



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JR 960/14

In the matter between:

SOLIDARITY obo JF PIO
and

Applicant

DEPARTMENT OF PUBLIC WORKS:
ROADS AND TRANSPORT, NORTH WEST
BOIKANYO ELISHA, THE MEC:
DEPARTMENT OF PUBLIC WORKS:
ROADS AND TRANSPORT, NORTH WEST
GENERAL PUBLIC SERVICE SECTOR
BARGAINING COUNCIL
ROOPA, P N.O.

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Heard: 14 DECEMBER 2015

Delivered: 07 February 2017

Summary: Racial slurs – *Kaf* a slang for an invective, found derogatory and its use a dismissable offence.

JUDGMENT

- [1] The applicant seeks an order to review and/or to set aside an arbitration award issued by the fourth respondent (the Commissioner) on 20 March 2014 under the auspices of the third respondent, with case reference number GPBC 1432/2013. This Court is moved through application and the founding affidavit of Mr. James Frederick Pio (the applicant).
- [2] The applicant seeks furthermore, and order that the finding that the applicant's dismissal was procedurally and substantively fair be substituted with a finding that the dismissal was procedurally and substantively unfair, alternatively, remitting the matter back to the third respondent for a hearing *de novo* before a different commissioner other than fourth respondent, costs and further or alternative relief.
- [3] The facts in this case are summarised in the questioned commissioner's award and the record, and are outlined as follows hereunder. The first and second respondents are opposing this application, and have supplied the Court with the opposing affidavit of Mr. Makhothi Samuel Thobakgale, the Head of Department: Department of Public Works: Roads and Transport and Head of Administration, and Accounting Officer, North West.
- [4] At the contentious arbitration hearing, the fourth respondent heard the evidence of Mr Pule January Pheto (Pheto), Mr Jacobus Dematikus "Koos" Du Toit (Du Toit) and Mr Jacobus Booyens (Booyens) – all testifying for the respondents, on the one hand, and that of Mr Pio, as the applicant, on the other.
- [5] The salient facts are that on the 1 January 2013, Pio encountered technical problems with operating his new phone and asked Pheto to call it in order to test if it would ring. Pheto's placed the call from his own phone, and when Pio's phone rang, Pheto noticed that his name appeared on the screen of Pio's phone as "Jerry Kaf". This was also noticed by another colleague,

“Koos” (Du Toit)¹ who was in the presence of both Pio and Pheto when the latter placed the call. According to Du Toit, he understood the word “*Ka*” as an abbreviation of the word “kaffir”. Du Toit confirmed in the arbitration that he saw the image on the phone.

[6] Pio’s explanation is that he was attempting to transfer his contact list from the computer to his new phone. He had asked a Du Toit to assist him. The names of his colleagues in the laptop were saved according to the workplace they are stationed at. Thus, those that are stationed at the “*Kamp*” (Afrikaans for “camp”) he saved as “—*Kam*” and those that worked at the office, as “—*Kan*” short for “*kantoor*” (Afrikaans for “office”). However, he failed to produce the evidence in the laptop during the hearing, and when cross-examined on his failure to produce this evidence, he said that he had no thought about it at that time. The commissioner drew an adverse inference against him. Pio also raised the defence that Pheto did not tell him what he was unhappy about and he only heard about the complaint from Du Toit.

[7] It is common cause that Pheto did not say anything immediately after the incident. However, after facing insomnia that Friday evening, he decided to call Pio in the next morning, Saturday and confronted him about what he saw on the screen of his phone. According to Pheto, Pio’s response to him as I understand, unsolicited by anything, was: “*I did not say you were a kaffir*”. Pio denies the confrontation. Pheto then asked Du Toit, who witnessed the writing on the screen, to accompany him to report the matter to Booysen, which he did. Booysen confirmed that the meeting took place on Monday. Pio was subsequently charged with misconduct, brought before a disciplinary inquiry, and after he was found guilty, dismissed. He challenged his dismissal at the bargaining council.

[8] In argument, Mr Fritz, on behalf of Pio, submitted that the dictionary meaning of the word *Kaf*, in Afrikaans, did not mean “kaffir”. It was also not established that Pio had indeed saved Pheto’s name as ‘*Jerry Kam*’ on his phone. He also

¹ Indexed bundle, p14, para20.

submitted that Pheto benefitted from his dismissal as he had been acting in Pio's position after the latter's dismissal.

