CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 127/17

In the matter between:

RUSTENBURG PLATINUM MINE Applicant

and

SAEWA obo MEYER BESTER First Respondent

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION Second Respondent

KOBUS ERASMUS N.O. Third Respondent

Neutral citation: *Rustenburg Platinum Mine v SAEWA obo Bester and Others* [2018] ZACC 13

Coram: Zondo ACJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J, Theron J and Zondi AJ

Judgment: Theron J (unanimous)

Heard on: 9 November 2017

Decided on: 17 May 2018

Summary: Referring to a fellow employee as a "swart man" — test for whether words are derogatory and racist is objective — starting point must take into account the history of apartheid

Lack of remorse and no acknowledgment of wrongdoing — no possibility of rehabilitation — dismissal is an appropriate sanction

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court, Johannesburg):

1. Rustenburg Platinum Mine is substituted by Sibanye Rustenburg Platinum Mines (Pty) Ltd as the applicant.
2. The appeal is upheld.
3. The order made by the Labour Appeal Court is set aside and replaced with:

   "The appeal is dismissed with costs."
4. There is no order as to costs.

JUDGMENT

THERON J (Zondo ACJ, Cameron J, Froneman J, Jafta J, Kollapen AJ, Madlanga J, Mhlantla J and Zondi AJ concurring):

Introduction

[1] This Court must determine whether referring to a fellow employee as a "swart man" (black man), within the context of this case, was racist and derogatory and whether it was unreasonable for a commissioner, appointed by the Commission for Conciliation, Mediation and Arbitration (CCMA), to conduct arbitration proceedings and find that the use of the term was racially innocuous. If it is found to be racist and derogatory the further enquiry is whether the sanction imposed by the employer, namely dismissal, was appropriate.

Parties

[2] The applicant is Rustenburg Platinum Mine, which conducts mining operations at Thembelani Mine, Rustenburg. The first respondent is the South African Equity Workers Association (SAEWA or respondent), a registered trade union, which is acting on behalf of Mr Meyer Bester who had previously been employed by the applicant at the Mine as a senior training officer. The second respondent is the CCMA, a statutory body established in terms of section 112 of the Labour Relations Act.[1] The third respondent is Mr Kobus Erasmus N.O. (the commissioner), a commissioner who had conducted the arbitration proceedings relating to an alleged unfair dismissal dispute between the applicant and Mr Bester. No relief was sought against the second and third respondents and they have not participated in these and the previous proceedings.

Background

[3] On 28 May 2013, the applicant dismissed Mr Bester on grounds of insubordination and the making of racial remarks. The essence of the complaint was that Mr Bester had referred to a co-worker as a "swart man" and in so doing breached a workplace rule that prohibits abusive and derogatory language. Mr Bester had been employed by the applicant since 1 March 2008.

[4] The facts giving rise to Mr Bester's dismissal are detailed below. The applicant provided specified parking bays to certain employees. The applicant's chief safety officer, Mr Ben Sedumedi, allocated a parking bay to Mr Bester. At some stage, Mr Sedumedi allocated the adjacent parking bay to Mr Solly Tlhomelang, an employee of a sub-contractor at the Mine. During the beginning of April 2013, Mr Bester found a large 4x4 vehicle similar in size to his own vehicle, parked in the adjacent parking bay. Though parking in a limited space was possible, it was difficult to reverse and he was concerned that the vehicles may be damaged in the process. Mr Bester decided to take the matter up with Mr Sedumedi in an effort to arrange for

[1] 66 of 1995.

the other vehicle to be parked elsewhere. Mr Bester made repeated efforts to raise the issue with Mr Sedumedi, which included phoning and emailing him, but without success.

[5] On 24 April 2013, an incident occurred, the details of which are not common cause. According to the version presented by the applicant, Mr Sedumedi held a safety meeting at which Mr Pieter Van der Westhuizen, Ms Salome Moeng, Mr Tshepo Segona, Mr Phumzile Gobinamba and Mr Tlhomelang, were present. The applicant's version is that Mr Bester stormed into the meeting while it was in progress, pointed his finger at Mr Sedumedi and said, in a loud and aggressive manner, that Mr Sedumedi must "verwyder daardie swart man se voertuig",[2] otherwise he, Mr Bester, would take the matter up with management.

[6] According to Mr Bester there was no meeting in progress, rather Mr Sedumedi and Mr Van der Westhuizen were casually discussing jogging routes. When they had finished chatting, Mr Bester raised his parking difficulty with Mr Sedumedi but he responded by saying that he would not speak to a C5 grade employee. According to Mr Bester, Mr Sedumedi said "jy wil nie langs 'n swart man stop nie . . . dit is jou probleem".[3] Mr Bester said he told Mr Sedumedi not to turn the matter into a racial issue and that he intended taking the matter up with senior management.

[7] In a statement dated 2 May 2013, Mr Bester set out his version of what had transpired:

> "Mr Sedumedi then started going on and on about me who does not want to park next to a 'swart man'. I then said to Mr Sedumedi he must not try and make this issue of the parking area a racial issue.
>
> When I realised what Mr Sedumedi was trying to achieve and in which direction he wanted to force this issue I just turned around and left.

