

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO. ☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO. ☒ YES
(3) REVISED.

05/05/2025

DATE

[Signature]

SIGNATURE



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J409/2024

In the matter between:

HARMONY GOLD MINING COMPANY LIMITED

Appellant

and

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER SAKI NGADA

Second Respondent

SEPHITHIPHITHI AMOS NTSHOTSHO

Third Respondent

Heard: 28 January 2025

Delivered: 05 May 2025

Summary: Appeal in terms of section 10 (8) of EEA – appeal filed outside the prescribed period – condonation granted – an appeal in a strict sense – a reconsideration of the matter to determine whether employee succeeded in proving discrimination (racial harassment) and whether conduct complained of is rational; fair or justifiable – evidence considered – appeal dismissed.

JUDGMENT

PHAKEDI, AJIntroduction

- [1] This is an appeal in terms of section 10 (8) of the Employment Equity Act¹ (EEA) wherein the Appellant is challenging the arbitration award under case number GAJB12989-23 dated 23 March 2024. This section provides that:

'A person affected by an award made by a commissioner of the CCMA pursuant to a dispute contemplated in subsection (6) (aA) may appeal to the Labour Court against that award within 14 days of the date of the award, but the Labour Court, on good cause shown, may extend the period within which that person may appeal.'

- [2] At the outset, it is important to point out that, unlike review applications, the Rules for the conduct of proceedings in the Labour Court² do not have a specific provision dealing with these kinds of appeals. These are appeals in the true or strict sense, which involve a full re-examination of the evidence to determine whether the decision reached by the Commissioner was right or wrong, having regard to the facts and the law.
- [3] The Appellant, Harmony Gold Mining Company Limited, further seeks an order condoning the late delivery of its notice of appeal to this court. Section 10 (8) of the EEA confers this court with a discretion to extend the period within which the appeal may be noted on condition that the Appellant has shown good cause. Should the condonation application be declined, this Court lacks the necessary jurisdiction to consider the merits of the matter. However, if the condonation application is granted, then the appeal will be considered on the merits.
- [4] The Appellant received the award on 26 March 2024. The appeal was noted on the 30th of April 2024, outside the prescribed period of fourteen (14) days from the date the Appellant became aware of the award.

¹ Act 55 of 1998.

² GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court, repealed with effect from July 2024.

- [5] The EEA does not provide a definition of a 'day', nor does it exclude the application of any other Act of Parliament³. In order to calculate the period within which the Appellant ought to have noted the appeal, I accept that the appeal ought to have been filed within the 14 ordinary calendar days as envisaged in the Interpretation Act (Act)⁴. This means the appeal ought to have been noted on or before 9th of April 2024.
- [6] The notice of appeal was delivered, accompanied by a condonation application and the matter is not opposed.

Condonation application

- [7] In respect of the degree of lateness, the notice of appeal was delivered approximately 15 days outside the prescribed timeframe set in section 10(8) of the EEA. The explanation for the delay provided by the Appellant is that its Employee Relations Manager, Mr Thabang Molahlehi, was under the mistaken impression that it had six weeks to deliver an application to review and set aside the arbitration award. The Appellant also had to comply with its policy of ensuring that findings of alleged racial discrimination were reported to a specific subcommittee, and this exercise took just over a week to complete.
- [8] The Appellant asserted that it has strong prospects of success in the appeal and that the third respondent will not suffer any prejudice if the late noting of the appeal is condoned bearing in mind that the incident in question occurred on 25 July 2020. Furthermore, the second respondent awarded compensation to the third respondent and he remains employed.
- [9] In respect of the importance of the matter, the Appellant submitted that the appeal relates to an issue of social importance in that the alleged utilization of racially offensive language occurred within its workplace, and it is necessary

³ Section 63 of EEA.

⁴ Act 33 of 1957. Section 4 reads:

'When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or on any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively also of every such Sunday or public holiday.'

that this issue must be properly ventilated. Should condonation not be granted, the Appellant will be deprived of its statutory right to note an appeal against an adverse decision reached by the second respondent.

[10] The Constitutional Court in *Booi v Amathole District Municipality and Others*⁵ emphasized that condonation is not merely for the taking. The Court confirmed that condonation should be granted if it is in the interests of justice, which has to be determined by reference to all relevant factors including the nature of the relief sought, the extent and cause of the delay, the effect on the administration of justice, prejudice and the reasonableness of the explanation for the delay.

[11] In applying the ratio in *Melane v Santam Insurance Co Ltd*⁶ (*Melane*), the Court in *Academic and Professional Staff Association v Pretorius NO and others*⁷ summarized the principles for consideration as follows:

'The factors which the court takes into consideration in assessing whether or not to grant condonation are: (a) the degree of lateness or non-compliance with the prescribed time frame; (b) the explanation for the lateness or the failure to comply with time frame; (c) prospects of success or bona fide defence in the main case; (d) the importance of the case; (e) the respondent's interest in the finality of the judgment; (f) the convenience of the court; and (g) avoidance of unnecessary delay in the administration of justice...

It is trite law that these factors are not individually decisive but are interrelated and must be weighed against each other. In weighing these factors for instance, a good explanation for the lateness may assist the applicant in compensating for weak prospects of success. Similarly, strong prospects of success may compensate the inadequate explanation and long delay.'

[12] In *Foster v Stewart Scott Inc*⁸ (*Foster*), his Lordship Mr Justice Froneman (as he then was) held as follows:

'It is well settled that in considering applications for condonation the court has a discretion, to be exercised judicially upon a consideration of all the facts.

