



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no JR 130/14

In the matter between

RUSTENBURG PLATINUM MINE

Applicant

And

SAEWA obo MEYER BESTER

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

KOBUS ERASMUS N.O.

Third Respondent

Heard: 3 December 2015

Delivered: 26 January 2016; edited and order corrected 26 January 2016.

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application to review and set aside an arbitration award issued by the third respondent ('the commissioner'). In his award, the commissioner found that Mr Bester (on whose behalf the first respondent acts) was unfairly dismissed by the applicant, and reinstated him with retrospective effect. Bester was dismissed after being found guilty on charges of insubordination and making racial remarks. The essence of this case concerns a reference by Bester to a co-worker as a 'swartman' and whether it can be said that in making the remark, Bester breached a workplace rule that prohibits abusive and derogatory language and in particular, racist remarks.

Factual background

- [2] The relevant factual background is apparent from the commissioner's award. For present purposes, it is sufficient to record that Bester was employed by the applicant as a senior training officer. He was suspended on 25 April 2013 and dismissed on 28 May 2013, a decision that was upheld on 1 July 2013 after an appeal hearing.
- [3] The incident that gave rise to Bester's dismissal occurred on 23 April 2013. As will appear from the discussion below, there is a dispute about precisely what occurred, but at the root of it was a disagreement about parking arrangements. The applicant's chief safety officer, Mr. Sedumedi, had gratuitously permitted Bester, who was head of the training department, to park his car in bays ordinarily designated for employees engaged in the safety department. At some point, Sedumedi permitted an employee of a contractor, a Mr Solly Thomelang,

to park in an adjacent bay. Bester says that he found it difficult to park his car, since both vehicles were large. He says that on a number of occasions, he asked Sedumedi to look into the problem.

- [4] The applicant contends that on the morning of 26 April 2013, Bester burst into Sedumedi's office where a safety meeting was underway and in a loud and aggressive manner demanded that Sedumedi 'verwyder daardie swart man se motor', or words to that effect. The applicant took the view that Bester's conduct and the use of the word 'swartman' constituted misconduct, and charged Bester with insubordination (in that he interrupted the meeting in the manner in which he did) and making racial remarks. Bester denied having stormed into the meeting and acting in an aggressive manner. He also denied having demanded that Sedumedi remove the car, and in particular denied having used the word 'swartman' or referring to anyone in those terms. On the contrary, Bester accused Sedumedi of introducing race into the encounter by accusing him of not wanting a black person to park next to him.
- [5] Bester was suspended pending a disciplinary hearing. At the hearing, Bester was found guilty of both counts of misconduct and dismissed. After his dismissal and the refusal of an appeal, he referred a dispute to the CCMA alleging, amongst other things, that his suspension and his dismissal were substantively and procedurally unfair.

The award under review

- [6] In his award, the commissioner summarised the evidence and then proceeded, as commissioners customarily do, to analyse that evidence. For present purposes, it is sufficient to record that the commissioner concluded that Bester's suspension was procedurally unfair (because the applicant had not followed the relevant procedure), that his dismissal was procedurally fair, that there was no apprehension of bias on the part of the chair of the disciplinary hearing, and that

the appeal process was fair.

- [7] In relation to Bester's contention that his dismissal was substantively unfair, the commissioner concluded that the applicant had failed to prove on a balance of probabilities that Bester had contravened any workplace rule and that in any event, dismissal was not an appropriate sanction. The commissioner's reasoning is apparent from the terms of the award. In relation to the charge of insubordination, he concludes as follows:

26.3 I carefully considered all the evidence presented to me but failed to find any evidence that prove or even suggest that Mr Bester refused to accept the authority of his employer or that he wanted to defy the employer's authority. Even if he walked into a safety meeting which was in progress (which was denied) that in itself can surely not be classified as defying the authority of the employer. If the person(s) in the meeting were the seniors of Mr Bester to which he reported, one might still have been able to say that he could have disrespected them or have defied their authority by storming into a meeting and shouting at his seniors. However none of the persons in the room (at the time of the incident) had any authority over Mr Bester and his actions could therefore clearly not have defied the employer's authority. The respondent's witness (van der Westhuizen) even admitted that the tone used by Bester was his normal tone of voice. I also find it highly improbable that the safety meeting was formally in progress at the time that the applicant entered. Why would the applicant have concocted such a detailed vision of what Sedumedi and Van der Westhuizen were discussing and how would he have known all the details of the route (which was factually correct) if this was never discussed in his presence?