[2] Translated to English as "remove that black man's vehicle."

[3] Translated to English as "you do not want to park next to a black man . . . this is your problem".

> The next thing I have heard is that I have been charged and that I will be suspended.
>
> I have not shouted at anybody in Mr Ben Sedumedi office neither had I pointed fingers at anyone or in any direction. I did not make any comments using the words 'swart man'."

[8] On 25 April 2013, the applicant suspended Mr Bester pending the outcome of a formal disciplinary enquiry. The applicant subsequently charged Mr Bester with two acts of misconduct. The first charge was for insubordination for disrupting a safety meeting. The second charge was for making racial remarks by referring to a fellow employee as a "swart man".

[9] On 21 May 2013, Mr De Jager, the chairperson of the disciplinary enquiry, found Mr Bester guilty on both charges. Mr De Jager recommended the sanction of dismissal and, on 28 May 2013, the applicant dismissed Mr Bester.

Litigation history

CCMA

[10] On 3 June 2013, Mr Bester referred an alleged unfair dismissal dispute to the CCMA. The dispute was not resolved through conciliation and was referred to arbitration. The commissioner handed down his award on 19 December 2013. The commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair.[4]

[11] The commissioner's reasoning on the substantive unfairness of the dismissal was:

> "Both the applicant as well as the person referred to (Mr Solly Tlhomelang) further indicated that they did not know one another prior to the incident on the 24th of April 2013. It would therefore in my opinion have been highly probable that the

[4] *SAEWA obo Bester v Rustenburg Platinum Mine*, unreported arbitration award of the CCMA, Case No NWRB1692-13 (19 December 2013) (Arbitration Award) at para 32.

> applicant might have used the term 'swart man' to identify the person who parked next to him as he by that time did not know his name. I find it less probable that Mr Sedumedi (who was in my opinion an extremely poor and very evasive witness) would without being triggered by something that was said to him, accuse the applicant of not wanting to stop next to a 'swart man'. No other derogatory words or phrases were used by the applicant (according to the witnesses). I really do not see how such a phrase (referring to a physical attribute in order to identify a certain person) could be classified as a racial remark. It would be similar to the situation where someone comes into the CCMA offices not knowing my name and then asking for me by stating the 'wit man' who for instance parked next to the entrance gate. I will not take any offence to this even if the person who utters these words is talking in a loud voice in front of all CCMA users.
>
> The chairperson's reasoning for finding the applicant guilty of both insubordination and racial remarks is with respect farfetched and nonsensical. It was clear that he was under immense pressure when dealing with the allegations of racial remarks and in the circumstances failed to keep a cool head and properly dissect what exactly was done and said."[5]

[12] The commissioner ordered that the applicant reinstate Mr Bester with retrospective effect to his position as a senior training officer and awarded him back pay in the amount of R191 834.21.[6]

Labour Court

[13] Aggrieved by the arbitration award, the applicant launched an application in the Labour Court to review and set aside the award. The Labour Court held that the evidence of Mr Van der Westhuizen and Mr Sedumedi, with regards to the meeting that was underway when Mr Bester stormed through the door, was consistent with the evidence of the other employees present at the meeting and there was no cogent reason for the commissioner to have rejected this evidence.[7] The Labour Court further found that the commissioner's finding that Mr Bester uttered the words "swart man"

[5] Id at paras 26.6-7.

[6] Id at paras 33-4.

[7] *Rustenburg Platinum Mine v SAEWA obo Bester* [2016] ZALCJHB 75 (Labour Court judgment) at para 19.

was supported by the evidence and, despite Mr Bester's denial, clearly correct.[8] The Labour Court was of the view that "the commissioner's failure properly to resolve the material dispute of fact before him resulted in factual findings that are entirely arbitrary".[9]

[14] The Labour Court found that there was no conceivable reason why race might justifiably have served as an identifier:

> "To the extent that context is relevant, it should be recalled that Mr Bester stormed into a meeting that was in progress, that he was aggressive and belligerent, that he pointed his finger at Mr Sedumedi and in a loud voice demanded that Mr Sedumedi remove the 'swart man's' car from next to his. Those present in the meeting were offended by Mr Bester's conduct. Mr Bester was not, as the commissioner suggested, benignly 'referring to a physical attribute in order to identify a certain person'. Mr Bester's reference to Mr Tlhomelang, as a 'swart man' was derogatory and racist."[10]

[15] In considering whether dismissal was an appropriate sanction, the Labour Court had regard to a memorandum circulated by the applicant to all employees on 16 April 2013, which reads:

> "It has come to the management's attention that some employees use abusive language with fellow employees. It was also raised with management that some senior management are swearing and shouting at their subordinates.
>
> This practice is not in accordance with our values and does not demonstrate care and respect towards each other and will therefore not be tolerated at Thembelani Mine.
>
> Disciplinary action will be taken against anyone who uses abusive language towards another person on Thembelani Mine. Let us refrain from using derogatory language against each other and strive to work together harmoniously."[11]

[8] Id.

[9] Id at para 20.