⁵ [2021] ZACC 36; [2022] 1 BLLR 1 (CC) at para 27.

⁶ 1962 (4) SA 531 (A) at 532C – F.

⁷ (2008) 29 ILJ 318 (LC); [2008] 1 BLLR 1 (LC) at paras 17–18.

⁸ (1997) 18 ILJ 367 (LAC); [1997] 2 BLLR 117 (LAC) at 369C-E.

Relevant considerations may include the degree of non-compliance with the rules, the explanation therefor, the prospects of success on appeal, the importance of a case, the respondent's interest in the finality of the judgment, the convenience of the court, and the avoidance of unnecessary delay in the administration of justice, but the list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other. A slight delay and good explanation for the delay may help to compensate for prospects of success which are not strong. Conversely, very good prospects of success on appeal may compensate for an otherwise perhaps inadequate explanation and long delay.⁹

- [13] *Lekhesa: In re Ngwenya v Trustees for the Time being of Sishen Iron Ore Co Community Development Trust and another*¹⁰ it was stated:

'The grant of condonation involves the exercise of a discretion, with a decision to condone a party's non-compliance with the rules of the court or directions constituting an indulgence granted by the court. Such an application should be granted if, having regard to the particular circumstances of the matter, it is in the interests of justice to do so, and refused if it is not. To reach a decision, regard is to be had to factors including the nature of the relief sought, the extent and cause of the delay, the reasonableness of the explanation for the delay, the importance of the issue to be raised, issues of prejudice and the prospects of success. As a general proposition, the factors to be considered are not individually decisive of an application for condonation but are all considered to determine what is in the interests of justice.'

- [14] In applying the above principles to the present application, I am of the view that the period of delay is not too excessive and the Appellant has provided an explanation for the delay in delivering the notice of appeal. I am also mindful of the fact that the third respondent, although not participating in these proceedings, will not be prejudiced if the late delivery of the notice to appeal is condoned. I am satisfied that the Appellant has shown good cause, and it is in

⁹ See also: *Melane* (Id fn 6); *Mansoor v CCMA and others* [2000] 1 BLLR 79 (LC); [1999] ZALC 150 at para 18; *NUM v Council for Mineral Technology* [1999] 3 BLLR 209 (LAC); [1998] ZALAC 22 at para 10; *Forster* (Id fn 8); *SA Broadcasting Corporation v Commission for Conciliation, Mediation and Arbitration and others* (2003) 24 ILJ 999 (LC); [2003] 5 BLLR 497 (LC); *Achilles v HE Auto Import and Export (Pty) Ltd* (2000) 5 LLD 18 (LC); *Fortuin v Commission for Conciliation, Mediation and Arbitration and others* (2005) 26 ILJ 96 (LC); [2004] 12 BLLR 1252 (LC).

¹⁰ (2024) 45 ILJ 1220 (LAC); [2024] 6 BLLR 585 (LAC) at para 14.

the interests of justice and fairness that the late delivery of the notice to appeal be condoned for the purposes of properly considering the appeal on the merits.

Background facts

- [15] The third respondent, Mr Sephithiphithi Ntshotsho (Ntshotsho), is employed as an underground locomotive driver by the Appellant and is based at Kusasalethu Mine in Carletonville, in Merafong. On Saturday, 25 July 2020, he was among other employees who were waiting for transport en route to various workstations within the mine when pushing and shoving ensued among employees.
- [16] During this pushing and shoving, the third respondent bumped against a fellow employee, Mr Cornelius van Zyl (Van Zyl), who was standing in front of him. Ntshotsho tried to explain to Van Zyl that he did not push him intentionally, as he was also pushed by the people who were behind him. Their argument escalated then Van Zyl turned around and said in Afrikaans "Jy is 'n kaffir". When he told him that he was going to open a case against him, he responded by saying, "*bring it on I am a representative of Solidarity trade union*". He then tried to pull down his lamp so he could get his employee number, but Van Zyl gave him his clock card, as it had the employee number. On the same day, Ntshotsho reported the incident to Molahlehi, but he encouraged him to report on Monday since the incident occurred on a Saturday.
- [17] On Monday, he reported the incident to Molahlehi who advised him to report the incident to his trade union, National Union of Mineworkers (NUM) and reminded him that he also had a right to open a criminal case against Van Zyl.
- [18] He later opened a criminal case against Van Zyl who was arrested and subsequently released on bail.
- [19] Ntshotsho was then advised that he cannot represent himself in the hearing because Van Zyl was his senior, as such Mr Gert van Emmenis (Gert), the Human Resources Leader will represent him. On 19 March 2021, the employer convened a disciplinary hearing against Van Zyl.

