CASES / VONNISSE

LEGAL PITFALLS OF INCOMPATIBILITY IN THE WORKPLACE: AN EXAMINATION OF THE LANDMARK RULING ON RACISM IN

Rustenburg Platinum Mine v SAEWA obo Meyer Bester 2018 (5) SA 78 (CC)

1 Introduction

In South African labour law, as is the position in other international jurisdictions, the contract of employment is founded on an employment relationship between employer and employee. This case note discusses the nature and scope of the implied term of trust and confidence in the relationship in relation to managerial employees, with particular emphasis on breach of fiduciary obligations as well as incompatibility (MacGregor "Racial Harassment in the Workplace: Context as Indicata SA Transport and Allied Workers Union obo Dlamini & Transnet Freight Rail" 2009 *Industrial Law Journal* 650). This obligation of mutual trust and confidence cuts both ways (*Western Platinum Refinery Ltd v Hlebela* (2015) 36 ILJ 2280) and means that the employer must not behave arbitrarily or unreasonably, or so as to destroy the necessary basis of mutual confidence (*Malik v BCCI* [1998] AC 20 35 and *Woods v WM Car Services (Peterborough) Ltd* 1981 IRLR 347).

Since the dawn of democracy in 1994 and influenced by constitutional changes in government, South African labour law has been drastically transformed. The new government, led by the African National Congress, had to come up with a legislative framework to deal with racism. Although the Labour Relations Act 66 of 1995 (LRA) does not explicitly deal with the question of racism at work, the importance of forging harmonious employment relationships is covered in the misconduct and incapacity in Schedule 8 of the LRA (Code of Good Practice: Dismissal). To this day, racism at the workplace remains a scourge and for this reason this case note examines the *Rustenburg Platinum Mine v SAEWA obo Bester* 2018 (5) SA 78 (CC)) case as its focal point. The effect of racism requires that a balance be struck between an employer's interest in managing its business as it sees fit and the employee's interest in not being unfairly and improperly exploited.

2 Methodology

The case note is the product of desktop analysis and further adopts a qualitative research methodology whereby case law, scholarly books and

legislative frameworks are examined and analysed. However, greater emphasis is placed on the 2018 case of *Rustenburg Platinum Mine v SAEWA obo Meyer Bester* as the focal point of the research study.

3 Background and issues

On 17 May 2018, the Constitutional Court made a landmark ruling on the thorny issue of racism at the workplace in South Africa. The facts of the case are that on 28 May 2013, Rustenburg Platinum Mine (employer) dismissed Mr Meyer Bester (employee) on grounds of insubordination and the making of racial remarks following parking bay allocations. The employer provided specified parking bays to certain employees and the person responsible for these allocations was the chief safety officer, Mr Ben Sedumedi. The employee was allocated an adjacent parking bay to Mr Solly Tlhomelang.

Sometime in April of 2013, the employee found a large 4x4 vehicle, similar in size to his own vehicle, parked in the adjacent parking bay. Though parking in the limited space was possible, it was difficult to reverse and he was concerned that the vehicles may be damaged in the process. The employee decided to take the matter up with Mr Sedumedi in an effort to arrange for the other vehicle to be parked elsewhere. The employee made repeated efforts to raise the issue with Mr Sedumedi, including phoning and emailing him, but without success.

On 24 April 2013, Mr Sedumedi was holding a safety meeting with other employees in attendance. The employee stormed into the meeting while it was in progress and pointed his finger at Mr Sedumedi, saying loudly and in an aggressive manner that Mr Sedumedi must "*verwyder daardie swart man se voertuig*" (loosely translated to mean "*remove that black man's vehicle*)." However, the employee alleged that it was in fact Mr Sedumedi who said "*jy wil nie langs 'n swart man stop nie ... dit is jou probleem*" ("*you do not want to park next to a black man ... this is your problem*"). The employee further alleges that he cautioned Mr Sedumedi not to turn the matter into a racial issue and that he intended taking the matter up with senior management. On 25 April 2013, the employer suspended the employee pending the outcome of a formal disciplinary enquiry. The employee was subsequently charged with two acts of misconduct and on 21 May 2013 was found guilty on both charges. The chairperson of the disciplinary hearing recommended the sanction of dismissal and on 28 May 2013, the employee was ultimately dismissed.

