admit it. She did this by evaluating the matter in line with the factors set out in section 3(c) of the Law of Evidence Amendment Act. She took into account that the nature of the proceedings was an arbitration which implored her to deal with the substantive merits of the dispute with the minimum of legal formalities. This is in line with section 138(1) of the LRA.[11]

[32] She also considered that the applicant had restricted access to his Facebook account (which is in line with the evidence at the arbitration); that the only person who could to testify as to whether he had posted the comments was the applicant himself, as it was the SAPS case that it was the applicant who posted the messages; that it would not assist the process if the journalist of the *Beeld* article was called to testify as her evidence itself would be hearsay; that Facebook was an American company and they were the only entity that could authenticate the messages in the absence of an admission by the account holder; and lastly she considered that evidence was led by Brigadier Lambert that there were difficulties involved in obtaining information from these

[11] See also *CUSA v Tao Ying Metal Industries and Others* (2009 (2) SA 204 (CC); 2009 (1) BCLR 1 (CC) ; [2009] 1 BLLR 1 (CC) ; (2008) 29 *ILJ* 2461 (CC).

companies (again in line with the evidence presented). (It must also be noted that the applicant, who complained that the journalist, Hilda Fourie, was not called to testify, made no attempt to subpoena her).

[33] The Commissioner's evaluation of the evidence was reasonable in relation to what was before her and is in line with what was required from her in terms of section 3(c) of the Law of Evidence Amendment Act, 16 of 1988 and s 138 of the LRA. Her admission of the evidence was therefore reasonable and there is no merit to the applicant's contention that the Commissioner committed an irregularity in admitting it.

[34] Moreover, the Commissioner's understanding and evaluation of Facebook and Google was in line with authority.[12] And the evidence considered by the Commissioner - the print-outs from Google (which incorporated the applicant's Facebook postings and comments) as submitted by Brigadier Lambert – were already in the public domain and the Commissioner could have regard to it without issues of admissibility arising. However, once this evidence was admitted, the Commissioner, based on section 3(c) of the Law of Evidence Amendment Act, reasonably and correctly considered and assessed the weight of the evidence. She considered the Facebook page which had the applicant's profile and a photo of him, identifying him as the author of the offensive remarks. She considered that the applicant did not dispute that the posts were made but that he only disputed who had made such comments. This is in line with the case presented by the applicant at arbitration.

[35] The Commissioner was therefore seized with mutually contradictory versions – the SAPS contention that the applicant had made the comments and the applicant's contention that it was not him. To resolve it, she employed the correct method to resolve disputes of fact as set out in *Sasol Mining (Pty) Ltd v Commissioner Ngeleni & others*[13] and *SFW Group Ltd & Another v Martell Et Cie & Others*[14] 2003 (1) SA 11 (SCA):

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[12] *Dutch Reformed Church Vergesig Johannesburg Congregation and another v Sooknunan t/a Glory Divine World Ministries* [2012] 3 All SA 322 ; 2012 (6) SA 201 (GSJ); *H v W* 2013 (5) BCLR 554 (GSJ) (at paragraphs (10) – (23).

[13] [2011] 4 BLLR 404 (LC).

[14] 2003 (1) SA 11 (SCA).

> "The technique generally employed by Courts in resolving factual disputes of this nature may conveniently be summarized as follows. To come to a conclusion on the disputed issues a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability, and (c) the probabilities. …"

[36] The Commissioner considered the defence put forward by the applicant at arbitration – that someone had created an account using his details as contained in his profile; or that someone had hacked into his account and made these postings. Again, this is in line with the evidence presented at arbitration. She also considered the applicant's evidence that to access his Facebook account one would need his password and that he had not given anyone his password. This too is in line with the evidence led before her. The Commissioner considered both of these scenarios and tested them in relation to its inherent probabilities, reliability and credibility.

[37] In relation to the first scenario - that someone had created another account using his details and photos – the Commissioner considered that the applicant had closed his account; there was no evidence that another account still existed; that the applicant as an experienced investigator would have brought proof of this and what would have motivated another person to use the applicant's Facebook account to indicate the hatred for whites. She came to the conclusion that the applicant's version was so far-fetched that it was not probable. This is a reasonable evaluation of the probabilities and a conclusion that another arbitrator could have reached.

[38] In relation to the second scenario - that someone had hacked into his account - the Commissioner inter alia considered that if this was the case the applicant would have distanced himself from making the remarks, which he did not do. She also took into account that Dagane only approached POPCRU and left the issue to the SAPS to investigate. She considered that the applicant was an investigator and that he understood how Facebook worked. It was unlikely that if someone had used the applicant's account in the manner that is alleged, and given that he had the skills to clear his name, he did not take steps in this regard.

[39] The Commissioner found on a balance of probabilities that the applicant was the author of the offensive and racist remarks; that he had posted

them; that he had breached a rule of conduct within the workplace; and that his remarks on Facebook offended the Constitution as they were discriminatory and constituted hate speech. This is a reasonable conclusion in relation to the totality of evidence that was before her.

