

THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

JUDGMENT

CASE NO: PR 184/2018

Of interest to other Judges

In the matter between

ONELOGIX (PTY) LTD

Applicant

and

JOHANNES WILLEM MEYER

First Respondent

RIAAN DE LANGE N.O

Second Respondent

CCMA

Third Respondent

Application heard: 31 October 2019

Judgment delivered: 3 December 2019

JUDGMENT

VAN NIEKERK J

- [1] On 25 October 2017, the first respondent (the employee) shared a WhatsApp message with some of his friends. The message comprised what is referred to as a meme. It depicted a young (white) child, holding a can of beer, and smoking a cigar. The caption reads: 'GROWING UP IN THE 80'S BEFORE ALL YOU PUSSIES TOOK OVER – MAY AS WELL DIE YOUNG'. In error, the employee's direct supervisor was included in the group to whom the message was sent. The supervisor (a black person) took offence and initiated disciplinary proceedings against the employee. On 8 November 2017, the employee was dismissed for forwarding a racially derogatory WhatsApp communication with an offensive and racial undertone. The employee challenged his dismissal in the CCMA, in an arbitration hearing conducted by the second respondent (the arbitrator). The arbitrator held that the employee was not guilty of the offence, that his dismissal was unfair, and that he should be awarded compensation equivalent to ten months' remuneration. In these proceedings, the applicant seeks to have that award reviewed and set aside.
- [2] The material facts are not in dispute. The applicant operates a vehicle delivery service. The employee was employed on 23 August 2011, and at the time of his dismissal, he was engaged as a long distance truck driver. In October 2017, the employee was issued with a final written warning for using the "K" word, directing it to another road user. It would seem that the fact that the employee used the word in a driver's cab in which he was alone (the event had been captured on a drivecam device installed in the cab) served as a mitigating factor. The incident that led to the employee's dismissal occurred five days later.

- [3] At the disciplinary hearing, the following charge was put to the employee:

Any act or omission that seriously impairs the trust relationship between employer and employee in that on 25 October 2017 (you) forwarded a racial derogatory WhatsApp communication to your direct Supervisor (fleet Controller) which is furthermore offensive with a racial undertone.

The chairperson (an independent legal practitioner) concluded that the employee was aware that his conduct was offensive, that he had shown no remorse, and that the conduct was not conducive to harmonious labour relations. As I have indicated, on 8 November 2017, the employee was dismissed.

- [4] The arbitration proceedings under review were conducted over some four days. In his award, the arbitrator recorded that the issue for decision was whether the employee's dismissal was substantively and procedurally fair. The evidence given at the arbitration hearing is summarised in the award. Mr Skweyiya, the employee's supervisor, testified that he had initiated the prior disciplinary proceedings against the employee. He had heard the "K word" used by the employee on the webcam monitor, and felt disappointed and hurt given the prevalence of racism in South Africa. He also felt inferior as a human being and was extremely disappointed by the incident. He approached his immediate superior, Van Rensburg, and reported the matter. A disciplinary hearing was convened in due course when the employee was given a final written warning on the basis that the word was not uttered within earshot of the road user to whom the epithet was directed. About two weeks after this disciplinary action, the incident that forms the subject of the present proceedings occurred. Skweyiya received the meme from the employee and testified that when the employee returned from his trip, he approached him but there was no apology forthcoming. Skweyiya testified further that he perceived the words 'took over', as they are used in the meme, to mean the establishment of a democratically-elected ANC government in 1994. He regarded the word "pussies" as being derogatory in as much as it refers to female genitalia. The use of the word was degrading in his

culture, and disrespectful towards women. For Skweyiya, the meme sought to represent the 1980s as being better than the present democratic order, and it was clear to him that the employee was part of a celebration of bad experiences of black people in South Africa, and that the meme was indicative of the concept of white supremacy. Skweyiya testified further that the employee had expressed no remorse, and that he could not envisage working with the employee any longer. He referred to an incident that he experienced during the 1980s when he had to hide from the authorities; that experience caused him to have bad memories of the 1980s. Further, during that period, his uncle had disappeared. His uncle's remains were reburied shortly before the second disciplinary hearing, which resulted in him (Skweyiya) being overcome by emotion and necessitated an adjournment of the proceedings for a short while for him to compose himself.