- [20] On this day, he was in the company of his witness, Sibusiso Xhamlo. They were then taken to a back room with no explanation as to why they ought to leave the hearing room to go and wait in the back room. Gert later came into the room and informed him that the disciplinary hearing will be postponed to allow the parties and their witnesses to undergo polygraph tests.
- [21] Ntshotsho initially refused to take the test because he knew nothing about the polygraph test. However, Gert convinced him to take the test, stating that if he did not take the test, he would be taken as a person who is not truthful at work, and he will not be in a good environment. He then agreed to take the test which was scheduled to take place on 29 March 2021. However, Van Zyl and his witness only took the test on 2 July 2021. He only received a copy of the polygraph results when the case was already continuing at CCMA.
- [22] He later learned that Van Zyl had been transferred to another company, and he went to the management to enquire about this. He then spoke to Molahlehi and further requested to see a picture of the witness Van Zyl intends to call to testify at the hearing. Molahlehi then informed him that the witness had resigned and was no longer working for the Appellant. When he was shown the picture, he informed Molahlehi that he had never seen such a person before, and he was not part of the group when the incident happened. He then asked to see the clock register for the gentleman in the picture, but Molahlehi told him that the law did not allow for such details to be disclosed. And on the issue of the transfer of Van Zyl, Molahlehi referred him to Gert.
- [23] When he met with Gert, he enquired about the status of the criminal case, but Ntshotsho told him that he was not ready to disclose any issues relating to the case. Then Gert confirmed that Van Zyl had been transferred to another shaft. When he heard this information, he got angry and left the office.
- [24] The following week, he was invited to testify at the criminal trial, and he was warned not to divulge anything relating to the case until the next court appearance. Upon his arrival at work, he then informed Molahlehi about the conditions set at the Court and the disciplinary hearing was not scheduled.

- [25] He went back to testify at the criminal court, and Van Zyl was found guilty and sentenced to a period of six months' imprisonment with an option of a R5 000.00 fine. During mitigation, Van Zyl informed the magistrate that he should not be harsh on him as he was still attending the internal hearing and the case could not proceed without him if he were imprisoned.
- [26] The following day, Ntshotsho approached Molahlehi and informed him about the outcome of the case, and that is when Molahlehi informed him that he would be the one dealing with the case, but nothing happened. He then referred a dispute in terms of section 10(6)(b) of the EEA¹¹ so that he could be assisted because the incident had affected his mental health, particularly his family and employment relations. He was then referred to the social worker by Molahlehi on 15 November 2022. The social worker then advised him to consult with the psychiatrist, but he felt no need for such, and he did not consult.
- [27] Under cross-examination, he reiterated that the Appellant could have resolved this case within the first three months of him reporting, and because he was never updated about the attempts to reschedule the disciplinary hearing, he felt that the Appellant did not do enough to ensure that his complaint was resolved.
- [28] At the close of the employee's case, Molahlehi requested an adjournment so he could call his witnesses, and the Commissioner acceded to his request. The matter then proceeded again on the 13th of March 2024.
- [29] The first witness for the Appellant, Mr Derick Koekemoer (Koekemoer), testified that he was an external service provider hired by the Appellant to conduct the polygraph test on the four employees of the Appellant. He testified that he is the one who prepared the polygraph reports and emphasised that the tests were taken voluntarily, as all the employees signed the consent forms. When he was examining Ntshotsho, he found deception, and he recorded a note saying, *"take note that the examinee did not cooperate very well during the in-test phase of the examination"*.

¹¹ This section provides that *"if the dispute remains unresolved after conciliation, any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute consent to arbitration of the dispute"*.

- [30] He further concluded that Xhamlo was not truthful in answering questions, and that is how they both failed the test.
- [31] When it came to Van Zyl, he found that he was truthful in all respects. He confirmed the truthfulness of his statement regarding the incident of the 20th of July 2020 and also gave more information which was not contained in the statement. Van Zyl denied that he had called Ntshotsho the 'K-word'. Van Zyl's version was that Ntshotsho made these allegations because he had informed him that he was going to discipline him for not complying with COVID-19 rules and regulations. Ntshotsho was behind him and not following COVID-19 rules.
- [32] However, due to Van Zyl's damaged lungs, his results were inconclusive. Meaning he neither failed nor passed the polygraph test. He further confirmed having tested Evert, who confirmed that he was not a party to the argument between Van Zyl and Ntshotsho. He then concluded that Evert was a truthful witness as he answered some questions with flying colours, although his results were also inconclusive.
- [33] Under cross-examination, Ntshotsho denied that he had taken the tests voluntarily. When it was put to Koekemoer that Van Zyl was found guilty on the charges emanating from the same incident by a court of law, he responded by saying that he was not aware of such, but it was highly unlikely that Van Zyl was guilty.
- [34] The second witness for the Appellant was Thabang Molahlehi who confirmed that the incident was reported to him telephonically on the 25th of July 2020 by Ntshotsho and he advised him to report the incident to his trade union National Union of Mineworkers (NUM) and further informed him that he had a right to open a criminal case against Van Zyl. The Appellant then charged Van Zyl, and Ntshotsho was represented by Gert, who is a Senior HR Team Leader.
- [35] He stated that the Appellant made genuine attempts to hold a disciplinary hearing against Van Zyl. The first delay was due to the fact that the Appellant had to consult the Solidarity Union because Van Zyl was a shop steward. The second contributing factor to the delays was the absence of both Ntshotsho and Van Zyl. He testified that Ntshotsho was on sick leave from the 8th to 14th of

September 2020, followed by a vacation leave from the 28th of September until the 18th of October 2020. The hearing could not proceed on 13th October due to the unavailability of Coenie Reeder, who was representing Van Zyl.

