



- (1) Reportable ~~Yes~~/No
(2) Of interest to other Judges: ~~Yes~~/No
(3) Revised

Signature

Date

THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPE TOWN

Case No: CA 18/2024

In the matter between:

**THE COMMERCIAL STEVEDORING AGRICULTURAL
AND ALLIED WORKERS UNION obo VUYANI QOMOYI**

Appellant

and

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

First Respondent

ANTHONY RUGGEIRO N. O

Second Respondent

NAMAQUA WINES (PTY) LTD

Third Respondent

Heard: 19 March 2026

Delivered: 08 April 2026

Coram: Nkutha-Nkontwana JA, Tokota and Moshwana AJJA

JUDGMENT

MOSHOANA, AJA

Introduction

- [1] South Africa emerged from an ugly past marred by racial segregation and domination of one race over the other races. The white race was considered and made to be a superior race to all the other races. The preamble of the Constitution of the Republic of South Africa in recognition of the repulsive past states amongst others that it strives to *'heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.'*
- [2] In this judgment, for foundational and context purposes, certain terminologies deserve close scrutiny. Those are; racism; racist; white; and racist tendencies or behaviour. *Racism* is the prejudice, discrimination, or antagonism directed against a person or people based on their membership in a particular racial or ethnic group. A *racist* is a person who holds prejudice, stereotypes, or animosity against individuals based on their race or ethnicity, often believing their own race is superior. *White* as a skin colour, is one of the race classifications in South Africa. In the past, the government of the day, through its apartheid policy, fostered and promoted what became known as white supremacy, which is the racist belief that white people are superior to other races, aiming to maintain white power, privilege, and societal dominance.
- [3] *Racist tendencies* refer to subtle, often subconscious behaviours, attitudes, or prejudices that stereotype, excludes, or devalue an individual based on race or ethnicity.

- [4] Central to this appeal lies a question whether calling out someone as a racist makes the caller a racist or thereby, the caller displays racist tendencies. In the present appeal, one Mr Qomoyi was dismissed because he had referred to his superior, one Mr Meyer as a *white racist*. In fact, Mr Meyer is a white person. Being referred to by one's racial classification cannot on its own amount to racist tendencies. Thus, the sting in this appeal is the epithet "*racist*."
- [5] As it shall be demonstrated in due course, a proper understanding of these terminologies and the taking into account of the historical and societal context, provides an appropriate guidance to any decision maker dealing with sensitive and sufficiently opaque disputes involving racial discrimination. The present appeal lies against the order of the Labour Court handed down on 05 July 2024, in terms of which the Labour Court dismissed with costs an application seeking to review and set aside an arbitration award issued by a Commission for Conciliation, Mediation and Arbitration (CCMA) commissioner. The Labour Court refused to grant the appellant leave to appeal to this Court. Leave to appeal was granted by this Court on 13 February 2025. The appeal is opposed by Namaqua Wines (Pty) Ltd (Namaqua).

Background facts pertinent to the present appeal

- [6] It bears recognition at this embryonic stage that according to reports from human rights bodies, researchers, and trade unions, racial discrimination and exploitation are considered rife on many South African farms. Black farmworkers frequently report abuse, low wages, and precarious living conditions. A judicial notice of such realities is not out of kilter. Namaqua is a major producer responsible for approximately 12% of South Africa's wine production. It operates a full value chain from vineyard management and harvesting to bottling and marketing. A vineyard is an agricultural plantation of grape-bearing vines, primarily cultivated for winemaking. Therefore, Namaqua operates in the farming or agricultural industry. It is a wine farm that employs about 280 permanent employees and an additional 150 sessional workers.