[10] Id at para 23.

[11] Id at para 24.

[16] The terms of the memorandum made it clear that abusive and derogatory language would not be tolerated at the workplace. The Labour Court also noted that the undisputed evidence before the commissioner was that the applicant adopted a zero tolerance approach to the use of derogatory and abusive language.

[17] The Labour Court held that Mr Bester had committed an act of serious misconduct that warranted his dismissal and concluded that, on that ground alone, the award stood to be reviewed and set aside:

> "In my view, on a proper assessment of the evidence that served before the commissioner, he reached a decision that a reasonable decision-maker would not have reached. Even if the commissioner's flawed reasoning were to be disregarded, the result cannot be sustained on the basis that it nonetheless represents a reasonable result."[12]

Labour Appeal Court

[18] The Labour Appeal Court stated that the test to determine whether the use of the words "swart man" by Mr Bester was derogatory or abusive, and in contravention of the applicant's disciplinary code, was an objective one.[13] It reasoned that, in order to determine whether the words "swart man" are derogatory, the use of the words must be looked at in the context in which they were uttered.[14]

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[12] Id at para 26. The test for review was stated in *Sidumo v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC) at para 110:

> "To summarise, *Carephone* held that section 145 of the Labour Relations Act was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: [i]s the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair."

It is noted that the test the Labour Court applied was whether the decision reached was one which a reasonable decision-maker *would not*, as opposed to *could not*, have reached.

[13] *SA Equity Workers Association o.b.o Bester v Rustenburg Platinum Mine* [2017] ZALAC 23; (2017) 38 ILJ 1779 (LAC) (Labour Appeal Court judgment) at para 16.

[14] Id at para 19.

[19] The Labour Appeal Court was of the view that the real issue was whether Mr Bester's use of the descriptor "swart man" to identify the owner of the vehicle parked in the parking bay next to him was derogatory:

> "The objective facts are that Mr Bester was angry with Mr Sedumedi for refusing to assist him to resolve his parking problem. This caused him to act precipitously by storming into Mr Sedumedi's office and demanding in an 'aggressive and belligerent' manner that Mr Sedumedi must instruct the 'swart man' to remove his car from next to his. Mr Bester did not know Mr Tlhomelang, the owner of the 4x4 vehicle which parked in the bay next to him, and neither did Mr Tlhomelang know him. An important contextual fact is that Mr Bester is white and to his knowledge the person parked next to him was black. Whilst Mr Bester's status as a white person would bring him within the scope of potential condemnation, that alone is insufficient for such a finding."[15]

[20] The Labour Appeal Court held that the Labour Court erroneously adopted a subjective test in determining the effect of the words "swart man" on the persons present at the meeting. The Labour Appeal Court further held that "the question that the Labour Court ought to have asked was whether, in the opinion of a reasonable person possessed of all facts, Mr Bester's use of the word[s] 'swart man' in this context was derogatory and racist".[16] It found that "[h]ad Mr Sedumedi and Ms Moeng known the true state of Mr Bester's knowledge . . . they would not have viewed the expression 'swart man' in context as offensive".[17]

[21] The Labour Appeal Court held that Mr Bester did not know Mr Tlhomelang and therefore had no reason to denigrate him:

> "While it is clear on the evidence that Mr Bester had no reason to denigrate either Mr Sedumedi or Mr Tlhomelang, he did have a need to identify Mr Tlhomelang – a

[15] Id at para 21.

[16] Id at para 25.

[17] Id.

> person whose name, rank and division were unknown to him – and he used race as a descriptor in doing so. He may have been unwise to opt for this descriptor but his lack of wisdom is not the point in issue".[18]

[22] The Labour Appeal Court concluded that even though Mr Bester was charged with making racial remarks by referring to a fellow employee as a "swart man" the context disclosed that the perception that the words were derogatory and racist was certainly not the only plausible inference that could be drawn from the proven facts and the probabilities.[19] The inference that Mr Bester used the words "swart man" in the context, to describe Mr Tlhomelang, whose name he did not know, was equally plausible.[20]

[23] The Labour Appeal Court held that the Labour Court had erred in reviewing and setting aside the award of the commissioner. It confirmed the conclusion of the commissioner that the dismissal of Mr Bester was both substantively and procedurally unfair.[21] In addition, the Labour Appeal Court held that a racist remark made in the workplace is a serious offence which warrants dismissal.[22]

In this Court

Condonation

[24] The applicant filed three applications for condonation: for the late filing of its application for leave to appeal, the late filing of the record and the late filing of its written submissions.

[25] The application for leave to appeal was filed three days late. The reason for the delay was that on 1 November 2016 the applicant was sold as a going concern by

[18] Id at para 27.

[19] Id.

[20] Id.

[21] Id at para 32.

[22] Id at para 18.

Anglo American Platinum Limited (Anglo) to Sibanye Rustenburg Platinum Mines Proprietary Limited (Sibanye). This sale created confusion as to who the correct litigant was as Mr Bester was not identified as a transferring employee nor was he working in the operations that were transferred. The record was filed three days late. The reason provided for the delay was an "unfortunate and regrettable diary error" on the part of the applicant's attorney. No prejudice was caused by the delay and a reasonable explanation was offered for it. The written submissions were filed two days late and no prejudice was caused by the delay. Condonation is granted for the late filing of the application for leave to appeal, the record and the written submissions.