[40] In taking her assessment of substantive fairness further, the Commissioner also considered whether dismissal was an appropriate sanction. In this regard, she considered that the applicant was employed as a police officer with a mandate to protect its citizens irrespective of the race, colour and creed of such citizens. She considered that to threaten the safety of another sector of the community was wrong and that the conduct of the applicant did have the effect of bringing the SAPS into disrepute. This is a reasonable evaluation and her conclusion – that there was no reason to interfere with the decision of the SAPS – was one that a reasonable decision maker could have reached.

Bias

[41] In his oral argument, Mr Dagane did not pursue the argument that Commissioner Nkopane was biased; but he persisted with an argument that he was subjected to what he called “retaliatory justice”. As I understood his argument, this comprised a conspiracy theory – not raised at arbitration or in his founding affidavit in the review application – that the Commissioner wanted to prejudice him because he had complained (after the arbitration) to “various bodies, including the Office of the Director General of the Department of Labour” that the SSSBC had not resolved the dispute “expeditiously”. There is simply nothing before this Court to bear out this far reaching allegation.

[42] Insofar as it needs to be addressed, it is also clear from the transcribed record that at no stage can it be inferred that there was a reasonable apprehension of bias. It cannot be said that the Commissioner did not bring an impartial mind to the adjudication of the dispute. Her evaluation of the evidence simply indicates her considering the applicant’s versions and testing his versions in relation to its inherent probabilities, credibility and reliability. This cannot be tantamount to an inference of bias and for this reason this ground of review is also without merit.

[43] As Ms *Tilly* pointed out, in *Raswiswi v CCMA & others* [15] this Court set out the legal basis for the concept of bias and stated:

> "In the *BTR Sarmcol* case, the Appellate Division, as it then was, considered the test of bias in the context of when an Industrial Court judge [*sic*] should recuse himself or herself. The court found that the existence of a reasonable suspicion of bias satisfied the test for recusal. The test was further tightened up by the decision of the Constitutional Court in the *SARFU* case and elucidated by it in the *SACCAWU* case. Without, I hope, detracting from the nuanced reasoning expressed in those judgments, a major theme in the Constitutional Court's refinement of the test was to emphasise that not only must the apprehension of bias be that of a reasonable person in the position of the person being judged who has an objective factual basis for their suspicion, but the apprehension of bias they have must be one that in law would be recognised as raising a legitimate concern about the adjudicator's impartiality."

[44] In this case, the applicant has set out no reasonable apprehension of bias on the side of the arbitrator.

The gravity of the offence and the fairness of the sanction

[45] Mr Dagane was dismissed for very serious misconduct. He, a SAPS officer, had unfairly and openly discriminated against others (whites) on the basis of race through blatant blatantly discriminatory racial remarks; by blatantly threatening the future safety and security of white people; and by making remarks on Facebook which amounted to hate speech.

[46] It hardly needs to be reiterated that the use of racist language is despicable. Whilst there has been a plethora of cases on this most unfortunate scourge of our society, *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others*[16] perhaps remains the *locus classicus*:

> "The attitude of those who refer to, or call, Africans "Kaffirs" is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country - black and

[15] [2011] 9 BLLR 911 (LC) par [19].

[16] [2002] 6 BLLR 493 (LAC) at paragraphs [37] (Zondo JP) and [63] (Nicholson JA).

white - who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard he courts must play their proper role and play it with conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will "give expression to the legitimate feelings of outrage" and revulsion that reasonable members of our society -black and white - should have when acts of racism are perpetrated.

…

It was never contended that the use of the racist epithets in question should not be visited by the sanction of dismissal. Racism is a plague and a cancer in our society which must be rooted out. The use by workers of racial insults in the workplace is anathema to sound industrial relations and a severe and degrading attack on the dignity of the employee in question. The Judge President has dealt comprehensively with this matter in his judgment and I wholeheartedly endorse everything that he says in this regard."

[47] And in *SAB v Hansen*[17] Kathree-Setiloane AJA reiterated:

"Although Hansen had expressly denied using the impugned words at the arbitration hearing, he did not dispute that dismissal for such misconduct would be an appropriate sanction. Notably, in this regard, our courts have taken a very firm stand on the use of racist language in the workplace, in particular, the use of the word "kaffir", visiting upon such misconduct the sanction of dismissal. More recently, the Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [18] said this in relation to the history, meaning and implications of the use of the word "kaffir":

'[T]he word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the

[17] *South African Breweries (Pty) Ltd v Hansen and Others* (2017) 38 *ILJ* 1766 (LAC); [2017] 9 BLLR 892 (LAC) par [13] – [14].

[18] (2017) 38 *ILJ* 97 (CC) at para 4.

harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.'

