IN THE LABOUR COURT OF SOUTH AFRICA

Not Reportable

Case No: 1280/17

In the matter between:

NHLANHLA CHRISTOPHER MAKHOBA Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

COMMISSIONER R. LYSTER Second Respondent

CLOVER S.A. (PTY) LTD Third Respondent

Heard: **08 July 2021**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time of the hand-down is deemed to be 10h00 on 13 September 2021.**

JUDGMENT

HIRALALL AJ

Introduction

[1] This is an application in terms of section 145(2)(a)(i), (ii) and (iii) of the Labour Relations Act[1] ("the Act") for a review and/or set aside of the award of the second respondent ("the commissioner") under case number KNDB 6216-17, dated 21 August 2017 in the arbitration proceedings between the applicant and the third respondent ("the employer"). The application is opposed by the third respondent ("the employer").

Factual Background

[2] The applicant was employed by the respondent as a general worker with ten years' service. Following a report by a member of the public that the applicant had posted a comment on the Facebook page of Eyewitness News that all white people must be killed, he was charged with two offences relating, firstly, to the making of a racist comment on social media and secondly, to thereby acting contrary to the interests of the company. At the disciplinary enquiry, the applicant denied that he had posted the facebook comment 'Whites mz b all killed', and he pleaded that his Facebook page had been hacked. He was found guilty of both charges and dismissed in May 2017. He referred a dispute to the CCMA in terms of section 191 of the Labour Relations Act alleging unfair dismissal.

[3] When the matter came before the commissioner, Mr Jama acting for the applicant stated that the applicant had changed his version and that he admitted that he had placed the comment on Facebook. However, the fairness of the dismissal was still challenged on the following basis:

[1] Act 66 of 1995

(i) That the chairperson of the disciplinary was not impartial;
(ii) That the charges were duplicated;
(iii) That the respondent had withheld the social media policy from the applicant;
(iv) That the applicant had merely been commenting on other posts on the Facebook page which were critical of the ANC, and that the reason for initially denying that he had placed the comment was because
- it was a political matter which required a political resolution;
- the respondent had failed to supply him with its social media policy, and the incident had occurred outside of working hours not addressing any person or manager at the respondent;
(v) That he had not used any of the respondent's equipment to send the post and it was his personal Facebook account; and
(vi) That dismissal was not the appropriate sanction for the incident.

[4] The commissioner was required to determine the substantive and procedural fairness of the dismissal. He found that the dismissal of the applicant was both substantively and procedurally fair. He set out his analysis of the evidence that was presented at the arbitration hearing as follows:

'15. I shall deal first with procedural issues. There is no basis to the applicant's allegation that the chairman was not impartial. It was not disputed that he was the manager of another department, and that the applicant did not report to him. There was nothing about the progress of the disciplinary inquiry that was in any manner irregular and unfair. With regard to the allegation that the charges were duplicated, there is no substance to this. One charge related to the negatively affecting the interests of the company, and the other was that he had made a racist comment by calling for all white persons to be killed. With regard to the allegation that the respondent had withheld the social media policy from the applicant, it is clear that the social media policy was completely irrelevant at the disciplinary hearing, because the applicant's approach from the outset was that he had never made the comment and had never posted the comment.

16. With regard to substantive issues, it is very clear that the incident which gave rise to the charges, was extremely serious. The applicant made a public social media comment that all white people should be killed. In a country like South Africa, which has suffered for hundreds of years from racism, it is a grossly offensive form of racist misconduct to call for members of one race group to be killed. Aside from the fact that the company's disciplinary code provides that dismissal is the appropriate sanction for making racist comments, any person who lives and works in this country, or indeed in any society, must be presumed to be aware that to call for the killing of all members of a particular race group is a shocking form of misconduct. The only appropriate sanction for such misconduct is dismissal, see Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and others in which Zondo JP stated the following: *within the context of labour and employment disputes this Court and the Labour Court will deal with acts of racism very firmly. This will show not only this Court's and the Labour Court's absolute rejection of racism but it will also show our revulsion at acts of racism in general and acts of racism in the workplace particularly. This approach will also contribute to the fight for the elimination of racism in general and racism in the workplace in particular and will help to promote the constitutional values which form the foundation of our society.*' It is noted that the learned judge commented on racism in general, as well as racism in the workplace.

