

SOUTH AFRICA / JUDGMENT

Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration and Others (JR1904/2010) [2012] ZALCJHB 61 (29 June 2012)

[2012] ZALCJHB 61

COURT

Labour Court Johannesburg

BEFORE

Gaibie

CASE / FILE NUMBER

JR1904/2010

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR1904/2010

In the matter between:

MODIKWA MINING PERSONNEL SERVICESApplicant

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATIONFirst Respondent

TALANE S (NO)Second Respondent

RAMAEPADI S EThird Respondent

THE NATIONAL UNION OF MINEWORKERSFourth Respondent

HEARD: 24 May 2012

DELIVERED: 29 June 2012

Summary: Review – Dismissal for racist remarks – What constitutes racist slurs or remarks – Role of arbitrator

GAIBIE, AJ

Introduction

This is an application to review and set aside the arbitration award issued by the second respondent (‘the Commissioner’) under case number LP6158-09 dated 21 June 2010.

This matter concerns racism or the utterance of a racial slur by a black employee (‘Ramaepadi’) against white employees, and his dismissal in consequence thereof. Mr Ramaepadi challenged the substantive fairness of his dismissal.

Background facts

The applicant’s mining operations comprise of two shafts, the north shaft and the south shaft. The applicant has employees who are known as Multi Task Team Members (‘MTTMs’). They provide geological, surveying, sampling and planning services to the applicant. Their primary function is to collect various soil and ground samples from the different underground working areas for analysis. This information is shared on a daily basis with the technicians. The information gathered is used for a variety of purposes including an assessment of the roof conditions where underground mining activities take place in order to determine the appropriate roof support required in particular areas of the mine.

While the north shaft has more white employees, the south shaft consists of essentially black employees.

The incident in this matter occurred on 4 August 2009, at an economic resources management staff meeting (‘the meeting’). A large number of employees and MTTMs from both the north and south shafts attended the meeting including Ramaepadi, who was the applicant’s trainee resource technician and a shop steward of the National Union of Mineworkers.

It is not disputed that the applicant had previously experienced issues of racism at the mine and in consequence thereof adopted a zero tolerance policy towards racism. In a management brief numbered 016/2005, dated 30 August 2005, the applicant issued the following directive to all employees:

‘This brief serves to inform all employees that it has come to management’s attention that there has been a high number of allegations of racism at Modikwa.

In terms of Modikwa Code of Conduct clause 7.7 bullet point 8 such racism incidents/cases are prohibited and will not be tolerated.

I hereby urge everyone to refrain from any form racism. Anyone found guilty of any racism related incidents will be DISMISSED.

Yours in zero tolerance

...’

The applicant contends that after the formal business of the meeting was concluded, and at a point when many of the attendees got up to leave, Ramaepadi stood up to address the meeting and said that there was a problem with the use of the ERM office in the mornings at the north shaft. He said that MTTMs were unable to use that office because other employees such as technicians would be sitting in that office, and that the problem ‘had to do with concentration, we need to get rid of the whites.’

For convenience this event will be referred to as the ‘incident’ and the words quoted will be referred to as the ‘slur’ or the ‘racial slur’.

On 10 September 2009 and pursuant to grievances lodged by several employees, the following charge was formulated against Ramaepadi:

‘Use of racial remarks in that he uttered the words “we need to get rid of the whites” on the 4th August 2009 during the meeting at central.’

Pursuant to disciplinary proceedings, Ramaepadi was found guilty of that charge and he was dismissed.

Ramaepadi denied that he had uttered the slur and much of his defence turned on establishing:

Whether or not the slur was uttered; and

If so, at what stage of the meeting the slur was made. The relevance of this issue will become apparent later in this

judgment.

It was not contended on behalf of Ramaepadi that the words ‘we need to get rid of the whites’ did not constitute a racial slur or a racial remark. In fact, it was contended on his behalf¹ that he was aware that ‘the use of racial remarks is not allowed at the applicant’s mine’.

Was the racial slur made, and if so when?

In respect of this matter, the applicant led the evidence of:

Jacques Hansen (‘Hansen’), a resource technical surveyor, who worked on the same shift as Ramaepadi. Hansen had previously worked for the applicant, but left for a year and then returned to the applicant in July 2009. Hansen was seated approximately four to five metres from Ramaepadi at the meeting. He had no previous altercations or interactions with Ramaepadi as at the time of the incident.