- [36] Van Zyl was on leave on 4th November 2020, and he also took annual leave from the 26th of November until 23 December 2020. The Appellant closed its offices for the festive season, and this also contributed to the delays. Van Zyl was also on sick leave on 2 January 2021. On 11th January 2021, he was also on leave. He was also on sick leave from the 20th until 29th January 2021.
- [37] During February, he was able to secure the date of the 19th of March 2021. On this day, Van Zyl was represented by a certain Mr Kruger from Solidarity, who proposed that all the parties must undergo a polygraph test. He confirmed that Ntshotsho and his witness took the test on 29 March, and Van Zyl took the test on 2 July 2021. The events were overtaken by wage negotiations which concluded on the 16th September 2021.
- [38] Ntshotsho was on leave from 27th September to 17th October 2021, followed by Van Zyl, who was on leave from 1 October until 21 October 2021. The hearing was never rescheduled again. The Appellant closed its offices for the festive season on 23 December 2021 and only opened on or during January 2022. Van Zyl was on sick leave again from 16 January until 27 January 2022. The disciplinary hearing was then scheduled to take place on 19 May 2022, and Van Zyl was now represented by Mr Viviers, who made a request for disclosure of all witness statements, video footage and all relevant documentation, but same was not provided as they were not available.
- [39] On or during May 2022, Ntshotsho informed him that he had been warned at Court not to say anything regarding the case and requested the employer to suspend the proceedings pending the finalisation of the criminal court case. On or during November 2022, Ntshotsho was referred to a social worker, and Molahlehi gave him the referral letter. On or about 14 October 2022, Mr Van Zyl was found guilty and a six months imprisonment sentence was imposed on him. Soon after the issuing of the court judgment, Van Zyl was booked off sick

for a lengthy period between 20th October 2022 and the last sick note he submitted booked him off until 21 April 2024.

- [40] Under cross-examination when Ntshotsho put it to him that he was coerced to take the polygraph test by Gert who informed him that if he did not take the tests he will not be in a good position at work, he responded by saying that no employee should be forced to take a polygraph test and none of the employees who had refused to take polygraph tests were ever victimized.
- [41] Molahlehi was referred to a notification to attend the hearing, which clearly informed Van Zyl that he must ensure that he is present at the hearing together with his representative, but he was allowed multiple postponements to secure a representative, and this led to the delays in the hearing being finalised. When questioned about his knowledge of the criminal court findings, he stated that he was informed that Van Zyl is appealing, and as the Company, they cannot dismiss him on the strength of the court outcome.
- [42] At the end of his cross-examination, Molahlehi indicated that he wished to call Van Zyl as a witness although he had been booked off sick until 21 April 2024. He eventually indicated that he was unsure of the health status of Van Zyl as to whether he would come testify or not. The Commissioner invited both parties to make closing arguments, and they both did so orally.
- [43] The Commissioner, having listened to all the witnesses and assessing the evidence, concluded that Mr Van Zyl had committed the racial harassment and the Appellant failed to take all the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA. He then ordered the Appellant to pay Mr Ntshotsho an amount of R100 000.00 by no later than 5 April 2024. The Appellant is not happy with the decision and is challenging the award on the grounds listed hereunder.

Appeal grounds

- [44] The Appellant's first ground of appeal is that the Commissioner erred in refusing to grant an application for postponement in order to call Mr Van Zyl as a witness, and this resulted in it being denied an opportunity to properly present its case.

- [45] The second ground of appeal is that the Commissioner erred by failing to exercise his powers in terms of section 142 of the Labour Relations Act¹² to subpoena Petrus Evert to testify during arbitration proceedings and this resulted in the Appellant being deprived of a fair hearing.
- [46] The third ground is that the Commissioner erred by failing to inform Molahlehi that a negative inference will be drawn if no evidence was led on the Appellant's policy prohibiting racial discrimination.
- [47] The Appellant asserted further that the Commissioner erred in concluding that it was liable for Van Zyl's alleged racial discrimination despite evidence being presented that reasonable steps were taken to institute disciplinary proceedings against Van Zyl and the delays were not on the side of the Appellant but were on various aspect not under its control.

The legal framework

- [48] Section 6 of the EEA provides:

- '(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.
- (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

- [49] Section 48 of the EEA provides:

- '(1) A commissioner of the CCMA may, in any arbitration proceedings in terms of this Act, make any appropriate arbitration award that gives effect to a provision of this Act.

¹² Act 66 of 1995, as amended.

- (2) An award made by a commissioner of the CCMA hearing a matter in terms of section 10 (6) (aA) or (b) may include any order referred to in section 50 (2) (a) to (c), read with the changes required by the context, but an award of damages referred to in section 50 (2) (b) may not exceed the amount stated in the determination made by the Minister in terms of section 6 (3) of the Basic Conditions of Employment Act.'

Section 60: liability of employers

[50] Section 60 provides for an employer's vicarious liability in the event of an alleged contravention (by an employee) of the provisions of the EEA and the employer's failure to take the necessary steps to address the contravention, and provides that:

- (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.
- (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

Analysis and Evaluation

[51] "In the lexicon of the South African people, there is a word, which more than any other word, has the capacity to utterly denigrate the person to whom it is addressed and to mark the speaker as utterly contemptible. That word is "kaffir"..."¹³

[52] The Labour Appeal Court in *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and others*¹⁴ had an opportunity to deal with the impact of racism in a society and held:

[6] It is important that the conduct of the first respondent be viewed in the correct perspective and be treated with the seriousness that it warrants. The calling of, or, the reference to, an African person in South Africa as a "Kaffir" by a person who is not an African is part of the racial abuse that Africans have been subjected to in this country for over 300 years. This abuse has been perpetrated against Africans mostly by people who are white. Anyone who lives or has lived in South Africa knows this. In fact by now the word "Kaffir" is a term of racial abuse that is known internationally. In *Ciliza's* case, referred to below, James JP said at 247 of his judgment that in his opinion one of the recognised meanings which the word "Kaffir" already bore in South Africa as far back as when he gave his judgment in that case – which was in 1976 – was that such a person was "uncivilised, uncouth and coarse".