The employee referred an alleged unfair dismissal dispute to the CCMA. The commissioner held that the dismissal of Mr Bester was both substantively and procedurally unfair. The employer was not happy with the CCMA ruling and launched an application in the Labour Court to review and set aside the award. The Labour Court held that the employee 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. 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.

In light of the above factual background, the Constitutional Court had to determine two issues. The first issue to be determined was whether referring to a fellow employee as a "*swart man*" (black man) was racist and derogatory. The second issue was whether it was unreasonable for a CCMA commissioner to arrive at the conclusion that the use of the term was racially innocuous. This case note seeks to determine whether the sanction imposed by the employer was appropriate.

4 Overview of incompatibility as a ground for dismissal

In South African labour law, there are three main forms of dismissal – namely, misconduct, incapacity and dismissal on the basis of operational requirements. However, an employee may also be dismissed for other reasons related to incompatibility at the behest of a third party, and lastly as a result of a breakdown of trust and confidence. For purposes of this case note, dismissal on the basis of incompatibility takes centre stage owing to its overlapping relationship with racism in the workplace.

Grogan defines incompatibility as the "inability [on the part of an employee] to work in harmony either within the 'corporate culture' of the business or with fellow employees" (Grogan *Workplace Law* 11ed (2014)). It is common knowledge that personality clashes between employer and employee in the workplace can result in a breakdown of the employment relationship. More often than not, such a breakdown precipitates a dismissal based on the employee's incompatibility with fellow employees. Courts and other labour dispute forums have generally conceded that incompatibility forms a ground for a fair dismissal (Benjamin "The Italian Job: Eccentric Behaviour as Grounds for Dismissal" 1993 *Employment Law* 105). All cases should be decided based on the merits upon which they are founded (*Van Reenen v Rhodes University* (1989) 10 ILJ 926 (IC)). In other words, an employee who conducts himself or herself in a manner that gives rise to disharmony in the workplace may be found guilty of misconduct arising out of incompatibility. A classic example of this assertion can be found in the case of *Wright v St Mary's Hospital* ((1992) 13 ILJ 987 (IC)). In this case, the Industrial Court held:

> "[T]he employee must be advised what conduct allegedly causes disharmony; who has been upset by the conduct; what remedial action is suggested to remove the incompatibility; that the employee be given a fair opportunity to consider the allegations and prepare his reply thereto; that he be given a proper opportunity of putting his version; and where it is found that he was responsible for the disharmony, he must be given a fair opportunity to remove the cause for disharmony."(*Wright v St Mary's Hospital* (1992) 13 ILJ 987 (IC)1004H)

It is evident from the above judgment that the Industrial Court provided a test for incompatibility in the workplace. Furthermore, it has become accepted that in the absence of elements of misconduct, incompatibility in the subjective relationship between the employee and others in the organisation is best dealt with as a form of incapacity (Du Toit, Conradie, Giles, Godfrey, Cooper, Cohen and Steenkamp *Labour Relations Law: A Comprehensive Guide* 6ed (2015) 376–377).

Perhaps the most important term in a contract of employment is the implied term of mutual duty and confidence. This term was confirmed in the case of *Council for Scientific & Industrial Research v Fijen* ((1996) 17 ILJ 18 (A)), where Harms JA held that the relationship between employer and employee is in essence one of trust and confidence and that at common law conduct clearly inconsistent therewith entitles the "innocent party" to cancel the agreement (par 26).

