

SOUTH AFRICA / JUDGMENT

SAEWA obo Bester v Rustenburg Platinum Mine and Another (JA45/16) [2017] ZALAC 23; (2017) 38 ILJ 1779 (LAC); [2017] 8 BLLR 764 (LAC) (3 May 2017) [2017] ZALAC 23

COURT

Labour Appeal Court

BEFORE

Jappie, Davis, Kathree-Setiloane

CASE / FILE NUMBER

JA45/16

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: JA45/16

SAEWA

obo MEYER

BESTER

Appellant

and

RUSTENBURG

PLATINUM

MINE

First Respondent

KOBUS

ERASMUS

N.O.

Second Respondent

Held: 21 February 2017

Delivered: 03 May 2017

Summary:	Review of arbitration award – employee dismissed for making untoward racial remarks towards a fellow employee by referring to him as “swartman”.
Held:	Employer bore the evidentiary burden in the arbitration proceedings to prove that the language used was objectively derogatory. The test is an objective one - the court must examine the entire context in which the misconduct is alleged to have occurred and decide on a balance of probabilities whether the employee is guilty of such conduct and whether the employer has discharged the onus of proof - 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. Although the impact of a derogatory or racist word upon a person to whom it is addressed is not entirely irrelevant, the fact that he or she felt offended is only one element; the word itself must be shown to be derogatory and racist in context. Evidence shows that the employee had no reason to denigrate his fellow employee as he did have a need to identify the other employee - a person whose name, rank and division was unknown to him - and he used race as a descriptor in doing so. The employee was charged with “making a racial remark by referring to a fellow employee as a “swartman” when requesting that he moved his vehicle” - but that was not the only plausible inference that could be drawn from the proven facts and the probabilities. The inference that the employee used the word “swartman” in context to describe the other employee whose name he did not know, was equally plausible. This was the outcome that the Commissioner arrived at in the arbitration award. In view of the ambivalence on the evidence in relation to whether the employee’s use of the word “swartman” in context was derogatory and racist, the decision reached by Commissioner was one that a reasonable decision-maker could reach. In a racially charged society such as ours, where an accusation of

racism has far reaching and serious consequences, it is important to carefully scrutinise the context in which a race descriptor is used, and not to presume that the mere use of a race descriptor is axiomatically derogatory and racist. The Labour Court, however, erroneously adopted a subjective test in determining the effect of the word in question. The Commissioner arrived at a reasonable outcome. Labour Court's judgment set aside and replaced with a decision to the effect that the review application is dismissed. Appeal upheld with costs.

Coram: Jappie, Davis JJA and Kathree-Setiloane AJA

JUDGMENT

KATHREE-SETILOANE AJA

- [1] The appellant, Mr Meyer Bester ("Bester"), appeals against the judgement of the Labour Court (Van Niekerk J) in which it set aside on review a Commissioner for Conciliation, Mediation and Arbitration (CCMA) arbitration award in which the second respondent ("the Commissioner") found the dismissal of Bester by the first respondent, Rustenburg Platinum Mine ("RPM") to be procedurally and substantively unfair.
- [2] On 28 May 2013, RPM dismissed Bester, a Senior Training Officer stationed at its Thembelani Mine ("the Mine"), on the grounds of insubordination and making certain racial remarks. On 24 April 2013, Mr Ben Sedumedi ("Sedumedi"), employed by RPM as a Chief Safety Officer at the Mine, held a safety meeting at which Mr Pieter van der Westhuizen ("van der Westhuizen"), Mr Michael Soko, Ms Salome Moeng ("Moeng"), Mr Tshepo Segona ("Segona"), Ms Phumzile Gobinamba and Mr Solly Tlhomelang ("Tlhomelang") were present. While the meeting was in progress, Bester entered the office to raise an issue falling within the scope of Mr Sedumedi's authority relating to parking.
- [3] About two weeks before this date, Bester found a large 4X4 vehicle ("the vehicle"), similar in size to his own, parked in the parking bay adjacent to the one that Sedumedi, as a favour, had allocated to him. Though reverse parking in so limited space was not impossible, it was certainly difficult, and Bester feared that scratches and bumps may result. He, therefore, decided to take the matter up with Sedumedi in an effort to arrange for the vehicle to be parked in one of the other available bays. Bester made repeated efforts to raise the issue with Sedumedi, which included phoning him several times only to have the phone slammed down on him.
- [4] On 17 April 2013, Bester took photographs of the two parking spaces. Sedumedi saw Bester do this, but when Bester tried to approach

