Racists Beware

Some Labour Law Perspectives on Racism in the Workplace

By Letlhokwa George Mpedi | Opinion

Abstract

This contribution reflects on racism within the workplace from a labour law perspective. It deliberates on the approach adopted by the South African courts of law in dealing with the vexed issue of racism at work. In particular, this contribution focuses on the following themes: the relevant legislative framework, determining racism in the workplace, the nature and impact of racism at work, dealing with false accusations of racism, the use of racial slurs on social media, racism-related off-duty misconduct, and the dismissal of an employee at the behest of third parties. It concludes by arguing that racism in the workplace cannot and should not be tolerated. Furthermore, it is a broader societal problem that must be addressed by all stakeholders. Such stakeholders include employees, employers, trade unions, workplace fora, labour inspectors, the Director-General of the Department of Employment and Labour, and the Commission for Employment Equity. In dealing with racism, sight should not be lost of the fact that courts of law cannot unilaterally eradicate this scourge. South Africans from all walks of life have a role to play. After all, in as much as racism is taught, it can and must be unlearned.

Introduction

Racism has demonstrated over time to be one of the perennial challenges experienced in the world of work the world over. In South Africa, racism was one of the central features of the apartheid system. As Dugard (2018: 89) puts it, '[i]nstitutionalised race discrimination was the hallmark of apartheid'. Racism featured in all aspects of life, including sport (see Lapchick, 1979; Martin, 1984), religion (see Tiryakian, 1957), and employment (see Mariotti, 2009). The demise of the apartheid system did not spell the end of racism in South Africa. Instances of racism are reported from time to time in many sectors of society, ranging from sport to business. In the work environment, the Constitutional Court in Rustenburg Platinum Mine v SAEWA obo Bester and others (2018) 39 ILJ 1503 (CC) (at paragraph 52) delineated the situation as follows: 'Racism and racial prejudices have not disappeared overnight, and they stem, as demonstrated in our history, from a misconceived view that some are superior to others. These prejudices do not only manifest themselves with regards to race but it can also be seen with reference to gender discrimination. In both instances, such prejudices are evident in the workplace where power relations have the ability 'to create a work environment where the right to dignity of employees is impaired''.

In an effort to eradicate racism, post-apartheid South Africa established a legislative framework to promote equality and to prohibit unfair discrimination. These laws include the Constitution of the Republic of South Africa, 1996 (hereinafter the Constitution); the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000; labour laws such as the Employment Equity Act 55 of 1998 (hereinafter the EEA); and the Labour Relations Act 66 of 1995 (hereinafter the LRA).

The use of law to proscribe and punish racism makes sense as racial discrimination was legally sanctioned during the apartheid era. The following apartheid laws spring to mind: Population Registration Act 30 of 1950 (created a national race register and the Race Classification Board); Group Areas Act 41 of 1950 (created different residential areas for different races); Native Building Workers Act 27 of 1951 (made it a criminal offence for Bantu to perform skilled work in urban areas except in sections designed for Black occupation); Bantu Authorities Act 68 of 1951 (made provision for the homelands); Native Labour (Settlement of Disputes) Act 48 of 1953 (prohibited strike action by Black people); Bantu Education Act 47 of 1953 (made provision for racially segregated education facilities); Native (Prohibition of Interdicts) Act 64 of 1956 (denied Black people the opportunity to appeal to the courts against forced removals); and Extension of University Education Act 45 of 1959 (stopped Black students from attending white universities).

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Needless to say and as shown in this contribution, having relevant laws enacted does not automatically lead to compliance. Old habits, as the saying goes, die hard. As appositely stated by Chief Justice Mogoeng in South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others [2017] 1 BLLR 8 (CC) (at paragraph 1): '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'.

This contribution shares some labour perspectives on racism at work. It reflects on how courts have dealt with this thorny issue by addressing a variety of questions which include the relevance of the context in determining racism in the workplace, how to deal with a false accusation of racism, the use of racial slurs on social media, off-duty misconduct (related to racism), and dismissal of an employee at the behest of third parties. It concludes by providing a succinct way forward on eliminating racism at work.

Relevant legislative framework

The legislative framework dealing with racism at work is anchored in the Constitution. The Constitution, which is the supreme law of the country (Preamble, sections 1(c) and 2 of the Constitution), lists the achievement of equality and non-racialism as some of the values of South Africa (section 1(a)-(b) of the Constitution). It recognises the right to equality as a fundamental right (section 9 of the Constitution). Furthermore, it prohibits unfair discrimination based on, among other grounds, race, ethnic, or social origin and colour. The right to equality and the right not to be unfairly discriminated against are not absolute and so is every right contained in the Bill of Rights (see section 36 of the Constitution). It is therefore not surprising that laws and affirmative action measures can be introduced to 'protect or advance persons, or categories of persons, disadvantaged by unfair discrimination' (section 9(2) of the Constitution). In the area of labour law, the most notable piece of legislation is the EEA. The EEA has been enacted to 'promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment; ensure the implementation of employment equity to redress the effects of discrimination; achieve a diverse workforce broadly representative of our people; promote economic development and efficiency in the workforce; and give effect to the obligations of the Republic as a member of the International Labour Organisation' (Preamble of the EEA; see also section 2 of the EEA).