- [8] In relation to the charge of making racial remarks, the commissioner reached the following conclusions:

26.4 The next charge is that of racial remarks which apparently relates to the fact that Mr Bester had used the words 'swart man' while pointing to the complainant. The respondent (in their closing arguments) wanted to blur the

exact nature of the exchange by referring to transgressions of a racial nature and to racial conduct in the workplace. That was with respect not what the applicant was charged with. No evidence was however ever presented that the applicant during the incident referred to Mr Sedumedi as a black man while pointing to him. The applicant denied using the term 'swart man' at all and said that it was in fact Sedumedi who had used these words. All the respondent's witnesses (who were present at the time of the alleged incident) however testified that the applicant had indeed used the words 'swart man' when he referred to a person parking next to him. It was common cause that no other words that might have had a racial connotation were used. The question to answer is therefore firstly whether the applicant had used these words and if so, whether the words used constituted a racial remark?

- [9] Having posed the issue in these terms, the commissioner came to the following conclusions:

26.5 I have no doubt that the applicant had indeed pointed his finger at Sedumedi while discussing the parking issue with him. The reason why I say this is because Mr Bester has the habit (demonstrated during the arbitration) of using his hands and specifically pointing his finger to the person that he is talking to. Although the respondent's witnesses did not have exactly the same recollection of the words allegedly sent by Bester, they all clearly remembered the sequence of events and that he used the word 'swart man' to refer to the person parking next to him. The applicant himself admitted that these witnesses had no reason to lie or falsely implicate him. It was interestingly also put to Salome Moeng during cross-examination by Mr Engelbrecht Mr 'Bester had said to Ben to please (asseblief) make a plan with the black (swart) man who box next to him'. She responded to the statement by saying that he did not say 'asseblief'.

26.6 Both the applicant as well as the person referred to (Mr Solly Thomelang) further indicated that they did not know one another prior to the incident on 24 April 2013. It would therefore in my opinion have been highly probable that the 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 Sedumedi (who was in my opinion and 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 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.

- [10] Having decided that the applicant in effect had not contravened a workplace rule relating either to insubordination and express all racial remarks, the commissioner found it necessary to consider whether dismissal was the appropriate sanction under the circumstances. He did so in the following terms:

27.2 Even if I erred (which I strongly deny) and should have found that he did contravene either one or both of the same rules against insubordination and making racial remarks, the sanction of dismissal in my opinion still remains inappropriate.

27.3 The applicant had a clean disciplinary record without any previous warnings for similar misconduct. He was however previously counselled for showing disrespect towards a senior but this did not indicate that he was found guilty of any misconduct and was warned not to repeat such behaviour. The Behavioural Procedure agreement suggests a final written warning for a first offence of insubordination except if exceptional circumstances are shown, which were not.

27.4 The respondent's main witness, Sedumedi, although making a lot of noise about how he experienced what was said and done by Bester, indicated in his evidence that if Bester afterwards apologised, they could have sorted it out between them. Although he indicated that it would not have been an easy task to continue working with Bester, he was not convinced that the trust relationship was completely gone. No other evidence was presented that proved that such a trust relationship at indeed been destroyed. The offences in the Behavioural Procedure relating to racial issues referred to racial abuse or harassment, which

was clearly not applicable here.

27.5 As such I find the dismissal was clearly inappropriate.

- [11] As I have indicated above, the commissioner went on to reinstate the first respondent in the applicant's employ with retrospective effect.