Sedumedi to speak to him about his parking difficulty, Sedumedi brushed Bester off. Bester then sent an e-mail to Sedumedi to which

he attached the photographs. In the covering note to the e-mail, he wrote: “you don't want to talk to me so I think I must take this [matter] a little bit further”. However, Sedumedi regarded the message as “valueless” and chose neither to open the attachment to the e-mail nor reply to it. Mr Charles Cantor discussed the problem with Sedumedi at Bester’s request, but Sedumedi still refused to speak to Bester about it. Sedumedi instead instructed Tlhomelang, the owner of the vehicle, to take no notice of Bester’s concerns and to continue parking his vehicle in the parking bay next to Bester.

[5] On the morning of 24 April 2013, Bester walked into Sedumedi’s office. There is a dispute as to what took place there. On Bester’s version, there was no meeting in progress. He testified that Sedumedi and van der Westhuizen, the Engineering Safety Officer, were discussing jogging. When they finished chatting, he asked to talk about his parking difficulty, but Sedumedi responded by saying that he would not speak to a “C5” grade employee. After being told that Bester was actually a D - grade operative, Sedumedi jumped up from behind his desk and said “jy wil nie langs ‘n swartman stop nie... dit is jou problem”. After asking Sedumedi “not to turn this into a racial issue”, Bester indicated that he proposed to take the matter up with senior management. Sedumedi responded by saying that he should do as he wished.

[6] The thrust of RPM’s version as testified to by Sedumedi, Moeng, van der Westhuizen and Tlhomelang is that Bester stormed into a safety meeting that was in progress, pointed his finger at Sedumedi and said, in a loud and aggressive manner, that Sedumedi must “verwyder daar die swartman se voertuig” (from the parking bay) otherwise he would take the matter up with management.

RPM charged Bester with two acts of misconduct: insubordination and making racial remarks by using the word “swartman” to refer to a fellow employee when he requested that he move his vehicle. On 25 April 2013, RPM suspended Bester pending the outcome

of a formal disciplinary enquiry. On 23 May 2013, Mr De Jager (“De Jager”), the chairperson of the disciplinary enquiry, found Bester guilty of insubordination and making racial remarks to a fellow employee. De Jager recommended the sanction of dismissal and, on 28 May 2013, RPM dismissed Bester.

[7] Having unsuccessfully appealed against his dismissal, Bester referred an unfair dismissal dispute to the CCMA on 3 June 2013. The dispute was not resolved through conciliation and was referred to arbitration. The Commissioner handed down his award on 19 December

2013. Finding that De Jager’s decision was “far-fetched and nonsensical”, the Commissioner held that Bester’s dismissal was both substantively and procedurally unfair. He accordingly ordered RPM to reinstate Mr Bester with retrospective effect to his position as Senior Training Officer and awarded him back pay in the amount of R191 834 21.

- [8] Although the Commissioner concluded, in the award, that Sedumedi was an “extremely poor and very evasive witness”, he accepted that Bester had used the expression “swartman”. In support of this conclusion, he relied on the probabilities and an apparent concession, to this effect, in the version which Bester’s representative had put to Moeng.
- [9] Aggrieved by the arbitration award, RPM launched an application to review and set it aside. In the review, the Labour Court outlined the issues as being twofold: (a) whether there was a reference by Bester to a co-worker as a “swartman”, and
- (b) whether in making that remark, Bester breached a workplace rule that prohibits abusive and derogatory language and in particular racist remarks? On the former issue, the Labour Court rejected Bester’s testimony over that of Sedumedi, Moeng, van der Westhuizen, and Tlhomelang who were present at the meeting, and found that the Commissioner had been right to conclude that Bester used the expression “swartman” to refer to the person who parked next to him.
- [10] In relation to the latter issue, the Labour Court’s critique of the Commissioner’s evaluation of the evidence, which was presented at the arbitration hearing, is summed up in the following two paragraphs of the judgment:

‘[The Commissioner] accepts Bester’s version that there was no meeting underway at the time he entered the office, this despite the evidence of all of the other witnesses present who confirmed that the meeting had commenced, and van der Westhuizen’s denial that he had been engaged in conversation with Sedumedi about jogging routes. The Commissioner then accepted that Bester had pointed his finger at Sedumedi, not because of any evaluation of the evidence but on account of his personal observation of Bester’s mannerisms while giving evidence. He also appears to accept that the applicant’s witnesses had a clear recall of the sequence of events and in particular that Bester had used the word ‘swartman’ to refer to the person parking next to him. Because Tlhomelang did not know Bester prior to the incident, it is highly probable that Bester might have used the term ‘swartman’ to identify him.