17. A person who is prepared to make such comments as the applicant did, does so at his own risk, and must take the consequences which arise from this sort of gross misconduct. The applicant attempted to justify his comment by saying that he is a member of the ANC who loves his president and that he was angry because the other people on the Facebook page were criticising the ANC. That is no excuse for calling for people to be murdered. The ANC has always stood for a non-racial democratic society and has always publicly condemned people, of whatever group or political party, who encourage racial animosity and racial violence. The applicant only has himself to blame for the situation in which he now finds himself.

18. Furthermore, the fact that the applicant made the comment while he was at home is entirely irrelevant. The Labour Court in the matter of Minister of Correctional Services vs GPSSBC and Others Ref: JR 1197/09; JR 1125/09 February 2014 said that the general rule to be applied is that an employer has a right to institute disciplinary action against an employee when it has some interest in the conduct of the employee. On this basis, the employer's disciplinary code has been held validly to extend to misconduct committed after hours (Van Zyl v Duhva Open Cast Services (Edms) Bpk (1988) 9 ILJ 905) and on a bus transporting workers home after the end of shift (NUM & others v East Rand Gold and Uranium Co Ltd 1986 7 ILJ 739 (IC)). Similarly, in NEHAWU obo Barnes v Dept of Foreign Affairs [2001] 6 BALR 539 (P), the arbitrator held that the department was entitled to discipline a diplomat for harassing two flight attendants while on an aeroplane. The relevant threshold is a sufficient and legitimate interest by the employer in the employee's conduct. The respondent in this case had a very direct interest in the matter. It was undisputed that respondent employs people of all races. It cannot be expected to continue employing an employee who publicly calls for the killing of all members of one race group.'

[5] When the review application was launched, it was contended inter alia that the commissioner committed misconduct in relation to his duties in the arbitration proceedings, that he committed gross irregularities in the conduct of the proceedings, that he had exceeded his powers; that the award was improperly obtained; and that the arbitration award was unjustifiable in relation to the evidence produced at the hearing.

[6] The applicant went on to list the grounds as follows:

6.1 The commissioner failed to consider and to properly evaluate relevant and admissible evidence placed before him;

6.2 he failed to assess the credibility of the witnesses at all or in any adequate way;

6.3 he issued an arbitration award which was not justifiable in relation to the reasons given for it;

6.4 he reached conclusions which are not capable of reasonable justification when regard is had to the factual premises on which they are based;

6.5 he failed to take into account relevant decided cases and made findings which are not supported by the evidence

6.6 he issued an arbitration award which is not appropriate and thereby exceeded his powers, alternatively, issued an award which is unreasonable and/or grossly unreasonable

6.7 he failed to properly consider that the third respondent was relying on hearsay evidence from a person who does not know the applicant or have a relationship with him in order to dismiss him

[7] In addition, it was contended that the commissioner failed to take into account that the applicant was not provided with the social media policy and that he was simply charged in terms of the respondent's disciplinary code whereas the he was off duty at the time; that he failed to apply the legal test as to whether the respondent had an interest in the conduct of the applicant; and that he failed to take into account the arbitration guidelines,

[8] At the hearing of the matter, Mr F.G. Mkhwanazi who had replaced Mr Jama as the applicant’s representative submitted that the applicant was only challenging the fairness of the sanction of dismissal. He added that the applicant was not aware of the disciplinary code, and the social media policy, and that it was the duty of the

respondent employer to make the applicant aware of the disciplinary code and the social media policy, as well as the consequences of the offence he was charged with.