Wiehann Raith (‘Raith’), a stope observer, who has been employed by the applicant since February 2006, and worked on the same shaft as Ramaepadi. He had a good relationship with his colleague, Ramaepadi. It was estimated that he was approximately eight metres from Ramaepadi.

Nardus Cronje ('Cronje'), a resource leader surveyor, who has had a contractual relationship with the applicant since 2001, first as a contractor and then as an employee. He took the minutes of the meeting and was seated approximately five metres from Ramaepadi. He had no previous altercations with Ramaepadi.

Hansen, Raith and Cronje heard Ramaepadi utter the slur at the meeting. Their accounts of exactly what was said were broadly similar. All three witnesses confirmed that the slur was made at the end of the proceedings either slightly before the meeting was adjourned or shortly thereafter. It was common course between them that they were offended by the slur. Their evidence was coherent, consistent and was not seriously challenged by Ramaepadi's representative. There was, in any event, no suggestion by Ramaepadi that their evidence was fabricated, or that it was conspiratorial in any sense.

Ramaepadi gave evidence, and on his behalf the evidence of three employees: Khaya Mabutya ('Mabutya'), Beverley Kgetsi ('Kgetsi') and Sylvester Maake ('Maake') was led.

Ramaepadi denied that he had uttered the slur but indicated that he had said that 'there is a high concentration of white technicians in North Shaft and we need to take some to South Shaft in order to create a balance. The chairperson Mr Bob Van Rhyn acknowledged my input and said that he will make a follow-up on it. The meeting proceeded until it was officially closed'. He suggested that he had made this contribution at item 2 of the agenda and he confirmed the proposition put to him by the commissioner that 'the meeting then proceeded for quite some time before it was officially closed'.

Mabutya also denied that Ramaepadi had uttered the slur, but contrary to him, indicated that Ramaepadi had raised the issue of the concentration of white technicians in the north shaft, at the end of the meeting.

Kgetsi's evidence was broadly similar to Ramaepadi's evidence. Maake's evidence was almost in its entirety led by the commissioner. His account of what was said at the meeting is captured in the following excerpt from the transcript of the arbitration proceedings:²

'MR COMMISSIONER: Now you said how far were you seated from [Ramaepadi] that is the employee?

....

MR COMMISSIONER: Now you can – you can estimate here. I do not know how broad your chairs are. You can estimate.

MR MAAKE: Yes. Something like four metres

MR COMMISSIONER: Okay, about four metres roughly. Now did he say – did you hear the words that he uttered, let us get rid of the whites?

MR MAAKE: Yes.

MR COMMISSIONER: Okay. If he was seated some four metres away from you, if he had said these words, would you have heard that?

MR MAAKE: Definitely.'

Under cross examination Maake confirmed his evidence in chief in the following exchange:

'MR MBETHE: I am saying this issue, were they uttered these words to say let us get rid of white people ... at the end of the meeting?

MR MAAKE: Right in the meeting.

MR MBETHE: Right at the end of the meeting?

MR MAAKE: No, at the end of the meeting he spoke and then he finished and then BOB answered him, he said he will follow up on that and then there ... and then he said anyone offended then the answer was no and then the meeting dispersed.³

MR MBETHE: I thought that you were just prepared to come and tell us that the issue was discussed under communication and you never heard the words let us get rid of them and you did not hear anything and you were seated very far from where he was, 4 metres with other people present, you did not hear anything.

MR MAAKE: Mr Mbethe when I do my medical fitness they test my ears I am sure I heard these words.'⁴

At some point of the cross examination, the applicant's representative suggested that Maake's evidence was unreliable in respect of the precise timing as to when the slur was uttered. Be that as it may, Maake had in essence confirmed and corroborated in formidable fashion the applicant's version that the slur had been uttered.

The relevance, if any, as to when the slur was uttered was raised on behalf of Ramaepadi in an effort to avoid the implication of the charge which suggested that the racial slur was uttered 'during' and not after the formal adjournment of the meeting. It was argued that if the slur was made during the meeting, the scribe would have recorded it in the minutes of the meeting, and in the absence of such a recordal, the incident did not occur and the racial slur was accordingly not uttered.