The basis of the commissioner’s factual findings leaves one with a sense of bewilderment. In essence, he accepts that the meeting had in fact commenced only on account of the detailed nature of Bester’s account of a conversation that he says was being conducted between Van der Westhuizen and Sedumedi, a conversation they both deny ever took place. The detail of Bester’s version in these circumstances is entirely irrelevant – there was no cogent reason for the commissioner to reject the evidence of both Sedumedi and Van der Westhuizen in this respect – their evidence (that the meeting was underway when Bester stormed through the door) was consistent, and consistent with the evidence of the other employees present at the meeting. The next factual finding, that Bester had pointed his finger at Sedumedi, is made without any reference to the evidence. The commissioner’s finding is sustained by no more than the commissioner’s personal observation of Bester’s demeanour. The finding that Bester uttered the word ‘swartman’ is sustained by the evidence and despite Bester’s denial, clearly correct.’

[11] The Labour Court then referred to Modikwa Mining Personnel Services[1] and the judgements of this Court cited there[2] and reasoned that:

'What the Modikwa Mining judgment (and many others) demonstrate is that despite the formal dismantling of institutional apartheid, issues of race and racism

remain prevalent in South African workplaces. The use of racial identifiers plays an obvious role in the perpetuation of negative

stereotypes. The concept of race, as a social construct, continues to be imbued with ideological baggage and can serve the purpose of subjugation, where particular race groups continue to be viewed as 'other'.

[12] The Labour Court went on to hold that "[i]n the present instance, there is no conceivable reason why race might justifiably

have served as an identifier". In relation to context, it stated that:

'To the extent that context is relevant, it should be recalled that Bester stormed into a meeting that was in progress, that he was

aggressive and belligerent, that he pointed his finger at Sedumedi and in a loud voice demanded that Sedumedi removes the 'swartman's

car from next to his. Those present at the meeting were offended by Bester's conduct. Bester was not, as the Commissioner

suggested, benignly 'referring to a physical attribute in order to identify a particular person'. Bester's reference to Tlhomelang as a 'swartman' was derogatory and racist.'

[13] On sanction, the Labour Court found that the Commissioner had failed to appreciate the significance of the memorandum issued by RPM's General Manager on 16 April 2013 which read:

'It has come to 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 as One Team.'

[14] In relation to the memorandum, the Labour Court stated that RPM had adopted a zero-tolerance approach to the use of derogatory and abusive language, a fact of which Bester was aware. It accordingly concluded that on a proper assessment of the evidence presented at the arbitration hearing, the Commissioner “reached a decision that a reasonable decision-maker would not have reached”. In this regard, it reasoned:

‘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. Bester committed an act of serious misconduct that warranted his dismissal. On that ground alone, the award stands to be reviewed and set aside.’

The Labour Court accordingly reviewed and set aside the arbitration award and substituted it with an order declaring that Bester’s

dismissal was both substantively and procedurally fair. It is against this finding that Bester appeals, with leave of the Labour Court.

[15] It is close on two decades since the dismantling of the apartheid regime, yet racism remains a key challenge to our democracy. Racism is particularly pervasive in the workplace, where concerned employers have adopted a zero-tolerance approach to racist conduct and the use of racial expressions or epithets which are derogatory by making such misconduct a dismissible offence. Our courts have correspondingly dealt with acts of racism, and the use of racist language in particular, very firmly visiting upon such conduct the sanction of dismissal. [3]

[16] Bester was charged with the offence of making a racial remark by referring to a fellow employee as a “swartman” when he requested that the “swartman” move his vehicle. RPM’s disciplinary code defines the offence as “racial, ethnic or other abuse or harassment”. The memorandum issued by RPM in early April 2013 prohibits conduct that is “abusive” and “derogatory.” The test that applies to the determination of whether the use of the word “swartman” by Bester was derogatory or abusive, and in contravention of RPM’s disciplinary code, is an objective one. The employer, in this case, RPM, bore the evidentiary burden in the arbitration proceedings to prove that the language used by Bester was objectively derogatory. The test is not based on how the employer understood the word nor on the subjective 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.