- [7] Mr Vuyani Qomoyi commenced employment with Namaqua on 27 August 2019 as a general worker. In the course of his employment, he became one of the shopstewards of the Commercial Stevedoring, Agricultural and Allied Workers Union (CSAAWU), hereafter, the trade union.
- [8] On or about 3 August 2021, Mr Qomoyi, whilst busy with his normal duties was called, without seeking permission from his supervisor, by the bottling manager, Mr Meyer to accompany him to the Human Resources Office (HR). Other than being told that he is going to be a witness of something, Mr Qomoyi, had no inkling, despite his persistent request to be placed in the know, as to what was about to unfold at the HR offices. At the HR offices, he heard, for the first time, Mr Meyer telling one Mr Maimane, a trade union member, that he had been dismissed. In his capacity as a shopsteward, Mr Qomoyi was not involved in any process leading to the dismissal of Mr Maimane. Mr Qomoyi, believing that the dismissal of Mr Maimane was unfair, raised his objections to what was then unfolding. It became common cause that in the process of a heated debate over the dismissal of Mr Maimane, Mr Qomoyi in a pitched voice, referring to Mr Meyer, uttered words to the following effect; *you are a racist, stop being a racist you are firing black people*. The incident was captured on video footage. Before us, it was contended by counsel for Namaqua that Mr Qomoyi repeated those words about eight times on that day. I pause to remark that nothing magical turns on this contention. It was a one-day heated event.
- [9] Ultimately, Mr Qomoyi was suspended and was later hauled before a disciplinary hearing chaired by an external attorney. The allegations to be answered by Mr Qomoyi were couched in the following terms:

‘1. Gross insubordination, serious and deliberate disrespectful behaviour towards Management in a senior capacity – in that on 3 August 2021, near or at the Human Resources Offices, you pointed your finger at your superior, Mr Albrie Meyer, and called him a “*White Racist*”.

2. Displaying Racist behaviour – in that on 3 August near or at the Human Resources Offices, you pointed your finger at your superior, Mr Albrie Meyer, and called him a “White Racist”.

3. Refusal of a lawful and reasonable order/instruction – in that on 17 August 2021, you refused to translate a message from your superior, Mr Albrie Meyer, to the employees present.

4. Breach of Trust – in that as a result of your actions as per charge 1, 2, 3, the trust relationship between yourself and your superior has irreparably broken.

[10] The appointed external chairperson only found Mr Qomoyi guilty of charge 1, in a lesser form (insolence), and charge 2. For the lesser charge 1, he recommended that Mr Qomoyi be issued with a final written warning and for charge 2 that he be dismissed. I pause to remark that there was certainly an unfair splitting of charges between charges 1 and 2. Given the view I take at the end, nothing much is to be made of this.

[11] On 15 October 2021, Mr Qomoyi received communication from Namaqua under the hand of one Mr Xander Joubert, couched in the following manner:

‘NOTICE OF DISMISSAL

This serves to confirm the decision handed down at the disciplinary hearing held on 13, 14 and 23 September 2021.

You are dismissed from the employ of this company for:

1. Displaying Racist behaviour – in that on 3 August near or at the Human Resources Offices, you pointed your finger at your superior, Mr. Albrie Meyer, and called him a “White Racist”...

(Own emphasis)

[12] Undoubtedly, Mr Qomoyi was dismissed for reason of displaying racist behaviour and nothing more. Aggrieved by the fairness of the dismissal of Mr Qomoyi, the trade union referred a dispute alleging unfair dismissal to the CCMA for

resolution. Conciliation failed to resolve the alleged dispute. Commissioner Anthony Ruggiero was appointed to resolve the dispute through arbitration. After hearing evidence, the commissioner published his arbitration award on 12 April 2022. He found that the dismissal of Mr Qomoyi was both substantively and procedurally fair. He then dismissed the claim of Mr Qomoyi.

- [13] Disenchanted by the arbitration award, the trade union launched a review application in the Labour Court. As indicated at the dawn of this judgment, the Labour Court dismissed the review application with an order as to costs, hence the present appeal.