The Constitutional Court went on to quote the words of Brook J in *Thembani v Swanepoel*, which it said captured the best rendition of the use of the word kaffir as being "undoubtedly disparaging, hurtful and intentionally hateful":

'The term "kaffir" historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapable racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, the use can only be an expression of racism with a clear intention to be harmful and to promote hatred towards the person of whom it is used or to whom it is directed. This brings its use clearly within the ambit of section 10 of [the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000].'

[48] More recently, dealing with racist utterances similar to those posted by Dagane, in the context of the #feesmustfall protests at the University of Cape Town – such as "kill all whites" and "fuck all whites", i.e. words very similar to those used by Dagane – the SCA commented in *Hotz v UCT*[19]:

"The issue of the content of the slogans, whether painted on the War Memorial and the bus stop or worn on a T-shirt, as well as statements, such as those made by the third appellant in the confrontation with a student, is a delicate one. Freedom of speech must be robust and the ability to express hurt, pain and anger is vital, if the voices of those who see themselves as oppressed or disempowered are to be heard. It was rightly said in *Mamabolo* that:

'… freedom to speak one's mind is now an inherent quality of the type of society contemplated by the Constitution as a whole and is specifically promoted by the freedoms of conscience, expression, assembly, association and political participation protected by ss 15 - 19 of the Bill of Rights'.

[19] *Hotz and Others v University of Cape Town* [2016] 4 All SA 723 (SCA); 2017 (2) SA 485 (SCA) paras [67] – [69].

> But in guaranteeing freedom of speech the Constitution also places limits upon its exercise. Where it goes beyond a passionate expression of feelings and views and becomes the advocacy of hatred based on race or ethnicity and constituting incitement to cause harm, it oversteps those limits and loses its constitutional protection. In *Islamic Unity Convention* Langa CJ explained the reason for this:
>
> 'Section 16(2) therefore defines the boundaries beyond which the right to freedom of expression does not extend. In that sense, the subsection is definitional. Implicit in its provisions is an acknowledgment that certain expression does not deserve constitutional protection because, among other things, it has the potential to impinge adversely on the dignity of others and cause harm. Our Constitution is founded on the principles of dignity, equal worth and freedom, and these objectives should be given effect to.'
>
> A court should not be hasty to conclude that because language is angry in tone or conveys hostility it is therefore to be characterised as hate speech, even if it has overtones of race or ethnicity. The message on Mr Magida's T-shirt said unequivocally to anyone who was more than a metre or two away that they should kill all whites. The reaction to that message by people who saw it, as communicated to Mr Ganger, was that this was an incitement to violence against white people. The fact that Mr Magida sought to explain away the slogan and suggest that it said something other than what it clearly appeared to say, is itself a clear indication that he recognised its racist and hostile nature. Whether it in fact bore a tiny letter 's' before the word 'KILL' is neither here nor there. The vast majority of people who saw it would not have ventured closer to ascertain whether, imperceptibly to normal eyesight, the message was something other than it appeared to be. They would have taken it at face value as a message being conveyed by the wearer that all white people should be killed. There was no context that would have served to ameliorate that message. It was advocacy of hatred based on race alone and it constituted incitement to harm whites. It was not speech protected by s 16(1) of the Constitution."

[49] In this case, Mr Dagane not only used disgraceful and racist language constituting hate speech; he did so in his capacity as a police officer, and he did so on a quasi-public forum accessible to potentially thousands of Facebook users. It was not an altercation between two individuals; it was a

public statement aimed at a racial group generally. There can be no doubt that dismissal was a fair sanction.

Conclusion

[50] The award is not open to review. That leaves the question of costs.

[51] There is no reason in law or fairness[20] why costs should not follow the result, as both parties had submitted. Mr Dagane committed egregious misconduct. He contributed to the scourge of racism and racial hatred that, most unfortunately, still persists amongst some individuals in our non-racial democracy. He has shown no remorse. Instead of upholding the law and the Constitution as a SAPS officer, he rejected the guiding principles set out in the Constitution and the Bill of Rights. He persisted – in a dilatory fashion – with a meritless application. He cast aspersions on the SAPS, the Bargaining Council and the arbitrator, Ms Nkopane – going so far as to accuse them of corruption, fraud and fabricating evidence in is oral argument. And there is no longer any relationship between the parties. There is no reason why the Minister of Police – and thus the taxpayer – should carry the costs.

Order

[52] I therefore make the following order:

52.1 The applicant's application for condonation is granted.

52.2 The third respondent's points *in limine* are dismissed.

52.3 The application for review is dismissed with costs.

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Steenkamp J

[20] LRA s 162. See also *Zungu v Premier of the Province of KwaZulu-Natal and Others* [2018] ZACC 1 par 24-26.

APPEARANCES

APPLICANT:	In person.
THIRD RESPONDENT:	Sumayya Tilly Instructed by the State Attorney, Johannesburg.