[7] The reference to, or the calling of, an African as a "Kaffir" by whites is the kind of racial abuse that courts in this country have, from time to time, been called upon to deal with. In this regard it is apposite to refer to at least two cases that occurred way back in the 1970s and early 1980s which, in my view, represent some of the typical instances where Africans were subjected to this type of racial abuse for absolutely no reason. The cases are *Ciliza v Minister of Police and Another* 1976 (4) SA 243 (N) and *Mbatha v Van Staden* 1982 (2) SA 260 (N). The facts of each one of these cases demonstrate some of the types of racial abuse that Africans have often been subjected to over many years. Almost invariably the circumstances have been where Africans have

¹³ *South African Revenue Service v CCMA and Others* [2016] 3 BLLR 297 (LAC); (2016) 37 ILJ 655 (LAC) at para 1.

¹⁴ (2002) 23 ILJ 863 (LAC); (2002) 6 BLLR 493 (LAC) (footnotes omitted).

clearly done nothing to invite the abuse or to provoke the abuser. Because of what the facts demonstrate in each case, it is important to set them out albeit as briefly as possible.'

[53] The Constitutional Court in *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (SARS)*¹⁵ held that:

- [1] This case owes its genesis to the use of the term kaffir in a workplace and a more assertive insinuation that African people are inherently foolish and incapable of providing any leadership worthy of submitting to. It bears testimony to the fact that there are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and the effortless observance of the right to dignity is a practical reality.
- [2] South Africa's special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.
- [3] In order to give some context and shed light on the correct attitude to adopt in dealing with the term kaffir, it is necessary to flesh out its history, meaning and implications. Dr Gabeba Baderoon says "kaffir" is "the most notorious word in South African history, known most pointedly for its license of violence towards Blacks during apartheid, but first used and elaborated during the colonial period. She goes on to observe that it is offensive in all senses and combinations to the extent of being

¹⁵ [2016] ZACC 38; [2017] 1 BLLR 8 (CC) at paras 1 – 5 (footnotes omitted).

unspeakable today, its use now constitutes a hate crime in our country and is unpardonably painful and violent. This is in line with the observation made about 33 years ago by Van Rensburg J and Jennett AJ that:

“When a black man is called a ‘kaffir’ by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation.”

- [4] It follows that the word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia, in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions. Professor Pierre De Vos has this to say about the term kaffir:

“This term has an ugly history in South Africa and was almost exclusively used by white racists as a gross generalisation to denigrate black South Africans. To be called a ‘kaffir’ is to be called a lazy and stupid person. But the assumption behind the word is that by being lazy and stupid one is merely behaving as all black people always behave – as white people expect black people and know all black people to behave. So even when a white person is called a ‘kaffir’, the recipient of the insult is being told that he or she is just as lazy and stupid as all black people are known to be by all racist white people.”

- [5] It could only have been with this disrespect in mind and the need to make a decisive break from the ills of the past, that non-racialism, human dignity and freedoms (which include freedom of expression without any trace of hate speech) are values foundational to our constitutional democracy. The healing of the divisions of the past, the national unity and reconciliation that need to be built and fostered respectively, are likewise intended to entrench peaceful co-existence,

respect and the right to dignity of all our people. It was in recognition of this constitutional vision that Brooks J recently endorsed the remarks in *Puluza* in the following terms:

"The appropriateness of this observation has not been adversely affected by the passage of more than thirty years since it was first expressed in *S v PULUZA*. If anything, the truth which finds expression therein is even more accessible today than it was before the dawn of a constitutional democracy in South Africa and the concomitant dramatic increase in the awareness of her citizens of the need to recognize, respect and exercise the demands now made by society for the demonstration of respect for human dignity and equality. *The term 'kaffir' historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapably racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, its use can only be as an expression of racism with a clear intention to be hurtful and to promote hatred towards the person of whom it is used or to whom it is directed. This brings its use clearly within the ambit of section 10 of PEPUDA...*"

- [54] In its submissions and throughout arbitration proceedings, the Appellant maintains that the Commissioner erred in holding the Employer vicariously liable on the basis of unproven allegations. It is the Appellant's submissions that Ntshotsho laid a false claim of racial harassment against Van Zyl on the basis that he failed to prove the veracity of the allegations against Van Zyl. Ntshotsho testified that Van Zyl was arrested, released on bail and subsequently sentenced to a period of six months with an option of a fine. In response to this, the Appellant's witness (Molahlehi) testified that Van Zyl had appealed the sentence, and the Appellant could not just dismiss him on the strength of the outcome of the criminal case.
- [55] The Appellant seeks to rely on the results of the polygraph test, which found that Ntshotsho and Xhamlo failed the test. Xhamlo did not testify during

arbitration proceedings. However, Ntshotsho testified that he was compelled to take the test, and for fear of victimization and being in a hostile environment, he eventually agreed to take the tests. The person who was supposed to represent him, Gert, is the one who agreed with Solidarity that the parties must be subjected to the polygraph tests, but did not discuss this with Ntshotsho and Xhamlo. Even so, Van Zyl and his witness only took the tests on 2 July 2021, three months after Ntshotsho had taken his on 29 March 2021.

