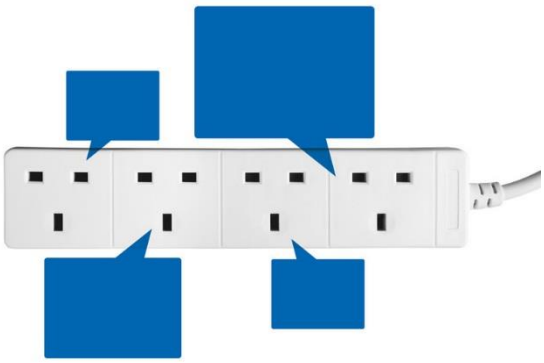
Employment Law update

ConCourt endorses a "rational" war on racism



In the recent judgment of ***Duncanmec (Pty) Ltd v Gaylard N.O*** **[2018] ZACC 29**, the Constitutional Court observed that complaints of racism in the workplace are rising rapidly and that the courts have a critical duty in the fight against racism, which they must play firmly but fairly.

In this matter, employees of Duncanmec participated in an unprotected strike, during which, they danced and sang struggle songs, one of which was translated to mean "*climb on top of the roof and tell them that my mother is rejoicing when we hit the boer*".

Duncanmec charged 9 employees and found them guilty of participating in an unprotected strike and racism, for their singing of the racially charged song. Following the findings of the chairperson of the disciplinary hearing, Duncanmec dismissed the employees.

NUMSA, acting on behalf of the employees, challenged the dismissal in the Bargaining Council. The Commissioner, who heard the matter, drew a distinction between referring to someone using racist language on the one hand, and singing an inappropriate song on the other. She found that the employees' conduct constituted the latter. After this and various other considerations, including the short-lived and peaceful nature of the strike, the Commissioner concluded that the dismissal was unfair. She reinstated the employees and found that their inappropriate conduct was deserving of a final written warning and a limitation to their compensation for the unfair dismissal.

Dissatisfied with the Commissioner's award, Duncanmec took it on review in the Labour Court, relying on the right to a "lawful and reasonable decision" and some of the review grounds in the Labour Relations Act. The Labour Court found that given the context, the Commissioner's award was not compromised by any irregularity, nor was it so unreasonable that no reasonable arbitrator could have made it. Duncanmec's review application was therefore unsuccessful and so was its application to appeal in the Labour Appeal Court.

Duncanmec then approached the Constitutional Court, where two questions remained to be answered, which were:

(i) were the employees guilty of racism?; and

(ii) was the commissioner's award so unreasonable that no other reasonable commissioner would have made it?

The ConCourt noted the important distinction that was drawn by the Commissioner between racist conduct and inappropriate conduct. Duncanmec accepted the Commissioner's factual findings in this regard and NUMSA did not dispute the finding that the singing of the song was inappropriate and

offensive in the circumstances. On this basis, the ConCourt held that it was willing to approach the matter on the basis that the employees were guilty of racially offensive conduct.

As regards the question of reasonableness, the ConCourt emphasised that a review is not an appeal and thus restated the principle that on review, the Court would interfere with the Commissioner's decision only if it was so unreasonable that it could not have been made by a reasonable Commissioner. The ConCourt found that the complaints on which Duncanmec based its review application lacked substance and some were simply irrelevant.

The Court rejected Duncanmec's claim that the Commissioner's decision had been soft on racism, emphasising that the employees were not found guilty of racism. Even if they had been guilty of racism, the Court said, this would not have meant automatically that they should be dismissed. The law requires that racism should be dealt with firmly, but the perpetrator of racism must be treated fairly.

The ConCourt held that the reasons given by the Commissioner rationally support the outcome of her award and therefore it would be inappropriate to interfere with it. Duncanmec's appeal was accordingly dismissed.

It is important to highlight the import of this judgment. The ConCourt did not express its views or make a finding on whether the singing of the song was racist or not. Rather, the ConCourt's role was to assess the *reasonableness* of the Commissioner's award. The ConCourt was satisfied that the award was reasonable in law, irrespective of what the Court's own views about the song may have been.

So what does this mean for employers who are confronted with allegations of racism against any of their employees? The simple answer is that context matters. There are instances where an employee may use language which is offensive to others, but this will not always mean that it constitutes racism. Employers are advised to consider all allegations carefully and, where necessary, seek professional advice to ensure that the action they take is reasonable and lawful.

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