- [9] Mr Voorby, on behalf of the respondents, submitted that two people saw the writing in the screen of Pio's phone and they could not both be wrong. The fact that Pheto was appointed to act in Pio's position was peripheral and should be ignored. Mr Voorby submitted that word '*Kaf*' was understood as slang for the word '*kaffir*' and that was what Pio meant by saving Pheto's name as he did on his phone.

The Arbitrator's Award

- [10] In the arbitrator's award, the latter identifies the issue he was called upon to determine as whether or not Pio committed the offence that he was charged with, which was framed as follows at the disciplinary inquiry:

"That on or about the 1st June 2012 at or near Camp K, you connoted racial abuse against your colleague (Mr Pheto) by storing his name as "*Jerry Kaf*" on your cell phone which showed (displayed) on your cell phone screen when he called your number when assisting with the ring tones thereof at Camp K which is your workplace"

- [11] He duly dealt with the evidence and accepted substantially the evidence of Pheto, Du Toit and Booyens, and held, without any doubt in his mind, that Pio did have Pheto's name saved as *Kaf* on his phone. He also accepted the evidence of the statement alleged by Pheto, that Pio told him "*I did not call you a kaffir*", as it was never challenged and disputed.

- [12] He rejected Pio's testimony on the existence of computer evidence that would have shown that Pheto's name was not saved as *Kaf* therein, on two grounds. Firstly, Pio did not raise that defence at all when confronted by Booyens, and secondly, that the evidence would not have been reliable, as it could have been altered with ease anytime by anyone.

- [13] He found that the word that was used as Pheto's ID on Pio's phone was derogatory, and therefore his dismissal was fair.

The test on review

- [14] Numerous judgments in this Court have dealt with the test that must apply when deciding whether the arbitrator's decision is reviewable, and these have been rehashed innumerable times since the Constitutional Court judgement in *Sidumo v Rustenburg Platinum Mines Ltd*² and should be now crystallised. The test is whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same.
- [15] In *Sidumo*³ the Constitutional Court very clearly held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision-maker could make. This reasonable test was succinctly adumbrated in the pre-*Sidumo* case of *Computicket v Marcus NO and others*⁴, thus: 'The question I have to decide is not whether [the arbitrator's] conclusion was wrong but whether ... it was unjustifiable and unreasonable.'
- [16] Furthermore, Waglay DJP (as he was then) recently pointed out in *The National Commissioner of the South African Police Service v Myers and Others*:⁵
- "Whatever one's personal view may be, the test as set out in *Sidumo* ... is whether or not the arbitrator's decision ... is a decision that a reasonable decision-maker could reach".
- [17] In *Fidelity Cash Management Service v CCMA and others*⁶ Zondo JP applied the *Sidumo* test thus:

² [2007] 12 BLLR 1097 (CC).

³ *Supra*, paras 118-119.

⁴ (1999) 20 ILJ 343 (LC) 346.

⁵ CA 4/09 (unreported), Labour Appeal Court, Cape Town (2 March 2012) paras [103] – [104].

⁶ [2008] 3 BLLR 197 (LAC) para [100].

“The test enunciated by the Constitutional Court in *Sidumo* for determining whether a decision or arbitration award of a CCMA commissioner is reasonable is a stringent test that will ensure that such awards are not lightly interfered with. It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision-maker could not have made in the circumstances of the case. It will not be often that an arbitration award is found to be one which a reasonable decision-maker could not have made but I also do not think that it will be rare that an arbitration award of the CCMA is found to be one that a reasonable decision-maker could not, in all the circumstances, have reached”. (My emphasis)

- [18] This Court will, and must therefore scrutinise the award to determine its score on the normative test-card for reasonableness. In so doing it is suggested by the Labour Appeal Court in *Herholdt v Nedbank Ltd*⁷ to look into the Hegelian dialectical interplay between *process* and *substance*. To position this philosophy, the LAC followed on the oft quoted and judicially inspirational dictum of Van Niekerk J in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*⁸:

“In summary, section 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner’s decision) must fall within a band of reasonableness, but this does not preclude this Court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner’s decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification”.⁹

- [19] A commissioner should be criticised if, when determining the matter before him or her, fails to ensure, before reaching a conclusion on a decision that he or she is about to make, that the award will be legitimised by reasonableness,

⁷ [2012] 9 BLLR 857 (LAC)

⁸ (2010) 31 ILJ 452 (LC)

⁹ At para 17.

justifiability (in the light of the material that he took into account), and freedom from prejudice. Deviation will result generally in gross unreasonableness. In *Southern Sun Hotel Interests (Pty) Ltd v CCMA*¹⁰ Van Niekerk J also observed that it may be inferred from the judgment of the Constitutional Court in *Sidumo* that section 145 also invites scrutiny of the process by which arbitrators reach their conclusions.