- [56] Ntshotsho testified that he only learned about the results during arbitration at the CCMA. In rejecting the polygraph test results, the Commissioner held:

'The employer relied only on the polygraph test results to prove that the alleged racial harassment did not take place. In other words, the employer failed to lead direct evidence in the proceedings. It is trite that polygraph tests are only useful if they are corroborated by other direct evidence. In the absence of any direct evidence, I find that the polygraph test results submitted by the employer in the proceedings constitute unreliable evidence. Therefore, I find, on the balance of probabilities, that Van Zyl called the employee a kaffir.'

- [57] The Labour Court in *FAWU obo Kapesi and Others v Premier Foods Ltd t/a Ribbon Salt River*¹⁶ confirmed that polygraph test results have to be supported by direct evidence, and in the absence of direct evidence they cannot be relied upon to determine the guilt of the employee. The court held that:

'In *SATAWU & Others v Protea Security Services*, Protea Security Services sought to place guards with a new client who insisted that security guards used by it had to pass a polygraph test. When the guards could not be persuaded to undergo polygraph testing the employer embarked upon a section 189 consultative process. The Court held that before it could be fair to force employees to subject themselves to testing, the test or assessment used would need to be: (i) shown to be scientifically valid and reliable; (ii) shown to be capable of being fairly applied to employees; (iii) shown to not be biased against any employee or group. The court held that the employer had the onus to show that a dismissal was fair and therefore had to show that the test used is valid and reliable and not biased against any employee or group of

¹⁶ [2010] ZALC 61; (2010) 31 ILJ 1654 (LC) at para 86.

employees. In *Truworths v CCMA* the Court expressed doubts as to the probative value of the polygraph on its own:

[37] What appears from the foregoing is that a polygraph test on its own cannot be used to determine the guilt of an employee (see also John Grogan Workplace Law 9th edition page 160.) However, a polygraph certainly may be taken into account where other supporting evidence is available provided also that there is clear evidence on the qualifications of the polygraphist and provided that it is clear from the evidence that the test was done according to acceptable and recognizable standards. At the very least, the result of a properly conducted polygraph is evidence in corroboration of the employer's evidence and may be taken into account as a factor in assessing the credibility of a witness and in assessing the probabilities. The mere fact that an employee, however, refuses to undergo a polygraph is not in itself sufficient to substantiate an employee's guilt."

[58] The only evidence relied upon by the Appellant to allege that there was no contravention of the EEA is the results of the polygraph tests which conveniently suggests that Ntshotsho and his witnesses were not truthful witnesses and the reason why Ntshotsho laid a complaint was because Van Zyl had threatened to charge him for his failure to observe Covid-19 rules and regulations. However, in his complaint against Ntshotsho, filed a month after the incident on 17 August 2020, Van Zyl did not mention any of this. He only complained that on the 25th of July 2020, Ntshotsho had provoked and assaulted him. The other issue is that polygraph tests for both Van Zyl and Evert were inconclusive, and this cannot translate to a conclusion that both witnesses were truthful. The Commissioner was correct to reject these inconclusive polygraph tests as evidence in the absence of the Appellant leading any direct evidence.

[59] The Appellant is further aggrieved that the Commissioner deprived it of a fair hearing by refusing to give Molahlehi an opportunity to call Van Zyl and Evert as witnesses. It is alleged that he failed to exercise his powers to subpoena Evert when he was informed that he was no longer in the employ of the

Appellant. I fail to understand how the commissioner could have given the Appellant such an opportunity when Molahlehi did not make such a request to call further witnesses. He conceded that Van Zyl was forever sick, he was not sure when he was ever going to be fit to return to work or even avail himself to testify at the CCMA.

- [60] Furthermore, the evidence presented before the Commissioner confirmed that Molahlehi's main concern was to start the process of medically boarding Van Zyl and not to bring him to the CCMA as a witness. The contents of his email dated 12 September 2023 read:

'Dear Mr Moremi

Mr Cornelius van Zy, P3561411, solidarity representative was transferred to Moab, a year before last if I remember well leaving an outstanding case of the use of derogatory language, racist remarks. I struggled to have the case scheduled because he has been sick for a long time due to mine accident. I was informed that he was injured in June 2022 and the injury got worse in October 2022. Since then he has been reporting sick and sending me sick note. In the meantime the employee that lodged a complaint where Gert took over as a complainant has referred the company for not taking action against Mr Cornelius van Zyl. The concern from CCMA is that if Mr. Cornelius is so sick for this long period of time, for sure he is not getting any salary because he should have exhausted his sick leave. The question is for how long should a person be continuously sick before he could be medically boarded.

Can you please help or refer me to someone that can help me to establish how long will it take for Mr Cornelius van Zy to be medically boarded if he is not found fit to continue with his normal duties.

Kind regards

Thabang Molahlehi'

- [61] In paragraph 44 of his award, the Commissioner concluded that the Appellant failed to take the necessary steps to ensure that the racial harassment would not persist within the workplace because no evidence was led about whether it had a policy prohibiting racial discrimination. The Appellant is taking an issue

with this finding on the basis that the representative was not warned that an adverse finding would be made if evidence was not led on the existence of the policy. The Appellant is adamant that Van Zyl did not utter racial slurs against Ntshotsho, and even if it was proven that Van Zyl did contravene the EEA, the Appellant should not be held vicariously liable because it took all the necessary steps to address the complaint through a disciplinary hearing.