Grounds for review

- [12] The applicant's grounds for review are grouped under three headings, but there is in essence a single ground for review. The headings relate to Bester's suspension, the events of 24 April 2013 and the appropriateness of the sanction of dismissal. For reasons that will become apparent, I intend to deal in any detail only with the second and third of these heads, and then only with the charge of making remarks of a racial nature. Indeed, this was the focus of the submissions made by the parties' representatives during the course of argument.
- [13] The applicant contends that in coming to the conclusion that he did, the commissioner failed to have regard to the evidence before him and failed in particular to appreciate the context in which the remark that was the subject of disciplinary action against the first respondent had been made and in so doing, he failed to deal with the substantial merits of the dispute. Further, the applicant contends that the commissioner failed to appreciate the serious nature of the charges levelled against the first respondent. The applicant submits that the evidence before the commissioner clearly established that the applicant adopted a zero-tolerance approach to the use of abusive and derogatory language in the workplace and that a continued employment relationship was neither possible nor appropriate.

Applicable legal principles

- [14] This court is entitled to interfere with an award made by a commissioner if and

only if the commissioner misconceived the nature of the enquiry (and thus denied the parties a fair hearing) or committed a reviewable irregularity which had the consequence of an unreasonable result. The applicant contends for the latter, on the basis reflected above. However, the failure by an arbitrator to attach particular weight to evidence or attachment of weight to the relevant evidence and the like is not in itself a basis for review; the resultant decision must fall outside of a band of decisions to which reasonable decision-makers could come on the same material (see *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA)).

- [15] The Labour Appeal Court recently affirmed that while the failure of an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be held to be an irregularity, before the irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome (see *Head of Dept. of Education v Mofokeng* [2015] 1 BLLR 50 (LAC), at paragraph 30). In other words, whether a decision is unreasonable in its result ultimately requires this court to consider whether apart from the flawed reasons of or any irregularity by the arbitrator, the result could still be reasonably reached in the light of the issues and the evidence.

Evaluation

- [16] It should be appreciated at the outset that in relation to the charge of making remarks of a racial nature the commissioner was faced with a material dispute of fact. Bester's evidence was to deny ever having uttered the words 'swart man'. His version was that on the morning of 24 April 2013, he experienced difficulty parking his car on account of the fact that both he and Thomelang had relatively large vehicles to be parked in the bays allocated to them. He decided to speak to Sedumedi about the issue. He stopped at the door to Sedumedi's office. He denied that any meeting was in progress and testified that Van der Westhuizen and Sedumedi were engaged in a discussion about jogging routes. His evidence

was that he told Sedumedi that he would like to talk to him about the parking problem. Sedumedi accused him of not wanting to park next to a black person (“jy wil nie langs ‘n swart man stop nie, dit is jou probleem”). Bester testified that he told Sedumedi not to turn the issue into a racial one, and that he would pursue the issue with a higher level of management. Bester denied Sedumedi’s version i.e. that he (Bester) had stormed into his office during the morning meeting without apology or greeting and disrupted the meeting. Bester’s response was “that is the biggest lie there was ever told.” Similarly, when Sedumedi’s version that Bester had shouted at him and pointed his finger was put to Bester, Bester responded by suggesting that Sedumedi ‘is sucking this out of his thumb that I had - that this incident has ever took place (sic).’ Bester specifically denied having made any reference to a ‘swart man’.

[17] This evidence stands in stark contrast to that led by all of the applicant’s witnesses who were present at the meeting. Van der Westhuizen’s evidence was that Bester told Sedumedi ‘hy die swartman se kar uit die parkering moet uithaal’. Van der Westhuizen also disputed Bester’s version that he (Van der Westhuizen) and Sedumedi were in a discussion about jogging routes when Bester entered the office. He further denied that Sedumedi had said to Bester that he did not want to park next to a black man. Van der Westhuizen testified that Bester’s conduct was aggressive and unacceptable. This version is entirely consistent with the evidence given by Sedumedi, who testified that Bester had ‘stormed open’ the door, pointed a finger at him and demanded that he remove ‘that swartman’s car’ from next to his (Bester’s) car. Thomelang’s evidence was that he arrived at the office when Bester was inside and that he heard an argument with Sedumedi ‘with loud voice’. Moeng told him that they were talking about him. He listened to the conversation and heard Bester saying to Sedumedi ‘.. ek sê nou vir jou haal daardie swartman se kar uit my parkering uit...’.

[18] The commissioner’s analysis amounts to this - he 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 'swart man' to refer to the person parking next to him. Because Thomelang did not know Bester prior to the incident, it was 'highly probable' that Bester might have used the term 'swart man' to identify him.