Legal principles

[9] Section 145 of the Act provides that any party to a dispute alleging a defect in any arbitration proceedings may apply to the Labour Court for an order setting aside the arbitration award, and 'defect' is given the following meaning:

(a) that the commissioner

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;
(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or
(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

[10] It is now trite that the requirements for the review of an award under the Act are stringent and that the applicable test in reviews is that of reasonableness: an award of a commissioner of the CCMA or a Bargaining Council is reviewable if the decision reached by the commissioner was one that a reasonable decision-maker could not reach.[2]

[11] In *Herholdt v Nedbank Limited*[3] , the Supreme Court of Appeal stated as follows:

'[25] … For a defect in the conduct of proceedings to amount to a gross irregularity as contemplated by section 145(2)(a)(ii), the arbitrator must have misconceived the nature of the

[2] Sidumo & Another v Rustenburg Platinum Mines Ltd & others, (2007) 28 ILJ 2405 (CC)

[3] (2013) 34 *ILJ* 2795 (SCA)

inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable.'

[12] In *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[4], it was stated that 'in short, a reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.' The Labour Appeal Court went on to state per Waglay JP as follows:

'[20] The questions to ask are these: (i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employed give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he was required to arbitrate (this may in certain cases only become clear after both parties have led their evidence)? (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? and (v) Is the arbitrator's decision one that another decision-maker could reasonably have arrived at based on the evidence?'

[13] The applicant in this case is required to establish that the award was one that could not have been made by a reasonable decision-maker on the evidence presented.

Analysis

[14] At the commencement of the hearing of the review application, Mr Mkhwanazi submitted that the applicant's challenge to the award of the commissioner related only to the issue of the fairness of the sanction of dismissal. However, the net was

[4] (2014) 35 *ILJ* 943 (LAC)

still cast wide to include the question whether the applicant was in fact guilty of the offences he was charged with and I will deal with this first.

[15] On the question whether the applicant was guilty of the charges against him, it was common cause at the arbitration hearing that he had posted the offensive comment on Facebook. It was not in dispute that he was an employee of the respondent for some 10 years and that he had been inducted on the disciplinary code which prescribed dismissal for the offence of racism. However, much was made about the fact that the applicant was not provided with the company's social media policy but the reason for this, as was explained by the respondent at the arbitration hearing, was that it did not relate to the applicant as a general worker as he did not have access to a computer in the workplace. The content of the respondent's social media policy and the extent to which it educated the respondent's employees on the use of social media in the workplace is not known but it will in all probability not inform employees of the consequences of offences committed outside of their working hours which is the nub of the applicant's defence to the charges. In other words, the applicant did not contend that he did not know that he was not allowed to make such statements (whether on social media or not), he contended that he made the statement outside of his working hours and that it therefor did not constitute a disciplinary offence. It is also noted that the applicant was charged in terms of the respondent's disciplinary code and not the social media policy.

[16] Ms Oosthuizen referred the court to the case of *Tibbett and Britten (SA) (Pty) Ltd v Marks and others*[5] where the Labour Court confirmed that there is a standard of ethical behaviour that should be observed that is so obvious that the employer does not need to remind employees of that standard, and the fact that the type of misconduct was not spelled out in the disciplinary code was '*of no consequence'*. I am in agreement with this reasoning.

[5] Tibbett and Britten (SA) (Pty) Ltd v Marks and others, (2005) 26 ILJ 940 (LC)

[17] She submitted further that it is well established in law that an employer is entitled to discipline an employee for misconduct that occurs outside of the workplace in circumstances where there is a sufficient nexus between the conduct of the employee and the business of the employer.