Section 6(1) prohibits unfair discrimination, direct or indirect, based on inter alia race, ethnic, or social origin and colour. It should be recalled that according to section 6(2) of the EEA: 'It is not unfair discrimination to – (a) take affirmative action measures consistent with the purpose of this Act; or (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.' The LRA also addresses the issue of racism in the workplace. It classifies a dismissal as automatically unfair if the reason for such dismissal is that 'the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility' (section 187(1)(f) of the LRA).

Racism in the workplace:
A cursory overview of its form and impact

Racism in the workplace, which is a ground for dismissal (misconduct), can take a variety of forms. This includes racial slurs which are defined as 'derogatory or disrespectful nickname[s] for a racial group' (Croom, 2011: 343–344). Furthermore, racism at work can be overt or covert. Racism is legally, morally, and otherwise repugnant because it dehumanises the victim(s). As aptly articulated by the Durban Declaration and Programme of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (adopted on 8 September 2001): 'racism, racial discrimination, xenophobia and related intolerance, where they amount to racism and racial discrimination, constitute serious violations of and obstacles to the full enjoyment of all human rights and deny the self-evident truth that all human beings are born free and equal in dignity and rights, are an obstacle to friendly and peaceful relations among peoples and nations, and are among the root causes of many internal and international conflicts'.

Viewed from a workplace perspective, one can argue that racism has the potential to undermine good working relations in that it impedes racial harmony among employees. Furthermore, as argued in Edcon Limited v Cantamessa and Others [2019] JOL 46015 (LC), it can negatively impact on the business of the employer, particularly when left unpunished. The aforementioned views were echoed by the Constitutional Court in Rustenburg Platinum Mine v SAEWA obo Bester and Others (at paragraph 56) as follows: 'Our courts have made it clear, and rightly so, that racism in the workplace cannot be tolerated. Employees may not act in a manner designed to destroy harmonious working relations with their employer or colleagues. They owe a duty of good faith to their employers which duty includes the obligation to further the employer's business interest. In making racist comments in the public domain, the actions of the employee may foreseeably negatively affect the business of his employer or the working relationship between him and his employer or colleagues.'

Some commentators went as far as pointing out that there are no winners in the racism debacle, as it affects both the perpetrator and the victim

(see Reeves, 2000). For instance, in his address to the United Nations General Assembly on 3 October 1994, Mandela pointed out that: '[t]he very fact that racism degrades both the perpetrator and the victim commands that, if we are true to our commitment to protect human dignity, we fight on until victory is achieved.'

The relevance of context in establishing racism

Many racial epithets, defined as 'derogatory expressions, understood to convey hatred and contempt toward their targets' (Hom, 2008), are well known in South Africa and they include baboon (bobbejaan), kaffir (kaffer), and monkey (aap). There have been instances where a couple of racial epithets have been used together. For instance, in Lebowa Platinum Mines Ltd v Hill [1998] 7 BLLR 666 (LAC), an employee was disciplined for using insulting or abusive language in the sense that it was alleged that he addressed a Black colleague as 'bobbejaankoppie' (baboon head). While some racist utterances are identifiable at first sight, this does not apply to all racial slurs. For example, calling a colleague a Black man may be innocent or malicious. The issue is how one establishes whether words are racist or not. In Rustenburg Platinum Mine v SAEWA obo Bester and Others, in a matter involving a situation where a white employee addressed his Black colleague as 'swart man' (Black man), the Constitutional Court found that 'the test was whether, objectively, the words were reasonably capable of conveying to the reasonable hearer that the phrase had a racist meaning' (at paragraph [50]). Therefore, the test is an objective one. The Constitutional Court found that the test regarding whether words are derogatory and racist is objective. In their quest to establish whether there is implicit, covert, and indirect racism, the South African Courts have invariably found context to be important (see Rustenburg Platinum Mine v SAEWA obo Bester and Others and Modikwa Mining Personnel Services v Commission for Conciliation, Mediation and Arbitration and Others [2018] JOL 40266 (LC)).

Are racist tendencies restricted to one race group?