- [5] The applicant's second witness, Mr Heyns, was the chair of the disciplinary hearing that culminated in the employee's dismissal. The hearing was held over two days. Heyns testified that he considered the evidence, found in the employee guilty of misconduct that was the subject of the charge against him, and then considered mitigating or aggravating factors. He was not aware prior to the hearing of the incident that had given rise to the final written warning previously issued to the employee. At the disciplinary hearing, the employee testified that the message had been sent to Skweyiya in error. He later referred to the message being sent consequent on a network error and yet later, said that he could not explain how the message had been sent to Skweyiya's cell phone. Heyns stated that the employee testified that once he realised that the message went through to Skweyiya, he went 'yskoud'. It was put to Heyns that the reason why the employee went 'yskoud' is because he knew that Skweyiya was a religious person who would be offended by the language used in the meme – his feeling 'yskoud' had nothing to do with any racial connotation that might attach to the meme. Heyns disputed this, and testified that in his view, the reason why the employee became 'yskoud' was the employee's realisation that he had sent the meme to Skweyiya, and his appreciation of its offensive content and racial

undertone. Insofar as the sanction of dismissal is concerned, Heyns testified that he considered all the evidence and concluded that the trust relationship between the employee and his employer had been irreparably severed. He took into account Skweyiya's evidence that he could no longer see the way open to continue a working relationship with the employee and regarded the employee's conduct as being uncondusive to harmonious relations. Under cross-examination, Heyns testified that he considered the meme within the contextual framework of South Africa and concluded that there were racial undertones disguised in the message. Heyns disputed that the meme had no racist connotation, either directly or indirectly. In his view, and his reasonable, objective finding, based on the evidence before him, it was racist.

- [6] What is of some significance for present purposes is that under cross-examination, Heyns testified that at the disciplinary hearing, the employee had given no explanation as to the meaning of the meme. He did not testify that he regarded the meme as "generational" and thus without any racial connotation – this is a defence that emerged only at the stage of arbitration.
- [7] Mr Van Rensburg testified that he was the initiator of the disciplinary action taken against the employee. The respondent is 89% black and, and prides itself on its progressive transformation policies. The applicant placed emphasis on values such as respect, dignity and equity.
- [8] The employee testified that he had not intended to send the meme to Skweyiya and that when he realised his mistake, he sent a message explaining his mistake and apologising. He further testified that he telephoned Skweyiya from his truck and that he apologised, which apology was accepted. In regard to the present matter, he observed the meme as being one indicative of the 1980s generation of children, of which he was part, and did not note any racial connotation to it. He regarded the meme as racially neutral. At least one of the other four recipients of the name was a person of colour and was not offended by the meme. He testified

that once he realised that the meme had been sent to Skweyiya, he knew that he would be offended by the inclusion of the word 'pussies'.

- [9] In his analysis of the evidence and arguments, the arbitrator noted that the employee did not dispute that the meme had originated from his cell phone and that it had been received by Skweyiya. He contended however that he had never intended to address the message to Skweyiya and could not explain how the message had been sent. Further, the employee denied that the message was racially derogatory, or that it had racial undertones. After referring to *Rustenburg Platinum Mine v SEAWA obo Bester and others*, the arbitrator confirmed that the test is *'not based on how the employer understood the words 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. Only 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 racist remark was not made with the intent to demean.'*
- [10] The arbitrator went on to record that it was for the applicant to prove, on a balance of probabilities, that the employee was guilty of the charge against him. After his analysis of the evidence, the arbitrator came to the following conclusion:
31. The second incident [the sending of the meme] calls for inferences and/or interpretation of a meme which on the face of it is neutral and, as the Applicant referred to it, generational in nature with no express racial words contained in it. The applicant was not the author of the meme, but merely shared the picture which she observed on Facebook by the WhatsApp platform. He stated that they were (sic) no racial connotation apparent to him to be observed in the meme at the time he shared it. He regarded it as an innocent joke.
 32. It was Mr Skweyiya, the reader thereof who apportioned a different context and meaning to the picture than what it would in the normal course have had. The ordinary, grammatical meaning of the words "*growing up in the 80's*" needs not much explanation in the context of the young boy in the picture. The meaning which an ordinary, reasonable reader would give to the words was that

you were a child during the 1980s growing up to adulthood. The boy who holds a can of beer in his hand and has a cigar in his mouth denotes two habits which one would ordinarily come across an older, more adult persons. In other words, the boy was mature before his age and did things that the men were doing. The boy wears no shirt and, the picture as a whole, portrays an image which is beyond that which one reasonably would expect of a boy of that age. He comes over as being “*tough*”.