It was common cause, in the evidence of all of the witnesses, that either the slur or Ramaepadi's comment about the concentration of whites in the north shaft was made at the meeting whilst employees were still present. On Ramaepadi's own version, his comment was made early in the meeting. In any event, the detail as to precisely when the racial slur was made is neither here nor there. Once the deed was committed, it is immaterial whether it was made shortly before or after the formal part of the meeting.

In the circumstances, and on the basis of the applicant's evidence which was independently corroborated by the evidence of Maake who testified for Ramaepadi, I find that the words formulated in the charge were uttered by Ramaepadi at the meeting. In other words, he uttered the racial slur at the meeting.

The context of the racial slur

Our courts have dealt with many incidents of racism, the vast majority of which have involved incidents of overt racism by whites against Africans.⁵ There will no doubt be occasion when this court will have to deal with implicit, indirect or covert incidents of racism. The context in which such incidents occur or the racial slurs are made will always be important.

In respect of overt acts of racism, our courts have readily had regard to the social, political and historical context of racism in this country. Consider for instance, incidents of racism that had been dealt with by the High Court during the apartheid era, and in respect of which Zondo JP (as he then was) makes reference in his judgment in *Crown Chickens*⁶. I quote below the relevant part of that judgment where Zondo JP, with reference to one of those cases and in respect of which the 'K' word had been used, stated that:⁷

'Mbatha's case came to court because he had sued Mr Van Staden for damages arising out of assault and calling him a "Kaffir". The basis for the claim for damages relating to being called a "Kaffir" was that Mr Van Staden's conduct in calling Mr Mbatha a "Kaffir" constituted injuria. At 262H of his judgment, Didcott J said that already then – that is 21 years ago – when a black man or woman in South Africa was called a "Kaffir" by somebody of another race, then "... as a rule, the term is a derogatory and a contemptuous one". He continued and said: "With much the same ring as the word "nigger" in the United States, it disparages the Black race and person concerned as a member of that race. It is deeply offensive to Blacks. Just about everyone knows that by now. The intention to offend can therefore be taken for granted, on most occasions at any rate".

... As I have said, when a person who is not an African calls an African person a "Kaffir", such conduct constitutes racial abuse. The racial abuse of Africans by certain whites did not stop in the 1970s and 1980s. It continued into the early 1990s and continues even today. It takes different forms but still remains racial abuse.'

In *Crown Chickens*⁸ (supra) the LAC dealt with an overt act of racism in the context of our new constitutional dispensation. In that judgment, Zondo JP indicated that South Africa has a constitution with a justiciable Bill of Rights, and that the preamble to the constitution recognises 'the injustices' of our past including its racist history. The relevance of the new

constitutional dispensation in this context is articulated in resounding language by Mohamed J in *S v Makwanyane and Another*⁹ in the following terms:

'The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos,

expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic. The past institutionalised and legitimised racism. The Constitution expresses in its preamble the need for a “new order ... in which there is equality between ... people of all races. Chapter 3 of the Constitution extends the contrast, in every relevant area of endeavour The past was redolent with statutes which assaulted the human dignity of persons on the grounds of race and colour alone; section 10 constitutionally protects that dignity. The past accepted, permitted, perpetuated and institutionalised pervasive and manifestly unfair discrimination against women and persons of colour; the preamble, section 8 and the postamble seek to articulate an ethos which not only rejects its rationale but unmistakably recognises the clear justification for the reversal of the accumulated legacy of such discrimination ...’

It is against this political and historical background that acts of racism must be determined. There is no doubt that the use of the notorious ‘K’ term will almost inevitably amount to racism or racist conduct given its political and historical context. It is also conceivable that the use of clear and unequivocal racist terminology or words that amount to hate speech, will in appropriate circumstances, also amount to racism.

Implicit, indirect and covert acts of racism, depending on the context in which they occur, may be as offensive, if not more offensive than overt racist acts precisely because they are aimed at achieving the effects of racism through indirect, underhand or divisible means.