The arbitration award

- [14] The commissioner rendered a detailed arbitration award laden with various case authorities on the subject of dismissal for utterance of “racial slurs.” Regarding the reason for the dismissal of Mr Qomoyi – displaying racist behaviour, the commissioner found that Mr Qomoyi’s justifications of *racial tirade* against Mr Meyer was without merit. With considerable regret, the commissioner devoted a considerable amount of time justifying the rejection of the justifications advanced by Mr Qomoyi without first addressing the crucial antecedent question of whether the uttered words are racist; amount to racism and or racist behaviour. This is more like putting the cart before the horse. The commissioner concluded that the conduct of persistently calling Mr Meyer a white racist who fires black people without representation was not justified, as such Mr Qomoyi’s dismissal was substantively fair.
- [15] It is perspicuous that the approach taken by the commissioner was that he was dealing with a proven racist tirade, hence he devoted much time on rejecting the alleged justifications advanced by Mr Qomoyi for calling Mr Meyer a white racist. Clearly, the commissioner departed from the premise that calling Mr Meyer a white racist is in of itself a conduct displaying racist behaviour; hence he labelled it a racist tirade. A racist tirade is a long, angry, and often public outburst of verbal abuse, utilizing racial slurs, hateful stereotypes, or dehumanizing language to

demean individuals or groups based on their race, ethnicity, or nationality. It is characterised by intense hostility, intolerance, and a clear expression of hateful prejudice.

- [16] Nowhere in his arbitration award does the commissioner specifically address the veritable question of whether Mr Qomoyi displayed racist behaviour – being the reason for his dismissal. The commissioner simply considered the utterance *white racist* in isolation and presumed guilt on the part of Mr Qomoyi. Section 188 (1)(a)(i) of the Labour Relations Act¹ (LRA) is clear. A dismissal is unfair if the employer fails to prove that the reason for dismissal is a fair reason related to the employee's conduct. Section 192 of the LRA imposes the onus of proof on an employer. Seeking to have an employee first justifying the utterance amounts to a reverse onus. It remains the statutory duty of a commissioner to determine whether a dismissal is fair or not. It was therefore incumbent on the commissioner to be satisfied that on the balance of probabilities, Mr Qomoyi is indeed guilty of displaying racist behaviour. Generally, a racist behaviour is any action, attitude, or policy that treats people unfairly, insults, or humiliates them based on their race, colour, descent, national origin, or ethnicity. It is rooted in prejudice and the belief that one race is superior to another, often leading to discrimination, harassment, violence, and systematic inequality.
- [17] As it shall be demonstrated later in this judgment, the Constitutional Court has already approved a particular test developed by the Labour Appeal Court (LAC) when dealing with utterance of racial slurs, epithets, or tirades. The arbitration award of the commissioner does not demonstrate any application of such a test. Ineluctably, the commissioner ignored binding authority by higher courts.

The Labour Court Judgment

- [18] The well-known and approved test for review is whether an arbitration award is one that a reasonable decision maker may reach. Where a commissioner, as in this case, ignores binding authority, it can hardly be said that his or her arbitration

¹ Act No 66 of 1995 as amended.

award is one that a reasonable decision maker may reach. Differently put, had the commissioner applied the test developed by the LAC and approved by the Constitutional Court, the outcome would have been that Mr Qomoyi is not guilty of displaying racist behaviour, as such his dismissal would have not been for a fair reason.

- [19] At a review application stage, a court of review is guided by the findings made by the commissioner in his or her arbitration award. In other words, a court of review is not itself re-hearing the dispute already determined by an arbitrator as statutorily commanded. After having confirmed and approving the rejection of the justifications raised by Mr Qomoyi at the opening address at arbitration, the Labour Court itself gravitated towards applying the test approved in *Rustenburg Platinum Mine v SAEWA obo Bester and others*². As stated before, nowhere in his arbitration award does the commissioner demonstrate any application of the *Bester* test. That failure on its own was reason enough for the Labour Court to conclude that the arbitration award is not one that a reasonable decision maker would reach. To my mind, the Labour Court impermissibly straddled into issues, though extremely relevant, not considered by the commissioner. Such is evident from the following:

[44] Having disposed of the purported justification grounds relied on by Qomoyi, one must turn to consider what he said, without cause, reason, or justification for it...