[20] And, in *Herhold v Nedbank Ltd* the Labour Appeal Court endorsed¹¹ the approach by the Labour Court (*a quo*), in which the latter had accepted that an award is reviewable if it suffers from substantive unreasonableness, namely, where a proposition is not supported by facts, the law, (and it might be added) the argument, and considerations recognised as valid.

[21] The LAC held further in *Herholdt*:

‘Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all relevant and material facts and issues is indispensable to a reasonable decision and if a decision-maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in the dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable.’¹²

[22] It was held in *CUSA v Tao Ying Metal Industries and Others*¹³, that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.

¹⁰ Supra.

¹¹ At para 41.

¹² At para 36.

¹³ (2008) 29 ILJ 2461 (CC) at para [134].

[23] In this case, the Court was drawn to the following written submissions¹⁴ made by the union official from Solidarity, Ms Nicolette Greef, representing the applicant:

“3.11 Schwartz *Lions over the Throne*: (1987) at 133 explains that in the context of a review, a court deals with a test of ‘reasonableness, not the rightness of agency (sic) findings of fact. The question under it is whether the evidence is such that the reasonable person acting reasonably could have reached the decision from the evidence and the inferences’

‘3.12 Although the judgement in Sidumo supra superseded the test for review as contained in the decision of this court in *Carephone v Marcus* 1999 (3) SA 384 (LAC) at para 37, the following dictum in the latter judgement is helpful in order to illustrate the nature of the test: *‘Is there a rational objective basis justifying the conclusion made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at’.*

‘3.14 It is important to emphasise, as is exemplified from *Carephone*, and in *Schwartz*, supra, that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whether this court might consider to be a better decision is irrelevant to the review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that the distinction, however difficult it is to always maintain, is respected”.

[24] The decision of the commissioner in the present case shall be viewed in the light of these principles.

Grounds of review

[25] This application is made on the basis that the commissioner committed a gross irregularity on the following grounds:

- i. The commissioner exceeded his powers conferred to him in terms of the Labour Relations Act¹⁵ (“the LRA”);

¹⁴ Applicant’s Heads, 11-12, paras 3.11 to 3.13.

- ii. The commissioner did not properly, rationally and justifiably apply his mind to the facts or the law; and that
- iii. The commissioner did not properly apply the provisions of the LRA in this instance.

[26] The applicant submits in this regard that the commissioner misconstrued the evidence and came to a wrong conclusion that his dismissal was fair. It is submitted in this regard that the commissioner did not have a full regard of all the evidence before him, and therefore, has littered his award with unreasonable findings that are irrationally connected to the question he was called on to answer.

[27] It is submitted further that the commissioner failed to deal with the evidence that the applicant did not use derogatory language; that his inference was not rationally made bearing in mind the evidentiary material; and specifically exceeded his powers by concluding that the word “*Kaf*” appeared in the applicant’s phone and by drawing an inference that it was a racial term.

Evaluation of the Award

[28] Snyman AJ, in *Kok v Commission for Conciliation, Mediation and Arbitration and Others*¹⁵, posits that in considering the applicant’s review application, the court must do so with the object of deciding if the award of the commissioner is, in short, reasonable. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*¹⁷, Navsa AJ held that the threshold test for the reasonableness of an award is: “*the decision reached by the commissioner one that a reasonable decision-maker could not reach?*” What the Constitutional Court meant in *Sidumo* was a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to

¹⁵ Act No 66 of 1995 (as amended).

¹⁶ Unreported judgement (*JR 2475 / 2010, JHB*) handed down on 20 February 2015.

¹⁷ (2007) 28 ILJ 2405 (CC), at para 10.

determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable¹⁸. In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*¹⁹ applied the *Sidumo* test as follows:

“*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator... In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come to on the available material”.

[29] Ms Greef, on behalf of the applicant, submits that there are two questions around which this case turn, namely (i) whether or not there was evidence of the alleged depiction of Pheto's name as 'Kaf' in Pio's Cellphone, and, if so, whether or not (ii) *Kaf* means or is a shortened version of *kaffir*, a derogatory and racial term.