It is my view that the terms used by Ramaepadi, on their own and out of context - ‘we need to get rid of the whites’ – constitute words that are clear, unequivocal and overtly racist in nature. In other words, the words speak for themselves and they conjunctively demonstrate the intention to be racist. They are, in other words a racist remark or a racist slur.

During the course of argument, it was contended on behalf of Ramaepadi that words cannot on their own amount to a racist slur and that they must of necessity be viewed in the context in which they are used for the purposes of determining whether they amounted to a racist slur. For reasons indicated earlier, I disagree with this proposition. Words have their own meaning and do not necessarily require a context within which to acquire meaning. Depending on the words used, there may however be circumstances in which words may acquire a different meaning. I do not believe that the racist slur uttered by Ramaepadi require a context for the purposes of interpretation. Their plain meaning indicate racism.

However, and to the extent that the context has any bearing on the words used, I believe that such an exercise is nevertheless useful.

Given that Ramaepadi had uttered the words, it is his understanding of the context that is perhaps the most appropriate place to begin this process. He said that he had raised a concern at the meeting about the way the MTTMs (who were mainly black employees) were treated and the fact that they had to use a filthy ‘container’ as an office. According to him, the container was not intended for office use but was meant to store equipment¹⁰ and did in fact store overalls, clothes, oils and machines.¹¹ As a ‘solution’ to this problem, he informed Bob Van Rhyn that there was a

high concentration of whites in the north shaft and that some of them should be transferred to the south shaft to create a balance.¹² It appears that he made this suggestion because whenever the MTTMs wanted to use the office in the north shaft they were unable to do so because white technicians who were concentrated in that shaft occupied that office.

Ramaepadi was however unclear as to the precise cause of the problem associated with the use of the office in the north shaft or its inaccessibility to the MTTMs, and his alleged 'solution' was no more than a tentative exercise aimed at assisting him to achieve answers to a potential problem that he had not quite worked out. In this regard he said:

'Because the problem here was in North Shaft, the white resource technicians if one comment on something they will all fall on that, so what I wanted to do is, is to distribute them so that at least the South Shaft and North Shaft must have equal or even number for white resource technicians so that we should see whether really that thing has been caused by the majority of the white surveyors there.'¹³

It is therefore not surprising that whilst he appeared to portray this issue as one of discriminatory treatment against black employees, he did not elevate this issue as a grievance or take it up formally with management. Ramaepadi's counsel suggested that the words used were in the context of his efforts of 'transformation' of the shafts. This proposition is not sustainable for two reasons: first, because Ramaepadi was not certain of the reason why there was unequal access to the office in the north shaft and could not in those circumstances have contemplated the noble intentions of transformation; and second, because if his intention was to achieve the noble benefits of transformation, he cannot possibly be pardoned for using ignoble means of achieving it.

Simply put, the context in which the words were spoken simply aggravates the purpose for which they were used. The words constitute a racial slur or a racial remark on their own and in the context in which they were used. Ramaepadi knew that his words constituted a racial slur and that white persons who heard it would have been offended by them. He did the obvious thing. He denied that he had uttered the words, to his detriment. His conduct was unacceptable and reprehensible, and it was conduct that was prohibited not only by the Constitution but by the applicant's disciplinary code.

But Ramaepadi's conduct was not only egregious because his conduct was racist or that it contravened the applicant's code, it was so for the additional reason articulated by Wallis,¹⁴ which was cited with approval by the court in *Lebowa Platinum Mines Ltd v Hill*:¹⁵

'Perhaps as a result of South Africa's history a number of cases in the Industrial Court and before arbitrators have dealt with dismissals arising from the employer taking disciplinary action against employees engaging in racially offensive conduct towards

co-employees. It does not suffice to explain these cases on the ground that the employees concerned were acting in breach of specific

provisions of a disciplinary code. Such incidents in the frequently highly-charged racial or political atmosphere of the workplace can be extremely detrimental to working relationships and disruptive of the entire business operation. It is submitted that a further foundation for the disciplinary action taken in these cases is an extension of the duty of respect owed to superiors by all employees. Such an extension involves a recognition of the interdependence of all people engaged in the enterprise and is consistent with any reasonable concept of the importance of human dignity in society. The position was well expressed by the arbitrator in *Siemens Ltd v NUMSA* (a case of racial abuse) in saying: “racial insults go beyond those to whom they are individually directed. They impact upon the workforce as a whole ...”. It is submitted that the proper basis for regarding the conduct in question as misconduct is that, irrespective of any provision of an applicable disciplinary code, such conduct is a breach of the extended duty of respect

identified above.’