[45] As the second respondent understood, the utterances by Qomoyi must be considered in the context it was used and considering all the events as a whole...

[46] Applying this approach in *Rustenburg Platinum Mine supra*, the real context....

(Own emphasis)

² [2018] 8 BLLR 735 (CC).

[20] In terms of section 145(4)(a) of the LRA, the Labour Court is only empowered to determine the dispute once the arbitration award is set aside. The Labour Court is not permitted, as it were, to *ex post facto* -after the fact, augment the arbitration award by determining issues left out of account by a commissioner. What the Labour Court did, as evident above was to determine the dispute without first setting the arbitration award aside. The Labour Court is simply not permitted to do so. Similar to the commissioner, the Labour Court placed much store on the judgment of the Labour Court in *SA Chemical Workers Union and Another v NCP Chlorchem (Pty) Ltd and others*³. In essence, the *Chlorchem* judgment concluded amongst others that '*if an employee, without reasonable cause therefor, accuses a fellow employee of being racist or of displaying a racist attitude, it will constitute a very serious form of misconduct*'⁴. This was said before *Bester* and is clearly inconsistent with the approved test.

[21] The Labour Court also reached the following conclusion:

'Surely, it cannot be clearer than that. Simply put, labelling someone as a racist when there is no truth, cause or justification for that label, is in itself racist. It follows that these kinds of accusations should only be made with great circumspection.'

(Own emphasis)

[22] With considerable regret, this Court does not agree that mere labelling, is in of itself racist or constitutes a display of racist behaviour. In reaching that conclusion, as it shall be demonstrated in due course, the Labour Court unfortunately erred. After considering a number of case authorities, where different utterances were made under different circumstances and context, the Labour Court reached the following conclusion:

³ (2007) 28 ILJ 1308 (LC). The commissioner had cited the judgment as that of the Labour Appeal Court in his award.

⁴ *Ibid* at para 31.

[60] In sum, and based on the authorities discussed, it is my view that accusing a manager of being a 'white racist' would *prima facie* constitute racist conduct and is an utterance that is undoubtedly racially charged. Meyer testified that he found the utterances to be hurtful and prejudicial to him, and undoubtedly, such utterances would objectively be perceived, by all the employees who witnessed it and/ or in whose earshot it happened, to be racist in nature.'

(Own emphasis)

[23] The conclusion of *prima facie*, reached by the Labour Court implies that the utterances would, without more, constitute a racist behaviour. I am unable to agree. It is also clear that the Labour Court applied the subjective test when considering how Mr Meyer felt about the utterance. In an attempt to apply the objective test, the Labour Court, as it should, did not use a reasonable person test. It confined itself to the persons who allegedly heard Mr Qomoyi, without any objective evidence whether the alleged people perceived what they allegedly heard as a racist behaviour. In *Bester*, witnesses who heard what Mr Bester said, testified and made their perception clear. In this matter, Mr Meyer was the only person who testified about his own perception and feelings. With considerable regret, that is not how the reasonableness test is to be applied.

Evaluation

[24] Given the history of this country, matters involving allegations of racism require careful consideration. They are not an open and shut cases simply because words like *racist* are uttered. They are not necessarily easy matters to navigate through. In this matter, it is true that Mr Qomoyi uttered the words *white racist* and directed them to Mr Meyer. The key question that required careful consideration was whether calling Mr Meyer a white racist is in of itself a racist behaviour. Put differently, does the name calling make Mr Qomoyi a racist himself? Although racial slurs are inappropriate conduct and can be hurtful and upsetting, it does not axiomatically follow that the utterer of the slurs is

necessarily a racist or displays racist behaviour. The Constitutional Court in *Bester* provided the following useful guideline in matters of this nature, it said:

[38] ... the use of the words “swart man” *per se*, is not racist and that the context within which the words were used would dictate whether they were used in a racist or derogatory manner. It was also accepted that the test to determine whether the use of the words is racist is objective – whether a reasonable, objective, and informed person on hearing the words would perceive them to be racist or derogatory. This is in accordance with the test for whether a statement is defamatory, as enunciated in *Sindani*:

“The test to be applied is an objective one, namely what meaning the reasonable reader of ordinary intelligence would attribute to the words read in a context of the article as a whole. In applying this test, it must be accepted that the reasonable reader will not take account only of what words expressly say but also what they imply.”⁵

(Own emphasis)

- [25] The test demands that one must consider the words first and determine whether the words objectively viewed were used by the utterer in a racist manner. In that exercise, the utterer is not necessarily considered but the words uttered or used are considered. In order to apply the test correctly, in this particular instance, it ought to be accepted that referring Mr Meyer as a white person cannot *per se* be racist or derogatory. As stated before, in this instance, the sting is the use of the word *racist*. The Court in *Bester* approved what the LAC stated, when it said 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 whether a reasonable, objective and informed person would on the correct facts perceive it to be so.”*⁶

⁵ *Ibid* fn 2 at para 38.

⁶ *Ibid* fn 2 at para 45.

- [26] The correct facts in this particular matter are that unexpectedly, it would seem, as it was never done before, Mr Meyer called Mr Qomoyi to go and witness, in fact, a dismissal of a black worker. It became common cause that Mr Qomoyi as a shopsteward was never part of the process leading to the dismissal of the black worker concerned. Hypothetically, an employer who would dismiss a black employee without any hearing may be perceived to be practising racist tendencies. The correct facts suggests that when Mr Qomoyi called Mr Meyer a white racist, it was after a black worker was dismissed in a manner perceived by Mr Qomoyi to be unfair. Certainly, Mr Qomoyi under those circumstances was entitled to express his opinion of who Mr Meyer was to him. It may well be so that Mr Meyer was not a racist, however, what Mr Qomoyi observed on that day, after being invited to witness it by the self-same Mr Meyer, was an unfair treatment of a black person by a white person.
- [27] Given the history of this Country, it can never be perceived by any reasonable person that Mr Qomoyi is capable of being a person who believes that a black race is inherently superior and that a white race is inferior to his race and that he unfairly discriminated or held prejudice against Mr Meyer because of him being a white person. When Mr Qomoyi used the words in question, it was his own interpretation of what he had just witnessed after being called by the self-same Mr Meyer to witness such. It can hardly be said that in uttering those words he was insulting or humiliating Mr Meyer based on the colour of his skin. The Court in *Bester* discouraged the beginning of the enquiry with the presumption that the context is neutral. This, because our societal and historical context dictates otherwise.
- [28] Similarly, the inquiry into the usage of the words must not begin from the context that the usage of the word *racist* is presumed to be a racist behaviour. As stated before, within the context of the history and societal context, the usage of the word *racist* does not imply that the user used it in a racially charged atmosphere. The fact that the utterance was accompanied by the phrase, *who fires black workers without a hearing*, gives the utterance a specific context. It may well be

that Mr Qomoyi considered Mr Meyer as a *cruel* or *unfair* white person, who ill-treats black workers. Given the power relations between Mr Qomoyi – a black general worker, and Mr Meyer – a white bottling manager, it is inconceivable that Mr Qomoyi was aiming at devaluing Mr Meyer as a member of the white race. It seems oxymoronic to contemplate such. History of this country does not bear that out. Mr Meyer is not a member of the previously disadvantaged group.