[17] As to the first element, which is whether Bester used the expression “swartman”, the evidence presented at the arbitration hearing reveals that Bester emphatically denied using the expression “swartman” in his exchange with Sedumedi, recognising that that would have been foolish in the workplace and devastating to his career. He, however, accepted that the

sanction of dismissal would be an appropriate sanction for such misconduct. Despite Bester's denial to the contrary, the Commissioner found that Bester had, in fact, used the word "swartman" in referring to the person (Tlhomelang) who parked in the bay next to him. Rightly so, it was conceded on behalf of Bester in argument that the Commissioner's finding on this issue is not beyond the bounds of reasonableness contemplated in Sidumo[4] and it must, as a result, be treated as dispositive.

- [18] Mr Boda, on behalf of RPM, argued that this concession coupled with Bester's failure "to come clean" compels the inference that he uttered the word "swartman" with intent to be derogatory to Tlhomelang because of his race, thus providing a basis for the Court to demonstrate its moral opprobrium to such conduct by confirming the sanction of dismissal imposed by RPM, the employer. Although I am mindful that racist conduct in the workplace is a serious offence and "an anathema to sound industrial relations" warranting the sanction of dismissal, it is important to bear in mind the gravity of a judicial finding of racism which will surely reverberate for many years after the incident with potentially long term consequences for all concerned. Consequently, before making such a finding against an employee accused of racist conduct in the workplace, the court must carefully scrutinise, against the totality of the evidence presented, whether on a balance of probabilities the employee is guilty of such conduct. Where certain denials and versions advanced in support of an ill-considered defence strategy are subsequently found to be mendacious as is the case here, that alone should not be the determining factor in relation to the question of the guilt or otherwise of that employee. In dealing with this question, the task of the court is to decide whether on the assessment of the evidence as a whole, the probabilities and the inferences that the employer has discharged the onus of proof on a balance of probabilities.
- [19] In determining whether the word "swartman" is derogatory on the objective test, the use of the word must be looked at in the context in which it was made. It is clear from the judgment that the Labour Court implicitly recognised that the word "swartman" is neutral on the face of it, and would require context if it were to acquire a "pejorative" meaning. For instance, and as pointed out in argument on behalf of Bester, 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"
- [20] The Labour Court was, indeed, constrained to consider context in determining whether the expression "swartman" as used by Bester, in his exchange with Mr Sedumedi, was derogatory. On the objective test, this meant that the Labour Court had to examine the entire context in which the misconduct is alleged to have occurred and the effect thereof. The context of course had to disclose, as the only reasonable inference from the proven facts, that the word "swartman" was derogatory and racist, and that Bester had acted with intent to demean. Only then could the Labour Court upset the decision of the Commissioner, which

was that no intent to demean had been proven.

[21] The objective facts are that Bester was angry with Sedumedi for refusing to assist him to resolve his parking problem. This caused him to act precipitously by storming into Sedumedi's office and demanding in an "aggressive and belligerent" manner that Sedumedi must instruct the "swartman" to remove his car from next to his. Bester did not know Tlhomelang, the owner of the 4x4 vehicle which parked in the bay next to him, and neither did Tlhomelang know him. An important contextual fact is that Bester is white and to his knowledge the person parked next to him was black. Whilst Bester's status as a white person would bring him within the scope of potential condemnation, that alone is insufficient for such a finding. I say this because it is clear from the record of evidence that the issue in dispute has nothing to do with the race of the person who parked next to Bester. There is no suggestion on the evidence that Bester objected to parking next to a "black man". The real issue is whether Bester's use of the descriptor "black man" to identify the owner of the vehicle parked in the bay next to his was derogatory.