Grounds of review

The applicant contends, in essence, that the commissioner in arriving at the conclusion that Ramaepadi had not uttered the racial slur and was consequently not guilty of the charge proffered against him, took into account irrelevant evidence and disregarded relevant evidence, and in so doing constituted a reviewable irregularity. It is apparent that the commissioner did not carefully assess the evidence before him and he omitted any consideration of relevant evidence, including that of Maake’s testimony in reaching his conclusion. In that regard, the commissioner is criticised for making various findings relating to the guilt or otherwise of Ramaepadi, which are premised on the review test dealt with below.

The decision reached by the commissioner is clearly one that would not have been reached by a reasonable decision maker in terms of the principle enunciated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.¹⁶

In *Pam Golding Properties (Pty) Ltd v Erasmus and Others*,¹⁷ Van Niekerk J dealt with reviewable irregularities of the kind committed by the commissioner in this matter and held that:

‘In his judgment in *Sidumo*, Ngcobo J reaffirmed the role of reasonableness in relation to conduct in these terms:

It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing ... the commissioner’s action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in s 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.’

Based on a proper assessment of the totality of facts placed before the commissioner, it is clear that he reached a decision that a reasonable decision maker would not have reached. On that ground alone the award stands to be reviewed and set aside.

Conduct of the commissioner

There is one further ground of review, articulated in the applicant's supplementary affidavit that requires a brief analysis. It was contended on behalf of the applicant that the commissioner assisted Ramaepadi's representative in leading his evidence, and that of his witnesses, at the arbitration proceedings to such an extent that gave rise to an apprehension of bias.

Whilst I do not intend to refer to the detail of the manner or the extent to which the commissioner became involved in Ramaepadi's presentation of his case, I consider it necessary to make the following comments. Having regard to the transcript of the arbitration proceedings, it is patently clear that there are numerous examples and extensive periods within which the commissioner got involved in the presentation of Ramaepadi's evidence and the evidence of his witnesses. His conduct was inappropriate, reprehensible and created a justifiable impression that he had a predisposition towards assisting Ramaepadi in the presentation of his case and in challenging the applicant's version of events. I believe that the commissioner's conduct and evidence of bias is fairly obvious from the record, and that a reasonable person in the position of the applicant would have had a factual basis for drawing such an inference and for having a reasonable apprehension of bias. See in this regard *Raswiswi v CCMA and Others*.¹⁸

Order

In the premises, I make the following order:

The arbitration award issued by the second respondent ('the Commissioner') under case number LP6158-09 dated 21 June 2010 is reviewed and set aside;

There is no order as to costs.

Gaibie, AJ

Acting Judge of the Labour Court

Appearances:

For Applicant: Advocate F Venter

Instructed by: Cliffe Dekker Hofmeyr Inc

For Third and Fourth Respondents: Nomali Tshabalala Attorneys

¹Paragraph 45 of the answering affidavit.

²At page 257 of the record.

3At pages 278 – 279 of the record.

4At page 280 of the record.

5Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others

[2002] 6 BLLR 493 (LAC); Lebowa Platinum Mines Ltd v Hill [1998] 7 BLLR 666 (LAC); Ciliza v Minister of Police and Another 1976 (4) SA 243 (N); Mbatha v Van Staden 1982 (2) SA 260 (N); S v Salzwedel and Others 2000 (1) SA 786 (SCA).

6See footnote 5

7Crown Chickens (supra) at para 12.

8Above n 5 at para 26.

9[1995] ZACC 3; 1995

(6) BCLR 665 (CC) at para 262.

10Page 179 of the record.

11Page 180 of the record.

12Page 178 of the record.

13Page 184 of the record.

14Wallis Labour and Employment Law, at para 25.

15 [1998] 7 BLLR 666 (LAC) at para 12.

16 2008

(2) SA 24 (CC) at para 110.

172010

(31) ILJ 1460 (LC) at para 6.

18(2011) 32 ILJ 2186 (LC) at paras 19-23.

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