[29] It must follow that had Mr Qomoyi not witnessed what Mr Meyer called him to witness – dismissal of a black employee – he would not have, unexpectedly, called Mr Meyer a white racist. In truth, it is not far-fetched to surmise that by calling Mr Qomoyi to witness what he ultimately witnessed, Mr Meyer was provoking Mr Qomoyi. Actually, given his testimony at arbitration as to why he called Mr Qomoyi, he was being grandiloquent to Mr Qomoyi *-to see how I (ek) treat your people (black employees)*. If Mr Qomoyi aimed at displaying racist behaviour, he could have used the words against Mr Meyer, when he first called him. It is clear on the correct facts of this matter that Mr Qomoyi was angered by what he witnessed few minutes later after being summoned to the HR Office. On the correct facts, no reasonable, objective, and informed person would have perceived Mr Qomoyi to be displaying racist behaviour towards Mr Meyer. A reasonable, objective, and informed person, would have perceived Mr Qomoyi as a person expressing his opinion about Mr Meyer on the strength of what he had just observed.

[30] The LAC has made it clear, and this was approved by the Constitutional Court, that before considering any justification by an employee, an employer must first establish whether a reasonable, objective, and informed person would have on the correct facts perceived Mr Qomoyi to be displaying racist behaviour. As stated before, when the commissioner's arbitration award is considered, he failed to conduct the reasonableness test as projected by this Court. First, he labelled the utterance as a racist tirade without subjecting the utterance to a projected test. Whereafter, he conducted a detailed examination of the justifications and rejected them, and made a finding that Mr Qomoyi displayed a racist behaviour.

This is at odds with the projected test. On application of the well-known review test, no reasonable commissioner would fail to conduct the enquiry approved by the highest Court of the land. Because the commissioner's arbitration award failed to meet the constitutional standard, the Labour Court ought to have reviewed and set it aside.

- [31] As found in *Bester*, the commissioner failed to approach the dispute in an impartial manner taking into account the totality of the circumstances. He observably failed to apply the test proposed by this Court and approved by the Constitutional Court. The touchstone in applying the test must be the usual limits of social interaction in the circumstances. In *Pardo v School District, No 43*⁷, the British Columbia Human Rights Tribunal had the following to say:

‘In my view, all the circumstances must be taken into account when considering whether a single comment constitute a contravention of the Code. Without suggesting that this is an exhaustive list, some of the relevant factors would be the egregiousness or virulence of the comment, the nature of the relationship between the involved parties, the context in which the comment was made, whether an apology was offered, and whether or not the recipient of the comment was a member of a group historically discriminated against.’

- [32] This approach was approved in *Campbell and Abraham v Krizmanich*⁸. I am in full agreement with the above approach. Being called out as a racist may be embarrassing if one is such, however, if one is not, as Mr Meyer professed not to be, the comment is incapable of being pathogenic or virulence. In this matter, as stated, the recipient of the comment, Mr Meyer is not a member of a group that was historically discriminated against. As stated before, historically, a white race was considered to be a superior race. It could well be that in certain quarters of South Africa; some white persons still consider themselves to be a superior race. This point was underscored by the Court in *Bester*. The Constitutional Court expressed a useful distinction on the usage of racial epithets. It said:

⁷ 2003 BCHRT 71.

⁸ 2009 BCHRT 5

[53] Gratuitous references to race can be seen in everyday life, and although such references may indicate a disproportionate focus on race, it may be that not every reference to race is a product of manifestation of racism or evidence of racist intent that should attract a legal sanction...

(Own emphasis)

[33] In *Chlorchem*, the Labour Court expressed itself in the following terms:

[12] I have no hesitation to conclude that to accuse a person of being a racist or to say a person that he is displaying a racist attitude is racially offensive.... I am also satisfied that such language could be described as "racial"...

(Own emphasis)

[34] This statement of the Labour Court suggests that the mere usage of the words imply racism or racist tendencies. This statement is at variance with the test developed by this Court and approved by the Constitutional Court in *Bester*. The statement clearly ignores the importance of the context as well as the circumstances under which the words may be used. As the Constitutional Court in *Bester* felicitously puts it, the principles applicable in defamation cases find application in such an instance. In defamation cases, a fair comment is a common law defence that protects the honest expression of opinion, even if the opinion is exaggerated, prejudiced, or harmful to a person's reputation, as long as the opinion is based on true or privileged facts and made without malice. As stated before, calling Mr Meyer a racist was based on the true fact that a black employee – undoubtedly a member of the previously disadvantaged group - was dismissed without Mr Qomoyi, as an elected shopsteward, representing him before being so dismissed. Therefore, his utterance constitutes a fair comment and cannot be classified as displaying a racist behaviour. I take a view that the approach in *Chlorchem* was not approved by this Court as well as the Constitutional Court. Consequently, this approach has to be rejected by this Court.