Substitution application

[26] Sibanye has applied to substitute itself as applicant. The applicant supports the substitution application. According to the applicant, the substitution application is necessitated by virtue of the operation of section 197 of the Labour Relations Act in that:

(a) Anglo has become incompetent to continue as the applicant in the main application;

(b) By operation of law Sibanye, which is a competent juristic person, is the applicant in the main application;

(c) Sibanye has effectively been substituted as the employer by the operation of section 197 of the Labour Relations Act; and

(d) Sibanye has a direct and substantial interest in the outcome of the main application.

[27] Section 197(2) of the Labour Relations Act states:

> "If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) —

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an *employee's contract of employment continues with the new employer as if with the old employer*". (Emphasis added.)

[28] The automatic consequences which flow from section 197 were lucidly explained in this Court's judgment in *NEHAWU*:

"Subsection (2) tells us the consequences that flow from a transfer of a business as a going concern as contemplated in subsection (1). It refers back to subsection (1) which envisages two categories of transfer: one from a solvent employer and the other, broadly speaking, from an insolvent employer. In both instances, the transfer of the business as a going concern results in the transfer of the workers to the new business. . . . The section is premised on the continuity of employment of the workers which is not interrupted by the transfer contemplated in subsection (1). 'That employment', subsection 9(4) says, 'continues with the new employer as if with the old employer'.

Reading the section as a whole and, in particular, having regard to the fact that all the rights and obligations flowing from employment with the transferring employer are transferred to the new employer in the case of a solvent business; that in the case of an insolvent business the contracts of employment are transferred; that the transfer of business does not interrupt the workers' continuity of employment; the inference that

> the transferee employer takes over the workers and that the transferee employer is, by operation of law, substituted in the place of the transferor employer is irresistible. It follows by necessary implication.
>
> If there is any doubt on this score, the recent amendment to section 197 puts matters beyond doubt by providing that 'the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment'. Indeed its declared purpose is '. . . the clarification of the transfer of contracts of employment in the case of transfers of a business, trade or undertaking as a going concern'."[23]

[29] In *Success Panel Beaters & Service Centre CC* the Labour Appeal Court held that the enforcement of an Industrial Court order against the new employer was permissible, as the order was made and transfer of business affected after the commencement of the Act.[24] The granting or dismissal of the main application would therefore be enforceable against Anglo and Sibanye.

[30] In the circumstances, Sibanye has made out a case for substitution and this relief should be granted.

Jurisdiction

[31] The applicant relies on section 167(3)(b)(i)[25] to argue that this Court has jurisdiction to hear this matter as it directly involves and implicates a number of constitutional rights, namely, the right to fair labour practices,[26] dignity[27] and equality.[28]

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[23] *National Education & Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (*NEWAHU*) at paras 63-5.

[24] *Success Panel Beaters & Services Centre CC v National Union of Metal Workers of South Africa* [2000] ZALAC 2; [2000] 6 BLLR 635 (LAC) at 638.

[25] Section 167(3)(b)(i) of the Constitution provides that: "The Constitutional Court may decide constitutional matters."

[26] Section 23(1) of the Constitution provides that: "Everyone has the right to fair labour practices."

[27] Section 10 of the Constitution provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[28] Section 9(1) of the Constitution provides that: "Everyone is equal before the law and has the right to equal protection and benefit of the law."

[32] To determine whether a matter is a "constitutional matter" requires a broad interpretation.[29] This matter relates to the assessment of evidence in labour disputes and the test to determine whether, in a given context, a statement is racist. This case – and the issues it raises – clearly implicates the rights to dignity and equality, and how racism in the workplace might affect the right to fair labour practices. Given our country's history and the remaining legacy of apartheid that our Constitution attempts to redress, a question involving racism and, more pointedly, what constitutes racism, is undoubtedly a constitutional issue and one that goes to the heart of our democracy.[30]

Leave to Appeal

[33] The applicant argues that it is in the interests of justice to grant leave to appeal on the grounds that the Labour Appeal Court incorrectly applied the law and set a standard of proof that was unfair as it was higher than the standard at common law. A mere misapplication of the law would not ordinarily entitle this Court to interfere with a decision of the Labour Appeal Court. The Labour Appeal Court is a specialist court which functions in a specialised area of law.[31] In *NEHAWU*, this Court recognised that judges of the Labour Court and Labour Appeal Court have the skill and experience to resolve labour disputes speedily and that this Court will only hear appeals from the Labour Appeal Court if the appeal raises "important issues of principle".[32]

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[29] *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 14. See also Du Plessis et al "Jurisdiction" in *Constitutional Litigation* (Juta & Co Ltd, Cape Town 2013) at 19.