[18] In *Biggar v City of Johannesburg (Emergency Management Services)*[6], the Labour Court noted that the courts have long acknowledged that disciplinary action may be taken against an employee for conduct committed outside the workplace if it has a bearing on the employment relationship. The court found that a sufficient link existed between the racism and the employment relationship despite the fact that the acts of racism did not occur at work. Therefore, the court was convinced that even though the acts of racism had taken place outside the workplace, outside the ordinary working hours and not in the execution of duties, 'this was not beyond the remit of the employer's disciplinary powers'. This approach was also followed in *Dolo v Commission for Conciliation, Mediation and Arbitration and Others*[7]

[19] The question whether offences committed outside of working hours constitute offences over which an employer could exercise discipline was also recently considered and dealt with extensively by the Labour Court in *Edcon v Cantamessa and others*[8] where the Court stated as follows:

> '[12] [Where] misconduct does not fall within the express terms of a disciplinary code, such misconduct may still be of such a nature that the employer may nonetheless, be entitled to discipline its employee. Likewise, the fact that the misconduct complained of occurred away from the workplace would not necessarily preclude the employer from disciplining its employee in respect thereof. The Court held in *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another* that:

[6] 2017 38 ILJ (1806) (LC)
[7] 2011 32 ILJ 905 (LC) para 19
[8] [2020] 2 BLLR 186 (LC)

"In our view the competence of an employer to discipline an employee for misconduct not covered in a disciplinary code depends on a multi-faceted factual enquiry. This enquiry would include but would not be limited to the nature of the misconduct, the nature of the work performed by the employee, the employer's size, the nature and size of the employer's work force, the position which the employer occupies in the market place and its profile therein, the nature of the work or services performed by the employer, the relationship between the employee and the victim, the impact of the misconduct on the work force as a whole, as well as on the relationship between the employer and the employee and the capacity of the employee to perform his job. At the end of the enquiry what would have to be determined is if the employee's misconduct 'had the effect of destroying or of seriously damaging the relationship of employer and employee between the parties' (See *Anglo American Farms T/a Boschendal Restaurant v Konjwayo* (1992) 13 ILJ573 (LAC) 589 (G –H.)"

[13] In *Dolo v Commission for Conciliation, Mediation and Arbitration and Others* an employee who was a casino table supervisor was dismissed for fraud when she and her boyfriend had committed fraudulent activities over time against the employer of her boyfriend. She then agreed to give evidence in a criminal matter against the boyfriend for indemnity against prosecution. Her employer became aware of that misconduct against a different employer and she was subsequently charged for it and was dismissed. She challenged the dismissal for her misconduct that was perpetrated outside her working place. The commissioner seized with the matter found that her employer could no longer trust her to handle money and to supervise other employees handling money. This Court upheld the right of her employer to discipline her and it found that it was reasonable for the commissioner to hold that her employer could no longer trust her, especially since she worked with money.

[14] *In Custance v SA Local Government Bargaining Council and Others* this court, per Pillay J, found the following:

"...the derogatory terms used manifest a deep-rooted racism which has no place in a democratic society. Whether the word was uttered on or off duty was immaterial as it is the attitude that persists which, when on duty, affects the employment relationship."

[15] In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* the employee alleged that he had not specifically been told that he could not use racist epithets. It made no

difference that the misconduct was not set out in a policy. The Code of Good Practice on Dismissal provides that employees may be disciplined if they break rules regulating conduct in or of relevance to the workplace. Misconduct can vary from dishonesty, assault, sexual harassment, fraud etc. Thus, the main principle is to determine the connection between the misconduct and the employer's business. Thereafter, the employer has to prove to which extent it has affected the employment trust relationship.

[16] In principle therefore, Edcon could exercise discipline over Ms Cantamessa provided it established the necessary connection between the misconduct, if any, and its business. …' (footnotes omitted)

[20] It is clear from the authorities cited that an employer can exercise discipline over an employee for off-duty misconduct if an enquiry into the factors listed in *Hoechst*[9] *supra* shows that there was a connection between his conduct and the employment relationship.

[21] The court went on to state as follows in *Edcon* supra:

'[20] In terms of section 16 of the Constitution Act, everyone has the right to freedom of expression which includes:-

20.1 Freedom of the press and other media;
20.2 Freedom to receive or impart information or ideas;
20.3 Freedom of artistic creativity and
20.4 Academic freedom and freedom of scientific research.

[21] The rights as mentioned above do not however extend, *inter alia*, to advocacy of hatred that is based on race, ethnicity, gender or religion and that constitutes incitement to cause harm.'