33. The words ‘*before you pussies took over*’ should be read in the context of the picture as a whole to ascertain the meaning thereof. The point of departure is that the children of the 1980s have by now grown up to be adults. As was the case with the 1980s there are also children born subsequent to the 1980s. The words “*before you pussies took over*” should be viewed in this context with reference to the apparent meaning of the meme to the ordinary, reasonable reader thereof. It was not in dispute between the parties that the meme originates from the USA. In my view, given that the applicant was not the author of the meme, the real meaning of the word ‘pussies should be sought within the USA’s use of the English word. The website <https://en.wikipedia.org/wiki/Puss/>’ in detail describes the connotations and meanings of the said word. In short, the word may mean “cat”, “female genitalia” or “weakness”. In the context of the meme, the only reasonable meaning which can be apportioned to the word “pussies” as it appears in the meme is that of “weakness”.... Considering the meme holistically, the apparent meaning thereof is that, in retrospect today, the children of the 1980s are tougher than the generation thereafter who are weaklings but nonetheless succeeded the generation of the 1980s as children in time. In my view, te ordinary, reasonable reader, not concerned with race, colour or creed, would acceot the meaning outlined in this paragraph as the intended meaning of the meme (own emphasis)...

36. Based on the above considerations are found that the applicant was not guilty of the charge which is levelled against it. I find that Mr Skweyiya was overly sensitive in his reading and understanding of the meme when it was mistakenly sent to his cell phone by the applicant. The reasonable reader informed of all the correct facts would have understood the meme to be generational in nature and not having any racial undertones. The respondent correctly found the applicant guilty of a similar offence with reference to the first incident. However, it does not

follow axiomatically that because the applicant was guilty of the “K-word” incident he should also be found guilty in respect of the second incident. Skweyiya regarded the applicant as a racist due to him having used the “K-word” and thus subjectively considered the meme which he received by mistake as being racially directed towards him. However, the available evidence in this matter does not support his view in that regard, with reference to the meme. The applicant never intended for him to receive the message and the meme itself contains no racial derogatory or just derogatory utterances. The applicant’s dismissal was substantively unfair as the applicant was not guilty of the charge levelled against him.

- [11] As I have indicated, the arbitrator went on to board the employee compensation in an amount equivalent to 10 months’ remuneration.
- [12] The applicant contends that the arbitrator misconstrued the nature of the dispute that he was called upon to determine. Apart from the WhatsApp communication being racially derogatory, it was further alleged in the charge against the employee that it was ‘offensive with a racial undertone’. Thus, the applicant submits that the arbitrator acted unreasonably in dealing with the dispute before him by focusing solely on whether the meme objectively viewed, was racist or not. Had he had proper regard to the true nature of the enquiry before him, the applicant submits that the arbitrator would have concluded that the employee’s dismissal was substantively fair. Secondly, the applicant submits that the arbitrator gave the employee the benefit of an unarticulated defence not supported by the evidence, and that his finding as to how a reasonable reader would view the ordinary meaning of the meme, is predicated entirely on his own dissection of the meme and his own interpretation of it, unsupported by any evidence. Thirdly, the applicant submits that the arbitrator committed a material error of law in finding that evidence relating to the employee’s final warning was inadmissible. Fourthly, the applicant submits that the arbitrator reached contradictory conclusions which rendered the logical and the outcome unreasonable.

[13] The test to be applied is one that recognises and reinforces the distinction between a review and an appeal. This court is entitled to intervene if and only if the arbitrator's decision is one that falls outside of a band of decisions to which a reasonable decision-maker could come on the available material. In *Head of Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), the LAC said the following:

[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an 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...

[32] ...Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the

ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, if an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

- [14] In *Rustenburg Platinum Mine v SA Equity Workers Association obo Bester & others* (2018) 39 ILJ 1503 (CC), the Constitutional Court had occasion to consider the issue of race descriptors that on the face of it are neutral but which may be regarded as racially abusive or insulting. The court said the following regarding the context in which the words (in that case, 'swart man') were uttered:

[38] It is accepted by both parties (the applicant and first respondent) that the use of the words 'swart man', per se, is not racist and that in the context in which the words were used to dictate whether they were used in a racist derogatory manner. It was also accepted that the test to determine whether these differences racist is an objective – whether a reasonable, objective and informed person, on hearing the words, would perceive them to be racist derogatory...