[30] See *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration* [2016] ZACC 38; 2017 (1) SA 549 (CC); 2017 (2) BCLR 241 (CC) (*SARS*) where this Court held, with reference to racism in the workplace, at para 29 that:

> "The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism. This, coupled with this Court's constitutional duty to help entrench the values of equality, non-racialism and human dignity, demands that this application be appealable in the interests of justice. And the issue central to this dispute requires the attention of the highest court in the land, at such a time as this."

[31] *NEHAWU* above n 23 at para 30.

[32] Id at para 31.

[34] The Labour Appeal Court stressed that the words must be looked at in the context in which they were uttered. In the Labour Appeal Court's view, "swart man" is prima facie a neutral phrase that requires context in order to acquire a pejorative – or laudatory – meaning.[33] As a consequence, the matter turned on whether the context in this instance transformed a neutral term into a pejorative one.

[35] The Labour Appeal Court recognised the potential impact of using racial descriptors as identifiers, particularly given the lingering legacy of apartheid but held that the "othering" implicit in the use of racial descriptors did not elevate them to pejorative expressions, stating:

> "It is a valid concern that the use of race descriptors without more to describe people of different races provides no information beyond permitting the audience to lump people into social groupings akin to racial stereotyping, the perpetuation of which must be discouraged. However, in view of South Africa's legacy of racial segregation, it would be remiss to overlook the tendency to identify people of different race groups by using race descriptors, whether inadvertently or not. By the same token, it must be recognised that racial descriptors can have the effect of perpetuating rather than healing divisions; 'othering' in the parlance. But this in itself cannot be regarded as racist. If it were considered to be so, then organisations seeking to perpetuate black consciousness and identity would be subject to outright condemnation – and our society has yet to adopt so absolute a stance."[34]

[36] The issue of when an apparently neutral race descriptor may be regarded as racially abusive or insulting is an important one that has not yet been considered by this Court. This issue is one which encompasses interests beyond those of the parties

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[33] The Labour Appeal Court judgment above n 13 noted the impact of a loss of neutrality as leading to either a pejorative or laudatory meaning at para 19—

> "the term 'black man', if used by a black person to refer to another black person, would not lose its neutrality: for example, 'the unidentified person who called yesterday was a black man'. However, when the word loses the neutrality, it can be pejorative. But it can equally be laudatory: for example, a bumper sticker of the by no means distant past proclaimed: 'I thank God I am a black man, Amen'. Context is, therefore, decisive to the neutrality or otherwise of the term 'black man'."

[34] Id at para 29.

involved and the approach of the courts in such matters is of general public importance.[35]

[37] In addition, this Court is obliged, as a custodian of the Constitution, to ensure that the values of non-racialism, human dignity and equality are upheld and in doing so it has a responsibility to deliberately work towards the eradication of racism.[36] Our Constitution is the embodiment of the values, both moral and ethical, which bind us as a nation and which as a nation we strive to achieve.[37] As this Court aptly held "[t]he Constitution is the conscience of the nation".[38] Having regard to the values of non-racialism, human dignity and equality and that there are reasonable prospects of success, it is in the interests of justice for this Court to grant leave to appeal.[39] In the circumstances, leave to appeal is granted.

Merits

The context in which the words were uttered

[38] It was accepted by both parties (the applicant and first respondent) that the use of the words "swart man", per se, is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner. It was also accepted that the test to determine whether the use of the words is racist is objective – whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist or derogatory. This is in accordance with the test for whether a statement is defamatory, as enunciated in *Sindani*:

> "The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in the context of the

[35] *SARS* above n 30 at paras 31-2.

[36] Id at paras 12, 14 and 29. See also *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* [2002] 6 BLLR 493 (LAC) at para 35.

[37] *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 262.

[38] *SARS* above n 30 at para 12.

[39] Id at para 33.

> article as a whole. In applying this test it must be accepted that the reasonable reader will not take account only of what the words expressly say but also what they imply."[40]

[39] It is thus necessary to have regard to the evidence in this matter. In his evidence in chief, Mr Bester testified:

> "I also know that in this era that we are working now and at this time, it would be devastating for your career to go into an office, start shouting and pointing fingers and shouting the word swart man in front of a hundred people. Even in front of one person. You just do not do it and therefore I say Mr Sedumedi is sucking this out of his thumb . . . that this incident has ever [taken] place."

[40] Relevant portions of Mr Bester's evidence under cross-examination read:

> "Mr Yeates: You said to him jy moet daardie swart man se kar langs my wegvat.
>
> Mr Bester: No I did not.
>
> . . .
>
> Mr Yeates: Using derogatory language like that would be detrimental to a person in your position.
>
> Mr Bester: Absolutely.
>
> Mr Yeates: And a person that would utter things like that should be dismissed.
>
> Mr Bester: Yes."

It is clear from this extract that it was Mr Bester's evidence that he did not use the term "swart man". He went on to acknowledge that using such language could be "detrimental to a person in his position" and could result in his dismissal.

