

**June 2017**

### *Employment Alert*

In a previous edition of our newsletter, we featured the very important Constitutional Court judgment in *SARS v Kruger & Others* where the court upheld the dismissal of Mr Kruger as being fair where he referred to his superior by the K-word.

We represented SARS in the Constitutional Court where it was held that "his abusive and derogatory language was directed at his superior and his fellow African workers and he impugned their thinking or intellectual capacity, demonstrating the worst kind of contempt, racism and insubordination...it bore repetition that the use of the word 'k...r' is the worst of all racial vitriols a white person can ever direct at an African in this country. To suggest that it is necessary for the employer to explain how that extremely abusive language could possibly break the trust relationship and render the employment relationship intolerable, betrays insensitivity or at best desperation of the highest order. Where such injurious disregard for human dignity and racial hatred is spewed by an employee against his colleagues in a workplace that ordinarily renders the relationship between the employee and the employer intolerable.... His was a demonstration of the worst kind of contempt, racism, and insubordination." The court concluded that reinstatement was not possible. This was in late 2016.

In February this year, the LAC in *SAEWA obo Bester v Rustenburg Platinum Mine and Another* had an opportunity to consider whether the use of the words "swart man" by a certain Mr Bester to describe the owner of a vehicle, which was parked in the parking bay next to his, was derogatory.

In brief, the facts were as follows: Mr Bester was allocated a parking bay. About two weeks later, another vehicle similar to his, parked in the parking bay adjacent to his. Although he could still access his parking bay, it had however become extremely difficult to manoeuvre and he feared scratching or causing a dent to the car parking next to his. His repeated attempts to get the Chief Safety Officer, Mr Ben Sedumedi, to intervene were unsuccessful. Ultimately, on 24 April 2013, he walked into Mr Sedumedi's office – there was a dispute over what transpired – and "in a loud and aggressive manner" said "*verwyder daardie swart man se voertuig*". Three witnesses, Mr Sedumedi included, testified that Mr Bester had stormed into a meeting that was underway. Mr Bester was subsequently charged with insubordination and making racial remarks by using the

words "*swart man*". He was dismissed and subsequently referred a dispute to the CCMA. The CCMA found in his favour and ordered his retrospective reinstatement. This decision was overturned on review. The matter eventually came before the LAC.

The LAC established that the term "black man" is neutral on the face of it and would require context to acquire a pejorative meaning. The issue for determination was whether the use of a racial descriptor, "black man", to identify the owner of the vehicle parked next to his parking bay was derogatory in circumstances where the name, rank and division of the owner of the other vehicle was unknown to him.

The LAC held that an objective test, not subjective test as used by the Labour Court, must be employed to determine whether the use of a term is racist, that is, whether "in the opinion of a reasonable person possessed of all the facts, Bester's use of the words '*swart man*' in the context was derogatory and racist?" This is a matter for evidence. The court held that had those who were present when the words "*swart man*" was used had the true state of Mr Bester's knowledge, they would not have viewed it in the context as offensive. The court reiterated that "race descriptors such as 'black man' are neutral and only by locating them in a 'pejorative' context that their use should be condemned as racist". Accordingly, the decision of the Labour Court was set aside.

The apparent distinction between the *Kruger and Bester* is that in *Kruger*, an undoubtedly derogatory word with vile historical context was used, whereas in *Bester*, a racial descriptor was utilised to identify an unknown African male without it would appear *Bester* displaying any form of racist conduct.

There is a warning to be sound; racial descriptors (black, Indian, coloured, white) must be considered within context and may not necessarily amount to racism. This decision goes once again to demonstrate the importance in leading evidence at arbitration with a proper appreciation of the applicable legal test at play and establishing racism on the facts where the employer seeks to discipline on such basis. This case is not a license to simply reference people by their race in the workplace.

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