[62] In order to escape liability under the EEA, the Appellant was obliged to consult all relevant parties (Ntshotsho and Van Zyl) and take the necessary steps to eliminate the alleged conduct of racial discrimination and comply with the provisions of the EEA. The arbitrator had regard to the facts of the case and concluded that indeed Van Zyl had contravened the EEA and Appellant had not taken any reasonable steps to investigate the incident. No evidence was led confirming that a consultation process took place. The only consultation was between the Appellant and the Solidarity trade union, and not with both parties. The Commissioner cannot be faulted for having reached a conclusion that the Appellant did not investigate the incident nor consult with the parties as envisaged in section 60 (2) of the EEA.

[63] The LAC in *SATAWU obo Members v South African Airways (Pty) Ltd and Others* dealt with the obligations of the employers to ensure that it complies with the provisions of the EEA and held that:

'In my view, the *ipse dixit* of the first respondent that it has acted in accordance with the Employment Equity Policy is not sufficient for one to conclude that it has done so. More factual basis was required from the respondent to show how it has complied with the Employment Equity Policy and other related policies and plans since it carries the *onus* to do so. It is only a Court trying the issue that will have an opportunity to consider all these matters.'¹⁷

[64] Molahlehi confirmed that when the representative from Solidarity requested the exchange of bundles, he informed him that they were not available including relevant policies, video footage. As such, I am of the view that the appeal has to fail on the first three grounds and the final question for determination is

¹⁷ [2014] ZALAC 40; [2015] 2 BLLR 137 (LAC) at para 22.

whether the Commissioner erred in concluding that the Appellant was liable for Van Zyl's alleged incident of racial discrimination by calling Ntshotsho, a black employee of the Appellant a kaffir.

[65] The Appellant is a mining company which employs people from different parts of our country and has a duty to ensure that all employees are treated with dignity. The attitude towards the victims of racial discrimination as it was demonstrated towards Ntshotsho in this matter is quite disheartening to say the least. On two occasions, Molahlehi emphasised that laying false claims of racism against a fellow employee was a very serious act of misconduct and Ntshotsho could be charged and dismissed for having lied about Van Zyl. He said these while testifying and knowing fully well that he did not have the version of Van Zyl whom he perceived as a truthful witness based on inconclusive polygraph test results.

[66] In the SARS¹⁸ case, Chief Justice Mogoeng (as he then was) expressed his utter abhorrence with the manner in which racism is being addressed in this country and stated:

[10] Another factor that could undermine the possibility to address racism squarely would be a tendency to shift attention from racism to technicalities, even where unmitigated racism is unavoidably central to the dispute or engagement. The tendency is, according to my experience, to begin by unreservedly acknowledging the gravity and repugnance of racism which is immediately followed by a de-emphasis and over-technicalisation of its effect in the particular setting. At times a firm response attracts a patronising caution against being emotional and an authoritative appeal for rationality or thoughtfulness that is made out to be sorely missing.

[11] That in my view is a nuanced way of insensitively insinuating that targets of racism lack understanding and that they tend to overreact. That mitigating approach would create a comfort zone for racism practitioners or apologists and is the most effective enabling environment or fertile ground for racism and its tendencies. And the

¹⁸ SARS at paras 10-11.

logical consequence of all this gingerly or “reasonable” approach to racism, coupled with the neutralising reference to the word kaffir as the “k word”, is the entrenchment and emboldenment of racism that we now have to contend with so many years into our constitutional democracy... Those who should help to eradicate racism or gross injustice could, with that approach, become its unthinking, unconscious or indifferent helpers.’

Employer's responsibility under section 60

- [67] Section 60(2) provides that the employer must consult all relevant parties and take the necessary steps to eliminate the alleged conduct of discrimination and comply with the provisions of the Act. While section 60(4) states that an employer may escape liability if it is able to prove that it had done all that was reasonably practicable to ensure that the employee would not act in contravention of the Act.
- [68] In determining whether an employer, in a section 60 claim, has done all that was reasonably practicable to ensure that the employee would not contravene the Act, the Court in *Biggar v City of Johannesburg*¹⁹, the respondent employer was found to not have taken any steps to prevent the racial discrimination complained of. Briefly, the Appellant, a black firefighter, was transferred to a new fire station, his children were subjected to various forms of racial abuse by the children of his white colleagues and the harassment continued for years even after the Appellant had complained. The Court, on the evidence presented, found that the City had taken no steps to address the racial harassment experienced. Where intervention did occur (i.e. the issuance of warnings against the Appellant's antagonists), the City failed to follow up or implement any lasting solutions. The Court found that the only reasonable conclusion it could reach was that the City was reluctant to deal with the issue. The Court found that the City did not take all necessary steps to eliminate the racial abuse and that it could not be said that it did everything that was reasonably practicable to prevent the continued harassment.

¹⁹ (2011) 32 ILJ 1665 (LC); [2011] ZALCJHB 5.