[41] Four main witnesses, namely, Mr Van der Westhuizen, Mr Sedumedi, Ms Moeng and Mr Tlhomelang, testified on behalf of the applicant at the arbitration

[40] *Sindani v Van der Merwe* [2001] ZASCA 130; [2002] 1 All SA 311 (A) at para 11.

hearing. They said they were present at the meeting when Mr Bester made the statement attributed to him. Mr Tlhomelang, while not strictly part of the meeting because he had arrived late, was standing just outside the doorway. Mr Sedumedi, Mr Van der Westhuizen and Ms Moeng further testified that they had considered the remarks to be inappropriate.

[42] The commissioner found that Mr Bester did utter the words "swart man" and that he had pointed his finger at Mr Sedumedi whilst discussing the parking issue.[41] He went on to hold that the dismissal was unfair on the basis that Mr Bester did not use the term in a derogative or racist manner but did so to identify the person who had parked next to him as he did not, at that time, know the person's name.[42]

[43] The defence, that the term "swart man" was not used in a derogatory or racist manner, was not raised or relied upon by Mr Bester. Mr Bester denied having used the term "swart man". This defence, on which the commissioner hinged his entire ratio for his finding, was not based on any evidence before him.

[44] The evidence before the commissioner, on which both the applicant and respondent were agreed, was that the use of such terminology within Anglo's workplace constituted derogatory language deserving of dismissal. It is against this evidentiary background that the commissioner was required to make his ruling.

[45] The Labour Appeal Court correctly stated the test to be applied:

> "The test that applies to the determination of whether the use of the words 'swart man' by Mr Bester was derogatory or abusive, and in contravention of Rustenburg Platinum Mine's disciplinary code, is an objective one. The employer, in this case, Rustenburg Platinum Mine, bore the evidentiary burden in the arbitration proceedings to prove that the language used by Mr Bester was objectively derogatory. The test is not based on how the employer understood the words nor on the subjective

[41] Arbitration Award above n 4 at paras 26.5-6.

[42] Id at paras 26.6 and 28.

> feelings of the person/s to whom the remark was made, but rather whether a reasonable, objective and informed person would on the *correct facts* perceive it to be so. Once that is established on the evidence, the burden of proof shifts to the employee to prove the existence of a ground of justification and that the derogatory or racist remark was not made with the intent to demean."[43] (Emphasis added.)

[46] The Labour Appeal Court unfortunately misdirected itself by finding in favour of Mr Bester, on the basis of an unarticulated defence not supported by the evidence. It was never Mr Bester's defence that he used the words "swart man" as a descriptor or that he did not mean to "demean" any person. He denied using the words and conceded that if he had done so, it could be a dismissible offence. There was no evidence in the record justifying a finding for Mr Bester on the basis that the Labour Appeal Court did.

[47] In applying the test, namely, whether a reasonable, objective and informed person would, on the *correct facts* perceive it to be racist or derogatory, the Labour Appeal Court made a fundamental error, like the commissioner, as it failed to identify the correct facts and relied on evidence that had not been placed before it. The Labour Appeal Court erred by relying on a defence which was not raised by Mr Bester.

[48] The Labour Appeal Court's starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary. In this sense, the

[43] Labour Appeal Court judgment above n 13 at para 16.

Labour Appeal Court's decision sanitised the context in which the phrase "swart man" was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in a post-apartheid South Africa.

[49] The Labour Appeal Court, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the dispute in an impartial manner taking into account the "totality of circumstances".[44] Not only was "swart man" as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using "swart man" was racially innocuous.

[50] Furthermore, in scrutinising the version of the witnesses as to whether they viewed the statement made by Mr Bester as being racist, the Labour Appeal Court applied a test that was too strict. The test was not whether they were correct in the context of the statement to have understood it as being racist; the test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning.[45] Only Mr Bester could have given evidence that he uttered the words with no racist intent. He failed to do so. The commissioner made a similar error in coming to the conclusion that Mr Bester used the words "swart man" to identify and not to denigrate a person whose vehicle was parked next to his. The commissioner failed to have regard to the evidence before him and failed in particular to appreciate the context in which the words concerned were uttered. During the arbitration proceedings both parties were *ad idem* (of one mind) in this respect. They agreed that using such language at the applicant's workplace would be detrimental and could warrant dismissal.

[44] *Sidumo* above n 12 at para 78.

[45] *Mohammed v Jassiem* [1995] ZASCA 115; 1996 (1) SA 673 (SCA) at 711.

[51] The commissioner's award fell to be reviewed and set aside as he reached a conclusion that a reasonable decision-maker could not have reached. This is the test for review that this Court has established in *Sidumo*.[46] The Labour Court was therefore correct in reviewing and setting it aside.

[52] The past may have institutionalised and legitimised racism[47] but our Constitution constitutes a "radical and decisive break from that part of the past which is unacceptable".[48] Our Constitution rightly acknowledges that our past is one of deep societal divisions characterised by "strife, conflict, untold suffering and injustice".[49] Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others.[50] These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination.[51] In both instances, such prejudices are evident in the workplace where power relations have the ability "to create a work environment where the right to dignity of employees is impaired".[52]

[53] Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product or a manifestation of racism or evidence of racist intent that should attract a legal sanction. They will, more often than not, be inappropriate and frowned upon. We need to strive towards the creation of a truly non-racial society. The late former President of the Republic of South Africa, Mr Nelson Mandela, said that "de-racialising South African society is the new moral and

[46] *Sidumo* above n 12.