[35] At arbitration, Mr Qomoyi testified as follows:

APPLICANT REPRESENTATIVE... In the video you can see you, the words that you used there, you were saying Mr Meyer (inaudible) Mr Meyer you are a white racist (inaudible). So, can you explain why you said that?

MR VUYANI QOMOYI: The reason why I said to Mr Meyer first of all I am a Shop Steward so each and everything that is happening with the firing of people at work I am involved. And right now, what is happening if, there is lady now who has been fired by the (inaudible) she is the (inaudible) she is unemployed. If Mr Meyer have to fire someone or, or, or with have to go with all procedures of this person must go to the hearing sits down, he don't call me as the Shop Steward. Maybe it, it, it is his part as a Manager, I am not a Manager, and the thing that now is confusing me is this, he don't call me even here, no he just wants (inaudible) with the problem. For an example on this case of Sipho Maimane and when he don't call me he will call me when he is firing this person like he did right now to, to Sipho Maimane and when I start ask him this question like why are you calling me now when you firing Sipho Maimane but why didn't you call me, especially the matter of Sipho Maimane...

MR VUYANI QOMOYI: He don't call me on that space, so why he call me when he is firing someone, then that is when he will call me. I don't know maybe he want me to feel the pain because I don't want to see people being unemployed, sitting there at home, I am not saying people must do wrong at work, I am not saying must not go to work, you see, but to me as a Shop Steward that is part of my job to make sure people are doing right things as well and to make sure that the people are not dismissed unfairly at work. That is my job as a Shop Steward,

[36] Based on the evidence he tendered at the arbitration, it can never be said that Mr Qomoyi intended to be racist. Instead, he was venting his frustration in the manner which black employees are being dismissed. Putting It otherwise, it was his response to what offended his own sense of justice and fairness. It cannot be objectively stated that he used those words seeking to display racist behaviour to

Mr Meyer. He was hurt by what was happening to his fellow black employee and he as the shopsteward appeared to have been unhelpful to their plight.

- [37] Allegations of racism are profoundly serious in nature. To my mind, Namaqua should have installed a full-scale investigation into all the allegations around racism instead of charging and dismissing Mr Qomoyi for allegedly displaying racist behaviour. Namaqua should have given the allegation that black employees are being dismissed without a hearing a little more attention. What obtained in this matter is not a situation where race supremacy is being displayed by Mr Qomoyi. The investigation could well have revealed that Mr Meyer was indeed treating black employees in a manner suggestive of racial oppression. Allegations of racism were not strange to Namaqua. One of its managers was sent to diversity training for alleged racist behaviour. This Court approves what was said by the Human Rights Tribunal in *Krizmanich* when it said:

[37] The evidence in this case is that the parties lost their tempers with each other and there was an exchange of racial slurs. While this is obviously not acceptable social conduct, it is a type of conduct that at times does arise in the heat of the moment and is often later regretted. In my view, although an exchange of racial slurs is inappropriate conduct and can be hurtful and upsetting to both parties, it is also a behaviour that is best addressed by an exchange of apologies. I do not think the purposes of the *Code*, in particular, to promote a climate of understanding where all are equal in dignity and rights, is served by judging racial slur to constitute discrimination contrary to the *Code* in this type of circumstance.'