[22] The evidence of Sedumedi and Moeng, although not decisive, is nonetheless important to the question of context. Mr Sedumedi

described the exchange as "frightening" because never before did someone interrupt a meeting that he was conducting, and point a finger at him in the presence of his subordinates. According to him, they were "all terrified". He then put the matter firmly on the footing that Bester knew the name of the owner of the vehicle, namely Tlhomelang, by saying this:

'I was very much offended by him classifying the guy parking next to him as swart man and especially when previously Mr Bester ... knew exactly the name of [the] person parking next to him but he chose on that particular day to classify and call him by the name swart man.'

Moeng was likewise under the impression that Bester knew Tlhomelang. Under cross-examination, she sought to equate Bester's failure to refer to Tlhomelang by name, with Bester's legal representative calling her "a lady", when he clearly knew her name. She later testified that Bester's use of the word "swartman" was offensive as it showed that "[Bester] did not want a black man parking next to him". However, when confronted under cross-examination with the inaccuracy of her proposition, she quickly backtracked from it.

[23] Sedumedi and Moeng felt offended. Their affront rested squarely upon the assumption that Bester, a training officer, could have identified Tlhomelang (the driver of the vehicle parked next to his) by name as Bester had inducted him. But on this aspect Sedumedi was mistaken. Bester was not responsible for inductions. He, in fact, had only met Tlhomelang, who had been at the Mine for a fortnight, during the course of the incident in Sedumedi's office, and they chatted amiably to each other immediately after the incident. Both Tlhomelang, who testified in support of RPM's case at the arbitration hearing, and Bester made this clear when they each testified that they did not know one another nor each other's names prior to the incident. It is, therefore, not surprising that Tlhomelang himself took no offence at being referred to as "die swartman".

- [24] The Labour Court found that “Bester stormed into a meeting; was aggressive and belligerent; pointed his finger at Sedumedi and in a loud voice demanded that Sedumedi removes the swartman’s car from next to his”. Although I accept this finding to be correct, I am unable to reconcile this finding with the subsequent finding that “Bester’s reference to Tlhomelang as a ‘swartman’ was derogatory and racist”. How the one relates to the other is not spelt out in the judgment. The latter finding, however, is certainly compatible with the related finding that “those present in the meeting were offended by Mr Bester’s conduct”. The Labour Court made this finding even though the evidence reveals that only Sedumedi and Moeng felt offended because they were seemingly ignorant of the true facts. At most, van der Westhuizen who was also present at the meeting viewed Bester’s conduct as inappropriate. And Tlhomelang, as I already indicated was not offended at Bester’s conduct.
- [25] Although the impact of a derogatory or racist word upon a person to whom it is addressed is not entirely irrelevant, the fact that he or she felt offended is only one element; the word itself must be shown to be derogatory and racist in context. In other words, the words must be found to be objectively derogatory on the evidence viewed as a whole. The Labour Court, however, erroneously adopted a subjective test in determining the effect of the word in question upon “all those present at the meeting” in Sedumedi’s office on the morning of the incident. However, how they perceived or understood the word “swartman” used in context is not decisive. On the objective test, the question that the Labour Court ought to have asked was whether, in the opinion of a reasonable person possessed of all the facts, Bester’s use of the word “swartman” in context was derogatory and racist? Had Sedumedi and Moeng known the true state of Bester’s knowledge, I am of the view that they would not have viewed the expression “swartman” in context as offensive.
- [26] Although cognisant of the danger to speculate, this is precisely what the Labour Court did in the final analysis. In holding that “there is no conceivable reason why race might justifiably have served as an identifier”, the Labour Court assumed that Bester had reason to denigrate both Sedumedi and Tlhomelang. In doing so, it ignored four cardinal facts on the evidence. The first and second are that Bester did not know Tlhomelang (the person he described by race) and therefore had no reason to denigrate him. The third is that Bester had no need to denigrate Sedumedi, with whom he had a close working relationship. And the fourth, as emphasised by Bester in his testimony at the arbitration hearing, is that he would have been a fool to denigrate black people in general in front of black co-employees of a company in which racism is deplored. As we know, just two weeks prior to the incident, RPM issued a memorandum to all its employees, working at the Mine, warning them against the use of abusive and derogatory language as this would be visited with disciplinary action.
- [27] While it is clear on the evidence that Bester had no reason to denigrate either Sedumedi or Tlhomelang, he did have a need to identify Mr Tlhomelang - a person whose name, rank and division was 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. He was charged with “making a racial remark by referring to a fellow employee as a ‘swartman’

when requesting that he moved his vehicle” - but that the context discloses the word to be derogatory and racist is certainly not the only plausible inference that can be drawn from the proven facts and the probabilities. The inference that Bester used the word “swartman” in context to describe Tlhomelang, the driver of the vehicle whose name he did not know, would be equally plausible.