The main point of this judgment is to illustrate that the employee should guard against any breach of the implied term of trust and confidence, as well as desist from causing disharmony in the workplace. Therefore, it is significant to note that disharmony manifests itself in many forms and confrontations as in *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*, which may serve as a classic example of the breakdown of an employment relationship. The implied term is also justifiable at common law where it is expected that the employee should act in good faith and, of course, in the interest of the employer (*Impala Platinum Ltd v Jansen* (2017) ILJ 896 (LAC)). A breakdown of the employment relationship may ultimately result in a valid termination of the employment contract between employee and employer, provided that both substantive and procedural requirements are followed (Fergus and Collier "Race and Gender Equality at Work: The Role of the Judiciary in Prompting Workplace Transformation" 2014 *South African Journal on Human Rights* 384–485).

Having outlined instances where it is the employee who caused the incompatibility by breaching the implied term of good faith, the case note now seeks to explore and examine the conduct of the manager or employer in this regard. It is common knowledge that racial undertones may trigger the clashing of individual disagreements or differences on the basis of incompatibility in the workplace. The case of *Gorfin v Distressed* ((1973) IRLR 290) provides a better examination of an employee who caused disharmony in the employment relationship. In this case, the employee who was described as a "determined and forceful lady", worked as a domestic servant at a geriatric home and was dismissed after other staff members complained that she had sowed dissension in the home. The Industrial Tribunal held:

> "[b]efore any dismissal arising from personality difference will be considered fair, the employer must show that not only is there a breakdown in the working relationship but it is irremediable. So every step short of dismissal should first be investigated in order to seek an improvement in the relationship." (Harvey *Industrial Relations & Employment Law* 1998 1(102) par 1046)

In the end, incompatibility may render employment intolerable and this ultimately means that dismissal would be a justifiable sanction for incapacity.

5 Link between racism and incompatibility in the employment relationship

More often than not, racism goes to the heart of a breach of the implied term of good faith in the employment relationship; it has been a scourge in South African society for many years. For this reason, soon after the attainment of democratic rule in 1994, the new government felt the need to redress the

imbalances of the past through enacting legislation to root out racism both in society and in the workplace. The courts also developed a jurisprudence that was more progressive and further fostered anti-racism.

It is common knowledge that racism at the workplace thrives in a disharmonious climate and this was evident in the case of *Erasmus v BB Bread Ltd* ((1987) 8 ILJ 537 (IC)). In this case, a white employee, who was also a distributing manager, uttered derogatory words to the effect that black employees stink and they should consider taking a shower before coming to work. The employee uttered these words on more than two occasions and his conduct was found to foment disharmony in the workplace. The employee was subsequently suspended, disciplined, and dismissed on charges related to incompatibility.

Another classic case linking racism and incompatibility is that of *Lebowa Platinum Mines Ltd v Hill* ((1998) 19 ILJ 112 (LAC)), where a white supervisor referred to a fellow black subordinate as a "*bobbejaan*" (loosely translates to mean a "baboon"). A complaint was lodged with the employer and the white supervisor was given a final written warning for the misconduct. This decision was met with resistance from the union, which argued that a final written warning was too lenient and did not comprehend the gravity of the misconduct committed. The union further demanded that the white employee be dismissed, failing which industrial action would be taken. The employer resumed negotiations with the employee and eventually decided that the employee should take a transfer to another mine. The employee refused and maintained that he would remain in the employment of *Lebowa Platinum Mine*. After negotiations had deadlocked, the employer was compelled to dismiss the employee on the basis of operational requirements. Kroon JA held that the employee, in unreasonably refusing the transfer, left the door open for his discharge.

In the above decisions, acts of racism were directed at another fellow employee, but what happens when such conduct is not directed at the person of another? This was illustrated in the case of *Cronje v Toyota Manufacturing* ((2001) 22 ILJ 735 (CCMA)), where a managerial employee of the company was dismissed, *inter alia*, for distributing racist or inflammatory material (via e-mail and in hard copy), and for violating the company's internal internet and e-mail use code.