- [38] A different approach, other than charging and dismissing Mr Qomoyi, which may have revealed proper evidence of what actually was taking centre stage at Namaqua, may have fostered exchange of apologies. Perspicuously, allegations of racism at Namaqua are not just smokes and mirrors. They seem not to be illusionary and deceptive. The fact that Mr Meyer professed to not be racist may not be sufficient as an answer. Racism as an epidemic is not transparent. No racist person may readily admit to being one. Nevertheless, this Court, on

application of the *Bester* test concludes that Mr Qomoyi did not display a racist behaviour. Thus, his dismissal for reason of displaying a racist behaviour was not for a fair reason. A reasonable decision maker, taking into account all the circumstances of this case, would have reached a finding that Mr Qomoyi was unfairly dismissed. The arbitration award of the commissioner must be set aside.

Was the dismissal of Mr Qomoyi substantively unfair?

[39] Regard being had to the totality of the evidence on record, this Court is in as good a position as the Labour Court would have been had it correctly reviewed and set aside the arbitration award. The evidence considered and discussed above clearly demonstrate that Mr Qomoyi was not guilty of charge two. When challenged to demonstrate the fairness of a dismissal, an employer may not use reasons not used in effecting a dismissal to justify the fairness thereof. The fact that Mr Qomoyi called Mr Meyer a white racist does not of itself make him guilty of displaying racist behaviour. The utterance, when viewed in the context it took place as well as taking into account the history and societal context and objectively viewed do not amount to racist behaviour. As already stated, Mr Meyer is not a member of the previously disadvantaged group. Taking history into account, Mr Qomoyi is incapable of staking supremacy over Mr Meyer. The Labour Court, although not permitted, wrongly applied the *Bester* test to the circumstances of this case. In that regard, the Labour Court erred and the appeal must be upheld.

[40] In any event, it is clear from the disciplinary code of Namaqua that the offence in question is not a dismissible one. For that reason, too, dismissal as a sanction was inappropriate, which renders the dismissal to be substantively unfair. Carefully considered, regard being had to the admitted splitting of charges, this Court states in passing that Mr Qomoyi was punished for his conduct – recommendation of final written warning for insolence – for pointing a finger and calling Mr Meyer a *white racist*. Dismissing him for the similar conduct was inappropriate and unfair. Having concluded that the dismissal is substantively

unfair, it is not necessary to disturb the finding that the dismissal was procedurally fair.

The issue of remedy

[41] Mr Boda, appearing for the appellant, correctly submitted that reinstatement is a primary remedy for substantive unfairness. There is no evidence on record to oust the ordering of the primary remedy. Mr Qomoyi testified that he wished to be reinstated and shall not have any difficulties to work with Mr Meyer again. Since Mr Qomoyi was not supposed to have been dismissed, his reinstatement ought to be with retrospective effect. The fact that Mr Qomoyi had nevertheless used the words *white racist*, would not of itself deprive him of the primary remedy since he is not guilty of charge two. Accordingly, Namaqua must be ordered to retrospectively reinstate Mr Qomoyi.

Conclusions

[42] In summary, the commissioner failed to apply the test approved by a higher court, as such his arbitration award is not one that a reasonable decision maker would reach. The Labour Court was not permitted to *ex post facto* augment the arbitration award by applying the approved test itself, without first setting aside the arbitration award. The usage of the words *white racist* in the context and circumstances of this case does not amount to display of racist behaviour. On application of the approved test, consideration of the words *white racist* to be a racial tirade without more is inappropriate.

[43] In the result, the following order is made:

Order

1. The appeal is upheld.

2. The entire order of the Labour Court is set aside and is replaced with the following order:

2.1 The dismissal of Mr Vuyani Qomoyi is substantively unfair.

2.2 Namaqua Wines (Pty) Ltd is ordered to reinstate Mr Vuyani Qomoyi retrospective from the date of his dismissal.

3. There is no order as to costs.

G N Moshwana

Acting Judge of the Labour Appeal Court of South Africa

Nkutha-Nkontwana JA and Tokota AJA concur.

APPEARANCES:

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Instructed by: SERI Law Clinic, Cape Town

FOR THE RESPONDENT : Mr RGL Stelzner SC

Instructed by: Vanderspuy, Cape Town

LABOUR APPEAL COURT