[69] *National Union of Metalworkers of SA & another v Passenger Rail Agency of SA*²⁰ concerned the alleged sexual harassment of a junior employee by two senior managers of the first respondent employer. The employee referred a section 10 process alleging that the respondent contravened the provisions of section 60 of the Act whilst the respondent alleged that, when the allegations of sexual harassment had been raised, steps had been taken in terms of section 60(2) of the EEA and thus, it had taken all the necessary steps in accordance with the provisions of the Act. Moshoana J provided a summary of the legislative scheme of the EEA and its dispute resolution mechanism and held that:

[16] In my view, a claim predicated on s 60 is one that is civil in nature. It does not resort under s 10 of the EEA. Thus its onus position is governed by the principle outlined in *Pillay v Krishna & another* — s/he who alleges must prove. As I see it, in a s 60 claim, two aspects require proof; namely (a) contravention of the EEA; and (b) the employer's failures. In the context of s 60, the contravention must have happened through acts of agents — employees — hence the need to bring that contravention to the immediate attention of the employer. Contravention of the EEA may happen in many forms, regard being had to the EEA as a whole. In an instance of sexual harassment, the contravention happens when one employee harasses another sexually. Since the employer may not be in a position to disprove the harassment allegation, the onus contemplated in s 11 must lie on the employee who committed the act of unfair discrimination and not the employer, since allegations are not made against it.

[17] Therefore, the conclusion I reach is that s 11 finds no application in a s 60 claim. I also take the view that a s 60 claim may be brought without first complying with the dispute-resolution procedure outlined in s 10 of the EEA. This conclusion finds support from a plain reading of s 60(3). The section, in part, states: 'and it is proved that the employee has contravened the relevant provision' (emphasis added). It must naturally follow that the aggrieved party must prove the alleged contravention. Otherwise, who then must prove that the employee has contravened

²⁰ (2021) 42 ILJ 2637 (LC); [2021] ZALCJHB 312.

the relevant provisions? It cannot be the employer who must prove the contravention.

[18] In order to escape liability, the employer must disprove failure. I do accept that an employer may also succeed in a s 60 claim if it disproves that the EEA was contravened. Of course, in order to disprove the failure, the aggrieved employee must have proven that there is a failure on the part of the employer. Therefore, the overall onus in a s 60 claim rests with the aggrieved employee — plaintiff / Appellant.

[19] One last aspect to be mentioned on the issue is that the contravention of the EEA may be proven in separate proceedings and presented in a s 60 claim as proof of contravention. A proper reading of s 10 of the EEA suggests that Limo could have referred a dispute to the CCMA against Ramutloa and Swartz as individual employees. Section 10(2) refers to a party as opposed to an employee. However, if that party is an employee and alleges unfair discrimination on the grounds of sexual harassment, that employee as a party may refer a dispute to the CCMA for arbitration if certain conditions are met. Section 10(8) makes the point I am making in this judgment to be beyond perspicuous, in that it refers to a person affected by an award and not an employer specifically.

[70] In *V v Passenger Rail Agency of South Africa (PRASA) and Others*²¹ the Court confirmed that in order to be held liable in terms of section 60 the Employer has a duty to consult with all relevant parties. It was held that:

Turning to the issue of liability. Section 60 of the EEA effectively introduces what may be seen as the common law principle of vicarious liability. What is required is firstly, an allegation of discrimination (sexual harassment) being brought to the attention of the employer. Once that is done, the employer is obligated to consult all the relevant parties and must take the necessary steps. The necessary steps in this instance does not necessarily mean taking disciplinary steps against the alleged perpetrator. The steps must be aimed at eliminating the alleged conduct. Taking disciplinary steps does not of necessity lead to the elimination of the conduct. Where an employer adopts a code on

²¹ [2020] ZALCPE 6 at para 15.

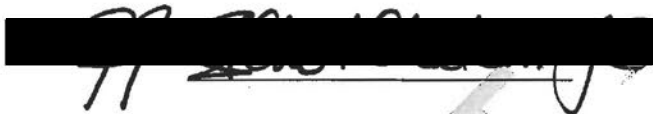
sexual harassment, such is a step aimed at eliminating the conduct of sexual harassment. This Court in *Potgieter v National Commissioner of the S A Police Services and another* concluded that the sanction, which was imposed by the SAPS was an irrelevant issue. The investigations conducted by Majola were sufficient. The obligation in the section is not intended at aimless processes. A disciplinary enquiry would have been an aimless exercise in the circumstances of this matter.'

- [71] Having regard to the merits of this matter, I am satisfied that Ntshotsho was able to prove that there was a contravention of the EEA during the criminal trial proceedings and the Appellant failed to accept such proof as evidence that indeed Van Zyl had called Ntshotsho a Kaffir. The Commissioner cannot be faltered for ignoring the Appellant's claims that Van Zyl had appealed against his conviction and sentence without any proof. Based on the above, I cannot find errors in the Commissioner's finding that the Appellant is vicariously liable for Van Zyl's contravention of the EEA in terms of section 60(4) of the EEA.
- [72] In terms of clause 6 of the CCMA guidelines published in line with section 115(2)(g) of the LRA, the CCMA and all its Commissioners are obliged to interpret and apply the Labour Relations Act and other legislation in accordance with judicial decisions of courts that are binding on it. These include the decisions of the Constitutional Court, the Supreme Court of Appeal, Labour Appeal Court, High Court and Labour Court. I am satisfied that the Arbitrator interpreted and applied all the legal principles applicable in Employment Equity disputes as prescribed in the guidelines.
- [73] For all the above reasons, the award is correct and not appealable on any of the grounds raised by the Appellant. The application was not opposed, as such the issue of costs does not arise.
- [74] In the result, the following order is made:

Order

1. Condonation for the late delivery of the notice of appeal is granted.

2. The appeal is dismissed.
3. There is no order as to costs.



GC Phakedi

Acting Judge of the Labour Court of South Africa.

LABOUR COURT

Appearances:

For the Appellant: Adv Engelbrecht SC

Instructed by: Webber Wentzel

For the Respondent: No appearance

LABOUR COURT