[30] It is common cause, that two witnesses saw the writing on Pio's Cellphone. The account of the events was supplied unchallenged at the arbitration hearing²⁰. The phone was in Du Toit's (Koos) hand when the call was made and registered on the handset. There was absolutely no reason for the commissioner to disbelieve Du Toit, in the absence of any supply of facts to the contrary. It is also illogical that Pheto would have called Pio in the morning of Saturday, only to tell him that he was stressing over the fact that his name was merely saved as *Kam* on Pio's phone. More inexplicable was Pios'

¹⁸ See *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 96; *Herholdt v Nedbank Ltd and Another* [2013] 11 BLLR 1074 (SCA) at para 25.

¹⁹ (2014) 1 BLLR 20 (LAC) per Waglay JP.

²⁰ Record of Proceedings, 211-212.

response that “*I did not call you a kaffir*”, when he had only saved him as *Kam*.

- [31] The commissioner had also satisfactorily dealt with the question of credibility and pointed out in his award that Du Toit impressed him as an honest, independent witness whose testimony left no doubts in his mind. He pointed out that the aspects of the evidence that seem to form the basis of the applicant’s defence were left unchallenged during the cross examination of Pheto by the applicant. I tend in this regard to agree with Mr. Mmolawa, for the respondents, that it was Pio himself who first used the word kaffir (*‘I did not call you a kaffir’*) when confronted by Pheto on Saturday morning of 2 June 2012. This would be unlikely to happen if the name that was saved was *Kam*, and not *Kaf*.
- [32] The applicant complains also that the respondents did not request the evidence of the laptop or phone during the hearing. I do not see how this evidence would have any utility to the evaluation of the facts alleged in this case. It is clear that the arbitrator would never have placed any value to it, since it would have been obvious that the probable tempering with such evidence would have been extremely high. All that was needed was for someone to change the settings and delete the initial saving, and then replace the name with another. Had the applicant been committed to his defence, it would have assisted the commissioner if he had procured an expert on Information Technology to show that he had indeed saved the name as he alleged. Furthermore, it was not the duty of the respondents to seek for, or invite, evidence that would have contradicted their own witnesses’ testimony. The duty lay with the applicant to produce such evidence if he believed it was crucial to prove his innocence.
- [33] In the words of the Judge President of this Court²¹, “*in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put*

²¹ *Goldfields*, supra.

another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions to which a reasonable decision maker could come to on the available material”.

- [34] The evidence that was presented before the commissioner in this case, which he evaluated competently and analysed strictly, in my view, falls within the range that could lead any decision maker to this band of decisions. Therefore, I find no reason to interfere with the commissioner’s decision that there was a depiction of Pheto’s identity in Pio’s Cellphone as *Kaf*, which decision was reasonable.

Is Kaf a derogatory term?

- [35] In the unreported version of the decision of *Rustenburg Platinum Mine v SAEWA obo Bester and Others (JR130/14)*²² Van Niekerk, J, referred with approval to another judgment from this court, *Modikwa Mining Personnel Services (2013) 34 ILJ 373 (LC)*, in which Gabie 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 and others (2002) 23 ILJ 863 (LAC)*, *Lebowa Platinum Mines Ltd v Hill (1998) 19 ILJ 1112 (LAC)*)’.
- [36] The Honourable Judge Van Niekerk observed further that ‘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 and another 1995 (3) SA 391 (CC)*) and that racism in the workplace is not to be tolerated’. (My emphasis).
- [37] In the judgement in *Modikwa* referred to above, the court had also 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

²² [2016] ZALCJHB 75.

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."

[38] And so is the word *Kaf* when used in reference to a black person, at least in South Africa. I say South Africa because this is the only country in the world that has a history of institutionalised separation and racism, was riddled with and still continues to writhe in the grime of the racial slur and the past. Even if one were to take the dictionary meaning of the word *Kaf*, as "chaff" in English: *worthless things, trash, garbage, trash, chopped hay and straws used as fodder*, one still finds a meaning that denigrates, insults, demeans and humiliates, Pheto. In any event, there was no doubt that Pio knew and understood the word *Kaf* to mean *kaffir*, as came out from his retort when Pheto called and asked to speak to him²³. There is no indication of anyone accusing him of using the word *kaffir* at all at that time. He knew exactly what he was dealing with, and that he had to defend or justify himself for the use of the slur. He knew what the word was and that any black person would have been offended by it.

[39] His defence is only aggravating than mitigating the situation. It does not make sense why, if he knew Pheto as "Jerry", he also had to use his race as an identifier. A reasonable inference is that he harbours prejudice. Our constitutional dispensation enjoins all employers to free workplaces from incidents of such prejudices.