[9] *Hoechst (Pty) Ltd v Chemical Workers Industrial Union and Another*

[22] Whilst the applicant was a general worker who did not use a computer or have access to the internet or the general public in the performance of his duties, of importance is the commissioner's finding that the respondent had a very direct interest in the matter since it employed people of all races and could not be expected to continue to employ an employee who publicly called for the killing of all members of one race group. An employer has a responsibility to provide a safe workplace for all of its employees and it cannot do so where an employee's conduct threatens the safety of its other employees.

[23] In *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others*[10], where the employee was dismissed for the use of a racist epithet, the Labour Appeal Court held that courts should take a firm stand against acts of racism, that in the light of the history of racism and racial abuse in this country and the constitutional values of human dignity and equality and the repugnancy of the employee's racist conduct, it will be seen that the employee's conduct was such that the only appropriate sanction for it was dismissal. The Court further stated that the courts have a duty to combat racism and racist abuse in accordance with the Employment Equity Act, 1997.

[24] In the present case, the applicant's conduct goes further to incite racial hatred and calls for the killing of persons belonging to a particular race group.

[25] In *City of Cape Town v Freddie and others*[11] where the employee compared his manager to Hendrik Verwoerd, the Labour Appeal Court had this to say:

'[55] However, it seems to me, given the painful and shameful atrocities perpetrated against the Black people in this country during the so-called Verwoerdian period, one should expect to see all right-minded and peace-loving people not to dare to be even perceived as associating themselves with anything to do with Verwoerd and his lieutenants, as well as his similarly-minded successors. Therefore, for Freddie

[10] [2002] 6 BLLR 493 (LAC)
[11] [2016] 6 BLLR 568 (LAC)

to describe Robson, without any justifiable cause, as being "*even [worse] than Verwoerd"* was an offensive racial insult, absolutely unacceptable for any employee to use against any other employee in the workplace, irrespective of whether the accuser is white or black. *Besides, it ought to be recalled that the use of racist language against a person or class of persons also constitutes hate speech and is prohibited and outlawed under the Constitution and the law.*' (footnotes omitted) (my emphasis)

[26] The seriousness with which hate speech is viewed can be seen from legislation enacted to prohibit it. The Promotion of Equality and Prevention of Unfair Discrimination Act, 2000[12] (PEPUDA), was enacted with the transformation of South African society in mind. Section 10 of the PEPUDA sets out in clear terms what constitutes hate speech, and provides for referral by the Equality Court of a case for possible criminal prosecution.[13]

[27] In the *South African Human Rights Commission v Khumalo*[14], where Khumalo published the utterance 'I want to cleans this country of all white people. We must act as Hitler did to the Jews. …' the Equality Court stated as follows:

---

[12] Promotion of Equality and Prevention of Unfair Discrimination Act, 2000[12] (PEPUDA)

[13] 'Prohibition of hate speech

10. (1) Subject to the proviso in section 12. no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to –

(a) be hurtful;

(b) be harmful or to incite harm;

(c) promote or propagate hatred.

(2) Without prejudice to any remedies of a civil nature under this Act, the court may, in accordance with section 21(2)(n) and where appropriate, refer any case dealing with the publication, advocacy, propagation or communication of hate speech as contemplated in subsection (1), to the Director of Public Prosecutions having jurisdiction for
the institution of criminal proceedings in terms of the common law or relevant legislation.'

[14] 2019 (1) SA 289 (GJ)