[47] *Makwanyane* above n 37 at para 262.

[48] *Shabalala v Attorney-General,Transvaal* [1995] ZACC 12; 1996 (1) SA 725 (CC); 1995 (12) BCLR 1593 (CC) at para 26. See also Labour Court judgment above n 7 at para 21.

[49] *Makwanyane* above n 37 at para 262.

[50] *Minister of Finance v Van Heerden* [2004] ZACC 3; 2004 (6) SA 121 (CC); 2004 (11) BCLR 1125 (CC) at para 116.

[51] *Brink v Kitshoff N.O.* [1996] ZACC 9; 1996 (4) SA 197 (CC); 1996 (6) BCLR 752 (CC) at para 44.

[52] Labour Court judgment above n 7 at para 22. See also *Campbell Scientific Africa (Pty) Ltd v Simmers* [2015] ZALAC 51; (2016) 37 ILJ 116 (LAC) at para 20.

political challenge that our young democracy should grapple with decisively".[53] He went on to say that "we need to marshal our resources in a visible campaign to combat racism – in the workplace, in our schools, in residential areas and in all aspects of our public life".[54] This Court has echoed such sentiments when it recognised that "South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations".[55]

Sanction

[54] Subsequent to the hearing of this matter, this Court invited the parties to file written submissions on whether, should it conclude that the finding of the internal disciplinary committee should be reinstated, the sanction imposed was too harsh and what alternative sanction could be considered. Both the applicant and the respondent filed additional submissions in this regard.

[55] In *Sidumo*, this Court listed a number of factors that a commissioner must consider when deciding on the fairness of a dismissal. The Court emphasised that the factors do not represent a closed list and that the weight to be attached to each factor would differ from case to case. The factors are: (i) the importance of the rule that was breached; (ii) the reason the employer imposed the sanction of dismissal; (iii) the basis of the employee's challenge to the dismissal; (iv) the harm caused by the employee's conduct; (v) whether additional training and instruction may result in the employee not repeating the misconduct; (vi) the effect of dismissal on the employee; and (vii) the long-service record of the employee.[56]

[53] Address by President Nelson Mandela to National Conference of the Institute for a Democratic South Africa (Idasa) Cape Town (18 August 1995), available at http://www.mandela.gov.za/mandela_speeches/1995/950818_idasa.htm.

[54] Id.

[55] *SARS* above n 30 at para 8.

[56] *Sidumo* above n 12 at para 78.

[56] We are dealing here with racism in the workplace. Our courts have made it clear, and rightly so, that racism in the workplace cannot be tolerated.[57] Employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues.[58] They owe a duty of good faith to their employers which duty includes the obligation to further their employer's business interests.[59] In making racist comments in the public domain, the actions of the employee may foreseeably negatively affect the business of his employer or the working relationship between him and his employer or colleagues. The chairperson of the disciplinary hearing was alive to this. This is evident from his statement that "[d]ismissal will be imposed for a first offence if the circumstances so warrant it and the employee's behaviour destroy[s] the employment relationship".

[57] As a country in transition, South Africa faces the on-going challenge of how to generate and maintain processes that restore dignity, create political and economic equality, and promote a culture of human rights. The mining industry is a racially charged environment. The applicant, as a responsible employer, is tasked with creating an organisation that advocates and practices social justice. To this end, a memorandum warning against abusive and derogatory language was circulated to all employees at the applicant's mine a few days prior to the incident. It was this memorandum which gave rise to the charges levelled against Mr Bester. The applicant had introduced a behavioural policy in terms of which the offence of racial abuse could attract a sanction of dismissal, even for a first offence.

[58] In contending that dismissal was too severe a sanction in the circumstances of this matter, the respondent, in its additional submissions, argued that Mr Bester had

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[57] In *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 1112 (LAC); [1998] 7 BLLR 666 (LAC) at para 12, Kroon JA stated that the use of racist remarks or conduct in the workplace should be considered in light of the highly charged racial or political atmosphere inherent in certain workplaces. Within such workplaces, the use of racist remarks can have the effect of destroying working relationships and being disruptive of the employer's business.

[58] *Erasmus v BB Bread Ltd* (1987) 8 ILJ 537 (IC) at 544B-C.

[59] *Council for Scientific and Industrial Research v Fijen* [1995] ZASCA 143; 1996 (2) SA 1 (SCA) at 9H-10D. See also *Cyberscene Ltd v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C).

given the applicant five years of loyal service and during that time he had trained numerous miners on how to keep themselves and their colleagues safe and accident-free while working underground. It was also contended that Mr Bester was capable of being rehabilitated and that the incident sparking his dismissal was an extraordinary occurrence unlikely to occur again.