[40] Judge Van Niekerk states also as follows in his judgement²⁴:

²³ Record of proceedings, p161; lines 5ff.

²⁴ At paragraph 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’.”

[41] I will now turn to the submissions that the commissioner has committed a gross irregularity by misconstruing the evidence before him and thus coming to a conclusion not based on the evidence properly before him. According to Ms Greef, the determinations that the word *Kaf* did appear on Pio’s phone, and that that word is a derogatory term are evidence of the commissioner’s gross misconduct in this regard.

[42] In this regard, Ms Greef because there were phone records submitted indicating that the names of employees working at the camp were saved as *Kam*, and those at the office as *Kan*, ‘then it should have followed that it is more likely that the word *Kaf* was not used. Furthermore it has not been disputed that the computer records were in existence prior to the hearing. It is submitted that the award is reviewable on this basis alone’²⁵.

[43] The commissioner states as follows in his award²⁶:

“His testimony on the existence of computer records throws up two problems. Firstly, how could anyone forget to use such critical information in his defence and absolve him of any blame? It is less than convincing, particularly as two witnesses saw things differently, one of whom was an independent third party who had no motive to deceive me. Secondly, such evidence would not be necessarily reliable, as it can be manipulated and there was no expert evidence available for its veracity. So too the offer to give his phone to Booysens, firstly on the following Monday and which easily could have been changed after Pio realised the trouble he was in over the weekend”.

²⁵ Applicant’s Heads, 14-15, paras 4.09 and 4.10.

²⁶ Indexed bundle, 26, Award, 4th para.

- [44] A rule sitting as bottom line of the best evidence rule is that a witness may testify on personal knowledge about a matter even if there is a writing, recording or photograph that documents the same thing. If another wants to prove the content of the handset of a cellular phone, it is his duty to produce the original. The commissioner was correct in finding that absence the evidence of an expert witness with a forensic report, the so-called computer records would have been unreliable as they could have been manipulated.
- [45] Furthermore, the production of the computer record itself in the circumstances would not have resulted in its automatic admission. It would still have had to meet authentication and hearsay objections, and such a foundation as the evidence of an expert witness must have been laid by Pio for its admission. The commissioner was fully alive to these principles and he properly and correctly traversed them in the award. Even if the commissioner was wrong, as was laid down by *Schwartz* above, this Court 'deals with a test of 'reasonableness', not the rightness of the agency'.
- [46] Ms Greef argues further that an assumption that the word *Kaf* means *kaffir* does not itself create a ground for that term to be declared derogatory. She adds to this submission another argument that the Afrikaans dictionary meaning of the word *Kaf*, (*chaff* in English) does not mean *kaffir*, and thus, not a derogatory term. According to *Wikipedia*²⁷, the word *kaffir* itself, is derived from the Arabic term *kafir* (meaning "disbeliever"), which originally had the meaning "one without religion". Arab Traders adopted the term to refer to non-Muslim peoples. It is recorded (in the same website) that 'the word was formerly considered by whites to be a neutral term for black South Africans'. The dictionary meaning of the word therefore, could be non-offensive, but its use and impact matter in the circumstances, because it has come to depict blacks as sub-humans. Its use in the workplace must be strictly proscribed.
- [47] The commissioner did deal with this aspect in the award. He accepted that cognisance could be taken that the word *Kaf* is a slang for *kaffir*. It is also universally known that the term *kaffir* is used in South Africa to refer

²⁷ Wikipedia Dictionary, [https://en.wikipedia.org/wiki/Kaffir_\(racial_term\)](https://en.wikipedia.org/wiki/Kaffir_(racial_term)).

negatively to a black person and is perceived by black people as a highly offensive ethnic slur. Even if it were to be accepted that Pio meant *chaff*, in my view, it would still have been highly inappropriate to identify your colleague with an invective. Chaff means dirt, and it could easily have been perceived by Pheto as a racist term, given the history of race relations and the continued racial tensions that are prevalent in the country. The commissioner has therefore correctly pointed out that “*our courts have found that the use of this term was a fair reason for dismissing an employee*”.

[48] In my view, the third respondent in this matter has rendered an award which any reasonable decision maker would have given. I find that he has properly and rationally applied his mind and came to justifiable conclusions. His award is therefore reasonable.

Order

[49] In the premises, I make the following order:

1. The application is dismissed with costs.

Mosime AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Ms Nicolette Greef
Instructed by:	Solidarity Union, Tshwane
For the Third Respondent:	Advocate M.E Mmolawa
Instructed by:	State Attorney, Mahikeng