Racism is not race-specific, in the sense that it can be perpetrated by any race group. Black persons (used broadly to include Africans, Coloureds, and Indians) are not immune from committing racist acts. This is sadly the case even though one would expect such a group to fully appreciate the pain of being on the receiving end of racism. As shown in Modikwa Mining Personnel Services v Commission for Conciliation, Mediation and Arbitration and Others, a Black employee was dismissed for uttering a racist remark at a work meeting, i.e. 'we need to get rid of the whites'. The other contentious issue that needs to be adequately settled is the question of whether persons of the same race group can be racist towards one another. For instance, can a Black man be racist to a fellow Black man? There is a view that the answer to such a question is no (Wadula, 2019). Notwithstanding what the views may be on the subject, one fact remains: the uttering of racial epithets cannot and should not be tolerated, especially in the workplace. The use of racist language at work should invariably attract a sanction.

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Dealing with a false accusation of racism

It is abundantly clear that racism should not be tolerated, particularly in the workplace (see Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp & Others [2002]6 BLLR 493 (LAC) and City of Cape Town v Freddie and Others [2016] 6 BLLR 568 (LAC)). However, a question that begs attention is what about false allegations of racism? Can (an) employee(s) deceitfully accuse fellow worker(s) of racism? Experiencing racism surely hurts. Conversely, it should be painful to be branded, without just cause and excuse, as a racist. As harshly as racism should be dealt with, it is only sensible that the same favour should be extended to false accusations of racism. Such blame should, in the workplace context, be treated as misconduct.

Our courts have indeed accepted that groundless allegations of racism could amount to serious misconduct. For instance, in SACWU & Another v NCP Chlorchem (Pty) Ltd & Others [2007] 7 BLLR 663 (LC) (at paragraphs 26–28), the Labour Court found that: 'Clearly, if an employee has conducted himself in a manner which may justify the allegation by another employee or employees that he is a racist or is displaying a racist attitude, then such allegation needs to be properly made to the employer and these allegations need to be investigated, if necessary through the institution of disciplinary action...Patently clearly, one needs to be able to accuse a person of being a racist or displaying a racist attitude without fear that making such allegations lead to one's dismissal. Equally clearly, if you make such allegations that a fellow employee is a racist or is displaying racist attitudes and you make them without justification or reasonable cause, therefore, you must accept that this will most likely lead to disciplinary action being instituted against you. Equally, it should be clear to any employee who makes unfounded allegations against a fellow employee that he or she is racist or that he or she is displaying a racist attitude, that this will in most instances, in my view, amount to serious misconduct which may lead to that employee's dismissal. Racial harmony in the workplace must be of paramount importance to each and every employer and employee alike. Just as racist behaviour needs to be rooted out, allowing employees to willy-nilly accuse fellow employees of being racist or displaying racist attitudes, must be addressed with equal fervour by employers if such allegations are baseless and made without reasonable cause therefore. Clearly, to allow such allegations to be made without there being a proper and reasonable basis therefore will be equally destructive to racial harmony in the workplace.'

In Chemical, Energy, Paper, Printing, Wood and Allied Workers Union obo Dietlof v Frans Loots Building Material Trust t/a Penny Pinchers [2016] 10 BALR 1060 (CCMA), the Commission for Conciliation Mediation and Arbitration found the dismissal of an employee who made a false accusation of racism on social media to be fair. In this matter, the employee falsely accused a manager of kissing only white women when congratulating them at an award ceremony and ignoring Black women. It argued that the actions of the employee 'could have serious consequences for the business of [the] company as it was being branded on Facebook by the applicant, as being racist' (at paragraph 8).

Use of racial slurs on social media

The Constitution recognises every person's right to freedom of expression (section 16(1) of the Constitution). However, such a right is not absolute. It can be limited. For example, section 16(2)(c) of the Constitution states clearly that the right to freedom of expression does not extend to 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm.' This important provision was emphasised in Edcon Limited v Cantamessa and Others. In this case, the Labour Court confirmed the dismissal of an employee who posted a racial slur on Facebook while on leave. It ruled that the employer can in principle discipline an employee as long as it can establish the requisite connection between the misconduct and its business (at page 14). While in the case in question the comments made had no connection with the employer's business, it was sufficient connection that the employee indicated in the post that she worked for the employer. This was found to compromise the good name of the employer in the eyes of the general public. Employees must avoid posting racial slurs on social media. Failure to do so could lead them straight to the unemployment line. It does not matter whether one uses his or her own device or data. Racial slurs posted on social media that connect an employer to the employer's business will most likely attract a disciplinary action that can result in the dismissal of the offending employee.