'[102] In South Africa, [however,] our policy choice is that utterances that have the effect of inciting people to cause harm is intolerable because of the social damage it wreaks and the effect it has on impeding a drive towards non-racialism. The idea that in a given society, members of a 'subaltern' group who disparage members of the 'ascendant' group should be treated differently from the circumstances were it the other way around has no place in the application of the Equality Act and would indeed subvert its very purpose. Our nation building project recognises a multitude of justifiable grievances derived from past oppression and racial domination. The value choice in the Constitution is that we must overcome the fissures among us. That cannot happen if, in debate, however robust, among ourselves, one section of the population is licensed to be condemnatory because its members were the victims of oppression, and the other section, understood to be, collectively, the former oppressors are disciplined to remain silent. The reality is that, given our history, White South Africans collectively have a lot to answer for. However, being relaxed about vituperative outbursts against Whites, on those grounds, contributes nothing of value towards promoting social cohesion. Reference has already been made to the risk of spiralling invective with uncertain but frightening possibilities. There can never be an excuse that absolves any one of us from accountability in terms of section 10(1). There may be surrounding circumstances which aggravate the utterances or mitigate the likelihood of incitement to cause harm; these are matters fall to dealt with when remedies are considered.

[103] To sum up, section 10 must be understood as an instrument to advance social cohesion. The "othering" of whites or any other racial identity, is inconsistent with our Constitutional values. These utterances, in as much as they, with dramatic allusions to the holocaust, set out a rationale to repudiate whites as unworthy and that they ought deservedly to be hounded out, marginalised, repudiated, and subjected to violence in the eyes of a reasonable reader, could indeed, be construed to incite the causation of harm in the form of reactions by Blacks to endorse those attitudes, reactions by Whites to demoralisation and rachet up the invective by responding in like manner, and thus by such developments, on a large enough scale, derail the transformation of South African Society.

[104] Accordingly, Khumalo's utterances are statements prohibited by section 10(1) of the Equality Act.'

[28] In *Rustenburg Platinum Mine v SAEWA obo Bester and others*[15], the Constitutional Court stated as follows:

> '[56] We are dealing here with racism in the workplace. 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 their employer's business interests. 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.' (footnotes omitted)

[29] The seriousness and gravity of offences involving racism and racial hatred cannot be over-emphasised. Employers are under a duty to provide a safe working environment and to protect all employees from harm, whether physical or emotional, whether they are black or white. An employer can be held liable for failure to take any action against its employees who are guilty of such conduct. South Africa is a country plagued by a history of racism and violence and social media plays a significant role in the incitement of racial hatred and violence. The power of such posts on social media inciting racial hatred cannot be undermined.

[30] The Code of Good Practice: Dismissal[16] provides that 'generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination'.

---

[15] [2018] 8 BLLR 735 (CC)

[16] Schedule 8 to the Labour Relations Act 66 of 1995

[31] In *Sidumo v Rustenburg Platinum Mines Ltd*[17], the Constitutional Court listed a number of factors (which is not a closed list) that a commissioner must consider when deciding on the fairness of a dismissal. These factors are

(i) the importance of the rule that was breached;

(ii) the reason the employer imposed the sanction of dismissal;

(iii) the basis of the employee's challenge to the dismissal;

(iv) the harm caused by the employee's conduct;

(v) whether additional training and instruction may result in the employee not repeating the misconduct;

(vi) the effect of dismissal on the employee; and

(vii) the long-service record of the employee.

[32] Commissioners are further guided by the CCMA Guidelines: Misconduct Arbitrations[18], which is crafted on the above factors, in determining the fairness of a sanction of dismissal. It provides essentially that such a determination involves three enquiries: an enquiry into the gravity of the contravention of the rule; an enquiry into the consistency of the application of the rule and sanction; and an enquiry into factors that may have justified a different sanction.

[33] The gravity of the offence, and the fact that the courts have stated loudly and clearly that racism in the employment context will not be tolerated, were adequately dealt with by the commissioner. The evidence before the commissioner was that the applicant had been in the company for 10 years, he had been inducted and trained on the respondent's disciplinary code, and that even if there was no disciplinary code in the company, any employee would know that it was an extremely serious offence for a member of one race group to call for the killing of all members of another race group. The respondent had a multicultural workforce and the

[17] [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC)

[18] CCMA Guidelines: Misconduct Arbitrations GN 34573, 2 September 2011, Item 94-108

applicant's comment had no place in the workplace. One witness referred to the applicant's Facebook comment as calling for 'white genocide'. It was not in dispute that the respondent's disciplinary code prescribed dismissal for the offence of racism, and that the respondent had consistently charged people for offences involving racism. The last employee that had been dismissed for racism was charged and dismissed for using the "K" word.