This led to the employee being suspended and facing disciplinary action. At the CCMA, the commissioner very carefully considered the nature of the material at issue (a picture of a gorilla with former President of Zimbabwe Robert Mugabe's head on it). The commissioner found that the employee's conduct in distributing this material was not only derogatory and offensive, but also racially stereotyping (*Cronje v Toyota Manufacturing supra* 745H–I). The commissioner held that distributing the material to a factory with 3 500 black employees negatively impacted on the efforts to build good relationships between labour and management in South Africa (*Cronje v Toyota Manufacturing supra* 739–740).

In a nutshell, it is significant to note that even employees at management level ought to conduct themselves in a manner that is compatible with the implied term of trust and confidence.

6 Lessons from *Rustenburg Platinum Mine v SAEWA obo Meyer Bester*

As with other cases relating to racism, the Constitutional Court in the *Rustenburg Platinum Mine* case began by acknowledging that the mining industry is a racially charged working environment for both races. This is attributed to the racial structure of the economic set-up engineered by the former apartheid system. It is common knowledge that the South African economy is reliant, among other factors, on mining. Therefore, the apartheid structure was designed to assign white employees to positions of responsibility over their black counterparts.

The court further interrogated whether, objectively, the words "black man" were reasonably capable of conveying to the reasonably hearer that the phrase had a racist intent. In an analysis of the employee's conduct, it is significant to highlight that his utterances had the potential of causing disharmony and tension in the workplace, which would point to incompatibility. Racism cannot be tolerated in the workplace; at a minimum, it goes against the values and spirit of the Constitution of the Republic of South Africa, 1996 (Constitution). The Constitution is founded on values of human dignity that seek to achieve equality and advancement of human rights and freedom (s 1(*a*) of the Constitution). Most importantly, the Constitution is also founded on non-racialism and non-sexism (s 1(*b*) of the Constitution). Furthermore, the Constitution gave birth to the Employment Equity Act 55 of 1998 (EEA), which aims to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination. Section 6(1) of the EEA provides that "no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, colour." All employees and employers of all colours are expected to carry out their duty of implied trust and confidence along the lines of the provisions of the Constitution and EEA respectively, with a view to ensuring harmonious employment relationships. The court focused on the fact that the employee did not demonstrate remorse for the derogatory words used towards black employees. This further illustrates the lack of accountability and responsibility on the part of perpetrators of racism and racial prejudices.

To sum up the test for incompatibility in relation to the *Rustenburg Platinum Mine* case, this case note remarks that the employee's conduct of calling a fellow black employee a black man caused disharmony, and further had the potential of deepening tensions among employees. In other words, the employee's action was irremediable considering the volatility of racial tensions in the workplace. The case note further seeks to highlight that the tension was as a result of the employee's action and this had an adverse effect on the employer's business. Having noted and examined the above test, this case note concludes by acknowledging that the dismissal of the employee was the only reasonable way to address the issue of racism at the workplace.

7 Conclusion and recommendations

The case note began with an examination of the common-law contract of employment and the impact of the implied term of trust and confidence on the employment relationship. Race relations in the workplace were also briefly examined. The *Rustenburg Platinum Mine* case provided a detailed account of deep personality differences in an employment relationship that triggered the Constitutional Court to intervene and provide guidance on racism at the workplace. It is significant to note that this case started in the CCMA and made it all the way up to the Constitutional Court.

The case note also gave an overview of incompatibility and what constitutes a dismissal for incompatibility. Several cases on the elements of incompatibility were examined and analysed. The impact of racism and incompatibility in the employment relationship was investigated and several cases dealing with racism were analysed and discussed. In the end, the case note records the legal pitfalls of incompatibility at the workplace.

Insofar as addressing the issues of racism at the workplace is concerned, the case note recommends the following:

- An effective labour policy framework should be developed with the aim of blacklisting perpetrators of racism at the workplace. This would have a deterrent effect on would-be perpetrators.
- Both government and other stakeholders, such as employers, should consider overhauling the current demographic imbalance in the workplace. To achieve equity at the workplace, transformation should therefore be the main objective as a precursor to addressing equality.
- Employers should also foster social interaction platforms among employees of all races outside of formal working relations.

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