[28] This is, in essence, the outcome that the Commissioner arrived at in the arbitration award. Having regard to the ambivalence on the evidence in relation to whether Bester’s use of the word “swartman” in context was derogatory and racist, I am simply unable to say that the Commissioner’s decision, on the Sidumo[5] test, is not one that a reasonable decision-maker could reach. Notwithstanding the irregularities in his reasoning, as highlighted

in the judgment of the Labour Court, the Commissioner considered the principal issue before him, evaluated the facts presented at the arbitration hearing and came to a conclusion that is reasonable.[6] Accordingly, the Labour Court erred in finding that the Commissioner “reached a decision that a reasonable decision-maker would not have reached”.

[29] 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.

[30] As it turns out, van der Westhuisen himself, unwittingly, used a race descriptor when testifying at the arbitration hearing. This is apparent from the following exchange between him and Bester’s representative during his cross-examination:

‘MR ENGELBRECHT: Dankie. Kan u onthou wie die persone was wat daar was in die kantoor?

MNR VD WESTHUIZEN: Dit is nou ek en MNR SEDUMEDI, SALOME [MOENG], TSHEPO [SEGONA] – ek kan nie daardie ander een swart mannetjie se naam onthou nie.

MR ENGELBRECHT: Die ander wat se naam onthou nie?

MNR VD WESTHUIZEN: Die ander swart man se naam.’

Ironically, van der Westhuisen’s use of this descriptor although of similar import to that used by Bester to identify Tlhomelang, whose name he did not know, went unnoticed by all concerned. What this illustrates, is that in a racially charged society such as ours where an accusation of racism has far reaching and serious

consequences, it is important to carefully scrutinise the context in which a race descriptor is used, and not to presume that the mere use of a race descriptor is axiomatically derogatory and racist. Race descriptors such as “black man” and “black woman” are neutral and only by locating them in a “pejorative”

context that their use should be condemned as racist.

[31] In view of the conclusion that I have arrived at, there is no need to deal with the appeal against the Commissioner’s finding that Bester’s dismissal was procedurally unfair. I also see no need to deal with the appeal against the Commissioner’s finding on the charge of insubordination, as it was not seriously pursued by RPM on appeal.

[32] Accordingly, I consider the Labour Court to have erred in reviewing and setting aside the award of the Commissioner. In the result, the finding of the Commissioner that the dismissal of Bester was both substantively and procedurally unfair must stand. I see no reason in law or fairness why costs should not follow the result.

[33] For all these reasons, the appeal succeeds and it is ordered that:

1 The appeal is upheld with costs.

2 The order of the Labour Court in the review application is set aside and replaced with the following order:

‘The review application is dismissed with costs.’

F Kathree-Setiloane

Jappie and Davis JJA concur in the judgment of Kathree-Setiloane AJA

APPEARANCES:

FOR THE APPELLANT

A Landman (Heads of argument prepared by Brassy SC with A Landman)

Instructed by Ronelda van Staden Attorneys

FOR THE FIRST RESPONDENT: F Boda SC

Instructed by Cliff Dekker Hofmeyer

[1] Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration and Others (2013) 34 ILJ 373 (LC).

[2] Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others

(2002) 23 ILJ 863 (LAC) and Lebowa Platinum Mines Ltd v Hill

(1998) 19 ILJ 1112 (LAC).

[3] Crown Chicken's (Pty) Ltd t/a Rocklands Poultry v Kapp and Others

[2002] 6 BLLR 493 (LAC) at para 38, South African Revenue Services v Kruger

[2017] 1 BLLR 8 (CC).

[4] Sidumo and Another v Rustenburg Platinum Mines Ltd and Others 2008 (2) SA 24 (CC) at para 110.

[5] Sidumo and Another v Rustenburg Platinum Mines Limited and Others 2008 (2) SA 24 (CC).

[6] Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others

[2007] ZALC 66; [2014] 1 BLLR 20 (LAC).

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Prepared on 9 October 2026 · Esheria