[59] Mr Bester has demonstrated an absolute lack of remorse for his actions and persisted with a defence of a complete denial. He did not acknowledge that his conduct was racist and inappropriate. He made no attempt to apologise. This Court has previously stated that the fact that an employee who is guilty of racist conduct apologised, admitted wrongdoing and demonstrated a willingness "to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity" may be a relevant factor in determining whether dismissal was an appropriate sanction.[60] As mentioned, Mr Bester failed to demonstrate a willingness to change. Instead, he resorted to a vicious attack on the witnesses who testified on behalf of the applicant during the disciplinary hearing. The chairperson of the hearing criticised Mr Bester's conduct in the strongest terms:

> "As chairperson I was astounded by the viciousness of the attacks by Mr Bester during the hearing. The behaviour carried out with intense violence and an apparent desire to inflict aggressive language, cruel and malicious act against a fellow employee and employees in a threatening manner during the hearing was irresponsible."

The chairperson further noted that Mr Bester had, during the hearing, used foul language and behaved in an insolent, disrespectful, rude, offensive and disruptive manner. He explained:

[60] *SARS* above n 30 at para 45.

> "Mr Bester challenged the authority of the hearing, being verbally rude and insulting and disrupting the ER Officer Mr Bogatsu Ramoenyane by verbally swearing (inappropriately) at him to keep quiet."

[60] At the disciplinary hearing, and after having been found guilty, Mr Bester was invited to make submissions in mitigation. He used this opportunity to justify his misbehaviour during the hearing:

> "It is human to react in the same manner as what I have done during the hearing as I have realised it is futile to argue whatever is being said as I am being framed. Seven witnesses against me with no witnesses? What was/is my chances? Therefore I have had all the same emotions as the normal man in the same circumstances would have had. Devastation, flabbergasted, revolt, being cross."

Even at this late stage, there was no recognition that he had behaved badly during the hearing and more so, that he had once again insulted his colleagues. An acknowledgement of wrongdoing by Mr Bester would have gone a long way in evidencing the possibility of rehabilitation including an assurance to the applicant that similar misconduct would not be repeated in the future.[61]

[61] The fact that Mr Bester was dishonest in denying making the statement weighs heavily against him when considering sanction. In *Sidumo*, this Court stated that "[t]he absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal".[62] These sentiments were endorsed in *Timothy*, where the Court said:

> "[G]iven the fact that the appellant had an unblemished record and that, until this point, there was no indication in his conduct of any dishonesty or any impropriety prior to the events that gave rise to this dispute, a form of progressive sanction would have been more appropriate. I have no doubt that these arguments would have carried far greater weight had there been a scintilla of recognition by the appellant of

[61] *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry* (2008) 29 ILJ 1180 (LC) at para 45.

[62] *Sidumo* above n 12 at para 117.

> his wrongdoing. . . . Throughout the disciplinary hearing . . . [the] appellant continued to take the view that the allegations brought against him were no more than lies. [The] [a]ppellant showed no remorse, no recognition of misconduct, save for a blatant and clearly dishonest denial."[63]

[62] Mr Bester has not learnt to conduct himself in a manner that respects the dignity of his black co-workers. By his actions he has shown that he has not made a break with the apartheid past and embraced the new democratic order where the principles of equality, justice and non-racialism reign supreme.

[63] This Court is satisfied that dismissal was an appropriate sanction under the circumstances.

Costs

[64] The labour courts have established a principle in terms of which the general rule that costs follow the event does not apply in situations where "there is a long–standing and continuing labour and employment relationship [between the parties as] such orders might not be in the best interests of that relationship".[64] In a similar vein, this Court will not readily make a costs order where there was a bona fide (good faith) dispute between parties who have a continuing bargaining relationship.[65] In this case, the dispute raises important issues not yet pronounced on by this Court and the impact of this decision will be felt beyond the parties to this litigation. In the circumstances, I make no order as to costs.

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[63] *Timothy v Nampark Corrugated Containers (Pty) Ltd* [2010] ZALAC 29; (2010) 31 ILJ 1844 (LAC) at 1849E-H.

[64] *South African Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd* (*Seafoods Division Fish Processing*) [2000] ZACC 10; 2000 (3) SA 705 (CC); 2000 (8) BCLR 886 (CC) at para 51.

[65] *National Union of Metalworkers of SA v Intervalve (Pty) Ltd* [2014] ZACC 35; (2015) 36 ILJ 363 (CC); 2015 (2) BCLR 182 (CC) (*Intervalve*) at para 73. Bona fide means "in good faith" and what constitutes a dispute was thoroughly canvassed in *Intervalve* at paras 86-8, but, as provided for in *Durban City Council v Minister of Labour* 1953 (3) SA 708 (N) at 712A-B, essentially a dispute—

> "must, as a minimum so to speak, postulate the notion of the expression by parties, opposing each other in controversy, of conflicting views, claims or contentions."

Order

[65] The following order is made:

1. Rustenburg Platinum Mine is substituted by Sibanye Rustenburg Platinum Mines (Pty) Ltd as the applicant.
2. The appeal is upheld.
3. The order made by the Labour Appeal Court is set aside and replaced with:

   "The appeal is dismissed with costs."
4. There is no order as to costs.

For the Applicant:	F Boda SC and Z Ngwenya instructed by Cliffe Dekker Hofmeyr Inc.
For the First Respondent:	A P Landman instructed by Ronelda Van Staden Attorneys.