- [15] This passage is quoted by the arbitrator, and appears to be relied on by the arbitrator in his determination that Skweyiya was 'overly sensitive' in his reading and understanding of the meme, and that a 'reasonable reader' informed of all the 'correct facts' would not have understood the meme to have any racial

overtones. But what the arbitrator ignored was the caution expressed by the Constitutional Court in *Bester* against a presumption of neutrality. The court stated:

[48] The Labour Appeal Court's starting point that phrases are presumptively neutral fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present. This approach holds the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – might be used as the starting point in the objective enquiry without recognising that the root of this view skews such enquiry. It cannot be correct to ignore the reality of our past of institutionally entrenched racism and begin an enquiry into whether or not a statement is racist and derogatory from a presumption that the context is neutral – our societal and historical context dictates the contrary. In this sense, the Labour Appeal Court's decision sanitised the context in which the phrase 'swart man' was used, assuming that it would be neutral without considering how, as a starting point, one may consider the use of racial descriptors in the post-apartheid South Africa....

[49] The Labour Appeal Court, by sanitising the context in which the words were used, incorrectly applied the test to determine whether the words used are derogatory, in the context of this matter, to the facts in this matter. The Labour Appeal Court, as well as the commissioner, failed to approach the disputed and impartial manner taking into account the 'totality of the circumstances'. Not only was 'swart man' as used here racially loaded, and hence derogatorily subordinating, but it was unreasonable to conclude otherwise. It was unreasonable for the commissioner, within this context, to find that using 'swart man' was racially innocuous “.

[16] In other words, communications that on the face of it appear neutral or innocuous are not always so, and neutrality should not be the starting point in the analysis of any communication that is the subject of scrutiny for racist or other derogatory content. In his analysis of the evidence, the arbitrator clearly applied a presumption of neutrality, and then proceeded to accord a meaning to the meme

divorced from context, and informed by his own lights. In essence, his reasoning amounts to this:

- a. the meme is on the face if it neutral, it being 'generational' in nature with no express references to race;
- b. the ordinary grammatical meaning of the words 'growing up in the 80s' in the context of a picture depicting a child smoking a cigar and holding a beer was one depicted a generation that grew up in the 1980s as tough;
- c. the words 'before you pussies took over' had to be construed in the context of the meaning attributed to the word 'pussy' in the USA. This connoted 'weakness';
- d. the meaning to be attributed to the meme is that the children of the 1980's are tougher than children of the current generation, who are weak;
- e. in the absence of any reference to race or any of the racial undertones that formed the subject of Skweyiya's evidence and his subjective interpretation of the meme, a reasonable reader would interpret the meme as free of any racial undertone or connotation and see it as no more than a comment on the current generation of children and their predecessors.

[17] In my view, the arbitrator committed an error of law by applying a presumption of neutrality. In doing so, he ignored the caution expressed in *Bester* that it cannot be correct to ignore the reality of our past and our racially-charged present and to proceed from a presumption of neutrality. Put another way, as the Constitutional Court observed, the context in which words or communications are uttered should not be sanitised by a presumption of neutrality - the totality of all the circumstances must necessarily be taken into account to determine whether a communication that on the face of it appears neutral is in fact derogatory.

- [18] In the present instance, the context is one in which the employee had been found guilty, only five days prior to the incident that gave rise to his dismissal, of using racist and derogatory language. The meme that he sent may have been inadvertently sent to Skweyiya, but that does not impact on the nature of the meme or any derogatory connotation that it might have. The fact remains that the meme was sent by the employee to Skweyiya, who took great offence at its content. This is not to say that Skweyiya's subjective reading of the meme as racially derogatory is determinative – but the fact remains that the context in which the meme was sent is one of a past of institutionally entrenched racism and in which an employer had taken steps to ensure, as Van Rensburg put it in his evidence, a workplace in which the values of respect, dignity and equity were present. The arbitrator compounded the error of a presumption of neutrality in his exposition of the meaning of the meme. In doing so, he afforded the employee an unarticulated defence, which until the arbitration hearing, had not been one of a benign meaning that he attached to the meme. It should be recalled that Heyns's uncontroverted evidence was that at the disciplinary hearing, no mention was made by the employee of any 'generational' interpretation of the meme – this defence emerged only at the arbitration hearing.
- [19] The arbitrator's conclusion that the meme depicted a representation of a 'tough' generation being compared to the current (younger) generation that is weak in comparison, is an exegesis of his own. It may have some validity in the United States of America (where the meme originated and where the arbitrator's explication is rooted), but that is not the context in which the meme was either sent or received. In a South African context, given this country's history and the notion that prevailed in the 1980s that some are inherently superior to others, the reasonable reader would read a racial undertone into the meme. The words 'growing up in the 1980s before all you pussies took over' have a clear connotation of a comparison between the era of apartheid and the advent of the era of democracy in 1994, and also a suggestion both that the era of apartheid was a heyday and that those who assumed power in 1994, i.e. black people, are