Off-duty misconduct

What an employee does after work is none of the employer's business (see Edcon Limited v Cantamessa

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and Others). That is the general rule. However, does that imply that employees are at liberty to engage in racist behaviour or utter racist slurs after work and/or outside of the employer's premises? The answer is not necessarily. The point is that there are exceptions to the general rule. There are indeed instances where an employer's disciplinary arm can be long enough to reach and discipline an employee who misconducts himself or herself after work. In National Union of Mineworkers & Other v East Rand Gold & Uranium Co Ltd (1986) 7 ILJ 739 (IC), the then Industrial Court rejected a plea to reinstate an employee who was disciplined and dismissed for assaulting a fellow worker on a bus while being transported from work to home. The principle is that an employer has the jurisdiction to discipline and dismiss an employee if the racist conduct is committed by an employee while he or she is still within the course and scope of his or her employment. There must be a connection between the misconduct and the employer. The protection that the employer has to extend to employees against racism is not restricted to the work premises. It extends to employer-provided accommodation. In Biggar v City of Johannesburg (Emergency Management Services) (2017) 38 ILJ 1806 (LC), a Black employee and his family who lived at housing apartments provided by the employer were subjected to severe racism perpetrated by his co-workers, who also resided at the housing apartments. The Labour Court found that the employer failed to take the necessary steps to protect the employee and his family against racism and adequately deal with racial harassment. It ordered the employer to pay the employee 12 months' compensation.

It is important to note that when it comes to off-duty misconduct, the fact that one was on leave may not always come handy as a defence. Two cases come to mind. The first one is that of Khutshwa v SSAB Hardox (2006) 27 ILJ 1067 (BCA), in which an employee on leave from work was indicted for shooting his wife and her boyfriend. It was found that the employer was justified in dismissing an employee in light of the serious nature of the charges and that 'the employer has a duty to ensure that the workplace environment is safe and secure' (at page 1071). The essence of the matter was that the employee's involvement in a criminal act placed the relationship of trust between himself and the employer under strain. In the area of racism, the pertinent case which is covered above under the use of racial slur on social media is that of Edcon Limited v Cantamessa and Others, where an employee was dismissed for using a racial slur on social media while on annual leave.

Dismissal at the request of a third party

The employment relationship is, generally speaking, a matter between an employer and an employee. Parties to an employment contract are invariably an employer and employee. Thus, the termination of such a contract is mainly a matter between the two parties. However, there are instances where an employer can terminate the contract of employment at the instance of a third party. A leading case on the subject of racism in the workplace is Lebowa Platinum Mines Ltd v Hill. In this case, a trade union threatened to embark on a strike action should the employer fail to dismiss an employee for using racist language. Such a dismissal is recognised in South African labour law as dismissal due to incapacity. The employee concerned is incapable of continuing with his or her employment due to a threat by a third party. Such a dismissal will be fair if it complies with, inter alia, the following principles which were expounded in Lebowa Platinum Mines Ltd v Hill (at paragraph 22) and summarised as follows: '(i) the mere fact that such a demand had been made was not enough to justify the dismissal; (ii) the demand had to have sufficient foundation; (iii) the threat of action by the third party if its demand was not met had to be real and serious; (iv) the employer had to have no other option but to dismiss; (v) the employer must have made a reasonable effort to dissuade the third party from carrying out its threat; (vi) the employer should investigate and consider alternatives to dismissal and consult with the [employee]; (vii) the extent of injustice to the employee must be considered; (viii) the blameworthiness of the employee's conduct should be taken into account.'

Racism in the workplace – the way forward

It will take more than (labour) legislation to eradicate racism in the workplace. The issue is that racism is a broader societal problem. So, all stakeholders will need to play their part. In as much as racism is learned, it can and must be unlearned. As Boncheck (2016) puts it: 'Unlearning is not about forgetting. It's about the ability to choose an alternative mental

model or paradigm. When we learn, we add new skills or knowledge to what we already know. When we unlearn, we step outside the mental model in order to choose a different one.' As society at large grapples with the challenge of unlearning and eventually eliminating racism, some key stakeholders have an important role to play in endeavours to eradicate racism in the workplace. These stakeholders include employees, employers, trade unions, workplace fora, labour inspectors, the Director-General of the Department of Employment and Labour, and the Commission for Employment Equity (see Chapter 5 of the EEA on monitoring, enforcement, and legal proceedings). All said and done, racism in the workplace should not be tolerated. Both real and false cases of racism should be handled with the harshness they deserve. South African courts, including the Constitutional Court, have – as shown in this contribution – led the way in this regard. However, this is not a war that can be won through the courts alone. We all have a role, no matter how modest, to play. This call was also sounded by the Constitutional Court in South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (at paragraph 8) as follows: 'South Africans of all races have the shared responsibility to find ways to end racial hatred and its outstandingly bad outward manifestations. After all, racism was the very foundation and essence of the apartheid system. But this would have to be approached with maturity and great wisdom, obviously without playing down the horrendous nature of the slur. For, the most counter productive approach to its highly sensitive, emotive and hurtful effects would be an equally emotional and retaliatory reaction.' As the fight against racism rages on, all that can be said, at least for now, is that racists beware!

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