[34] The evidence before the commissioner was further that the applicant had denied at the disciplinary enquiry that he had posted the Facebook comment, alleging that his Facebook page had been hacked. This, as is evident from the transcript, necessitated the respondent calling an expert witness to disprove the applicant's contention but it so happened that the applicant admitted at the arbitration hearing that he had made the post. The applicant then proceeded on a defence that the offence was committed outside his working hours. What is evident from the applicant's conduct of his case is that he denied a blatant contravention of a rule and was dishonest at the disciplinary enquiry, and more importantly that there was a complete lack of remorse. These factors, including the fact that at no stage did the applicant apologise or display a willingness to submit to a lesser sanction, off-set his personal circumstances such as his length of service and a clean record.

[35] I am reminded of the words in *Custance* supra and it bears repeating here:

'it is the attitude that persists which, when on duty, affects the employment relationship'.

[36] It was contended by the applicant that the respondent failed to call the member of public who made the report to it and that this showed that the public had no interest in the Facebook comment posted by the applicant. I do not agree with the contention that the absence of the member of public at the arbitration hearing is an indication of the public's lack of interest in the Facebook comment. It appears from the extracts contained in the bundle of documents presented at the arbitration hearing that there

were comments in response to the applicant's comment linking him to the respondent. One such comment was as follows:

"Nhlanhla Makhoba are you saying that whites must be all killed in your personal capacity or as an employee of Clover? Don't even know how you became a team leader with that hatefilled (sic), violent mindset of yours."

[37] In *Edcon* supra, the court stated that the employee's conduct there exposed Edcon to a risk of reputational damage. The fact that no damage was proved by Edcon was not a valid defence as the charge sheet did not allege that any such damage was actually suffered. In the present case, the second charge against the applicant is that he acted contrary to the interests of the company. The applicant clearly acted against the interests of the respondent.

[38] The applicant's explanation for posting the offensive comment was that someone on Facebook had commented that he believed that it was an offence for people to dress in military uniforms if they were not members of the SANDF. It was this that prompted him to make the comment as he was a member of the ANC and saw the comment about military uniforms as an attack of the President whom he loved. I have seen nothing in the extracts presented in the bundle of documents that show that the applicant was even mildly provoked to make the comment which he made.

[39] The commissioner took into account that the disciplinary code informs employees of the offence of racism and the consequences thereof, that it is a dismissable offence in terms of the disciplinary code, that the respondent was entitled to discipline employees for off-duty misconduct where such misconduct was connected to the respondent's enterprise, and that the offence committed by the applicant was extremely serious in that it called for the killing of all members of one race group. The applicant's total disregard for the seriousness of the offence was evident from the defences which he raised both at the disciplinary enquiry and the arbitration hearing. That the respondent acted consistently in disciplining employees

for offences of racism was evident from the evidence presented at the arbitration hearing.

[40] Having regard to the evidence that was placed before the commissioner, and further having regard to the submissions and arguments made on behalf of the parties, I am satisfied that the commissioner dealt with the substantial merits of the dispute, that the finding of guilt on both charges is unassailable and that there is no basis for a conclusion that the sanction of dismissal was too harsh. The decision arrived at was one that another decision-maker could reasonably have arrived at based on the evidence before him.

Conclusion

[41] Accordingly, the applicant's review application must fail, and the arbitration award of the second respondent must be upheld. The applicant's review application is therefore dismissed.

Costs

[42] Costs do not follow the result in the Labour Court. I see no reason to burden the applicant, who has to deal with his dismissal, with a costs order.

Order

[1] In the result the following order is made:

1. The application for review of the second respondent's award is dismissed.
2. There is no order as to costs.

_____

Narini Hiralall

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: For the Applicant: Mr F.G. Mkhwanazi of AMITU

RESPONDENT: Ms. V Oosthuizen instructed by Shepstone and Wylie