'pussies' (a derogatory term whatever its etymology). This was the meaning attributed by Heyns to the meme when he decided that the employee should be dismissed and in the context, it is a conclusion to which any reasonable, informed and objective South African would come. In my judgment, and in relation to the charge of misconduct against him, the meme sent by the employee had a racial undertone and was offensive.

- [20] In so far as the employee's justification is concerned, it should be recalled that the employee stated that he did not intend to forward the meme to Skweyiya. His explanations were less than consistent. In short, the employee was unable to proffer a plausible explanation for how the meme came to be sent to Skweyiya. But even if he had, this does not serve to exculpate the employee. The fact of the matter is that the meme was sent. While there may have been no specific intention on the employee's part to have sent the meme to Skweyiya, he did. In doing so, the employee violated a workplace rule that required him to respect the values of dignity and equality that underpin the applicant's value system and its rules of employee conduct. Indeed, Ms Charoux, who appeared for the employee, conceded that if the meme was found to be racist, the employee's dismissal was justified. In these circumstances, no more need be said about any justification for the employee's conduct. It is clear from Skweyiya's evidence that a continued employment relationship between the applicant and the employee is not possible. That fact, weighed with the gravity of the employee's misconduct and his prior final written warning, warrant the sanction of dismissal.
- [21] The arbitrator's error of law is material, and had a distorting effect on the outcome of the proceedings before him. The arbitrator's award is on that account *prima facie* unreasonable. There is nothing in the record to indicate that the award can nonetheless be salvaged, on the basis that it falls within a band of decisions to which a reasonable decision-maker could come on the evidence.

[22] For the above reasons, the arbitrator's award stands to be reviewed and set aside. There is little point in remitting the matter to the CCMA for rehearing – the record is complete and remission would serve little purpose but to occasion a further delay in the finalisation of this matter.

[23] In terms of s 162 of the LRA, the court has a broad discretion to make orders for costs according to the requirements of the law and fairness. In *Long v South African Breweries* 2019 (5) BCLR 609 (CC), the Constitutional Court affirmed the approach to the exercise of that discretion:

[27] It is well accepted that in labour matters, the general principle that costs follow the result does not apply...This principle is based on section 162 of the LRA, which reads:

(1) The Labour Court may make an order for the payment of costs, according to the requirements of the law and fairness.

(2) When deciding whether or not to order the payment of costs, the Labour Court may take into account—

(a) whether the matter referred to the Court ought to have been referred to arbitration in terms of this Act and, if so, the extra costs incurred in referring the matter to the Court; and

(b) the conduct of the parties—

(i) in proceeding with or defending the matter before the Court; and

(ii) during the proceedings before the Court.”

[28] The relationship between the general principle of costs and section 162 was considered and settled by this Court in *Zungu*:

“In this matter, there is nothing on the record indicating why the Labour Court and Labour Appeal Court awarded costs against the applicant. Neither court gave reasons for doing so. It seems that both courts simply followed the rule that costs follow the result. This is not correct...”

[24] This court is ordinarily reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. Although this is not an immutable rule, it seems to me that in the present instance the requirements of the law and fairness are best served by each party bearing its own costs. The employee remains unemployed, and the prospect of any costs order being satisfied in is any event remote.

I make the following order:

1. The arbitration award issued by the respondent is reviewed and set aside.
2. The award is substituted by the following:
‘The referral is dismissed’.

André van Niekerk
Judge

APPEARANCES

For the applicant: Adv. I Lamprechts, instructed by Cliffe Dekker Hofmeyr Inc.

For the first respondent: Adv L Charoux, instructed by MJ Boyens Attorney