[19] The basis of commissioner's factual findings leave 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 words 'swart man' is sustained by the evidence and despite Bester's denial, clearly correct.

[20] I mention these issues because it seems to me that the commissioner's failure properly to resolve the material dispute of fact before him resulted in factual findings that are entirely arbitrary. Be that as it may, the essence of the present enquiry relates to the commissioner's finding that Bester had not contravened

any workplace rule because in his view, the word 'swartman' was used by Bester in a purely descriptive sense and could thus not be classified as a racial remark.

- [21] In *Modikwa Mining Personnel Services* (2013) 34 ILJ 373 (LC), Gaibie AJ reviewed a number of decisions by this court in which incidents of racism in the workplace were at issue (see, for example, *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & others* (2002) 23 ILJ 863 (LAC), *Lebowa Platinum Mines Ltd v Hill* (1998) 19 ILJ 1112 (LAC)). At the core of these decisions is the decisive break that the Constitution represent from a past in which racism was institutionalised and legitimised (see *S v Makwanyane & another* 1995 (3) SA 391 (CC)) and that racism in the workplace is not to be tolerated. In the course of her judgment, Gaibie AJ found that an utterance by an employee to the effect that 'we need to get rid of the whites' was clearly and unequivocally racist in nature. To the extent that the employee dismissed for making this utterance had contended that the words ought necessary to be viewed in the context in which they were used, Gaibie AJ said the following, at paragraph 29 of her judgment:

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 Ramepadi requires a context for the purposes of interpretation. Their plain meaning indicates racism.

To the extent that context may have been relevant, after an evaluation of the context in which the words has been used, Gaibie AJ concluded that context simply served to aggravate the situation as the employee knew that his words constituted a racial slur and that white persons who heard it would have been offended by them.

- [22] 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 purposes of subjugation, where particular race groups continue to be viewed as 'other'. As Savage AJA recently observed in *Campbell Scientific Africa (Pty) Ltd v Simmers & others* (CA 14/2014, 23 October 2015), in the context of a case concerning remarks of a sexual nature made to a woman employee, the use of derogatory and demeaning remarks are concerned with power relations and serve to create a work environment where the right to dignity of employees is impaired, and barriers to substantive equality reinforced.

[23] In the present instance, there is no conceivable reason why race might justifiably have served as an identifier. To the extent that context is relevant, it should be recalled that the 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 remove the 'swartman's' car from next to his. Those present in 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 certain person'. Bester's reference to Thomelang as a 'swartman' was derogatory and racist.

[24] Insofar as the commissioner considered that dismissal was not an appropriate penalty for the first respondent's misconduct, it was not in dispute that shortly before the incident that gave rise to these proceedings, on 16 April 2013, the general manager of the applicant addressed a memorandum to all employees. The memorandum reads as follows:

Colleagues

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.

- [25] The terms of this memorandum make it clear that abusive and derogatory language would not be tolerated and constitute a clear warning of disciplinary action in the event of any breach of the applicant's values. The undisputed evidence before the commissioner was that the applicant adopted a zero tolerance approach to the use of derogatory and abusive language. Indeed, under cross-examination, Bester conceded that the use of derogatory language would justify dismissal.
- [26] 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. Bester committed an act of serious misconduct that warranted his dismissal. On that ground alone, the award stands to be reviewed and set aside. In the circumstances, it is not necessary for me to consider the further grounds for review proffered by the applicant.
- [27] Finally, insofar as costs are concerned, this court has a broad discretion in terms of s162 to make orders for costs according to the requirements of the law and fairness. In my view, there is no reason why costs ought not to follow the result.

I make the following order:

1. The arbitration award issued by the third respondent on 19 December 2013 under case number NWKD 1682-13 is reviewed and set aside.
2. The award is substituted by the following:
‘The applicant’s dismissal was substantively and procedurally fair.’
3. The first respondent is ordered to pay the costs of the application.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv F Boda, instructed by Cliff Dekker Hofmeyr Inc.

For the first respondent: Adv AP Landman, instructed by Ronelda van Staden Attorneys