



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 19/16

In the matter between:

SOUTH AFRICAN REVENUE SERVICE

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

NOMSA MBILENI N.O.

Second Respondent

JACOBUS JOHANNES KRUGER

Third Respondent

Neutral citation: *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* [2016] ZACC 38

Coram: Mogoeng CJ, Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J

Judgment: Mogoeng CJ (unanimous)

Heard on: 11 August 2016

Decided on: 08 November 2016

Summary: section 193 of the LRA — unfairness — gross misconduct — peremption — review of arbitration award — compensation — racism

ORDER

On appeal from the Labour Appeal Court (hearing an appeal from the Labour Court):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Court and the Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:
 - “(a) To the extent reflected in paragraph (b) below, the review application succeeds.
 - (b) That part of the arbitrator’s award in terms of which Mr Jacobus Johannes Kruger was reinstated in the employ of the South African Revenue Service is reviewed, set aside and replaced with the following:
 - (i) The South African Revenue Service must pay Mr Kruger compensation equivalent to his salary for six months at the time of dismissal.
 - (ii) Each party is to pay its or his own costs.”
4. Each party is to pay its or his own costs, in this Court and in the Labour Appeal Court.

JUDGMENT

MOGOENG CJ (Nkabinde ADCJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):

Introduction

[1] This case owes its genesis to the use of the term kaffir in a workplace and a more assertive insinuation that African people are inherently foolish and incapable of

providing any leadership worthy of submitting to. It bears testimony to the fact that there are many bridges yet to be crossed in our journey from crude and legalised racism to a new order where social cohesion, equality and the effortless observance of the right to dignity is a practical reality.

[2] South Africa's special sect or brand of racism was so fantastically egregious that it had to be declared a crime against humanity by no less a body than the United Nations itself. And our country, inspired by our impressive democratic credentials, ought to have recorded remarkable progress towards the realisation of our shared constitutional vision of entrenching non-racialism. Revelations of our shameful and atrocious past, made to the Truth and Reconciliation Commission, were so shocking as to induce a strong sense of revulsion against racism in every sensible South African. But to still have some white South Africans address their African compatriots as monkeys, baboons or kaffirs and impugn their intellectual and leadership capabilities as inherently inferior by reason only of skin colour, suggests the opposite. And does in fact sound a very rude awakening call to all of us.

Essential context

[3] In order to give some context and shed light on the correct attitude to adopt in dealing with the term kaffir, it is necessary to flesh out its history, meaning and implications. Dr Gabeba Baderoon says "kaffir" is "the most notorious word in South African history, known most pointedly for its license of violence towards Blacks during apartheid, but first used and elaborated during the colonial period."¹

¹Baderoon "The Provenance of the term 'Kafir' in South Africa and the notion of Beginning" at 1, 6-7, http://www.cilt.uct.ac.za/usr/cci/publications/aria/download_issues/2004/2004_MS4.pdf accessed on 27 July 2016 (Dr Baderoon). She sets out part of the word kaffir's historical context that reveals its more obnoxious and delegitimising effect and observes that:

"Settlers appear to name as kaffir what must remain separate from them, clearing a space for a selfhood that is defined against the other . . . [T]he creation of Otherness is a formula for the creation of the self. The alternative appears to be that indigeneity threatens to consume them, suggested by an insidious sense of time, such as 'kaffir appointment', for which one need not be punctual, or becoming a 'kafferboetie' [little brother] by feeling a contaminating sympathy for the despised group or 'to go to the kaffirs', which means to deteriorate.

She goes on to observe that it is offensive in all senses and combinations to the extent of being unspeakable today, its use now constitutes a hate crime in our country and is unpardonably painful and violent.² This is in line with the observation made about 33 years ago by Van Rensburg J and Jennett AJ that:

“When a black man is called a ‘kaffir’ by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation.”³

[4] It follows that the word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia,⁴ in colonial and apartheid South Africa it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or

‘[K]affir’ also functions to remake the landscape. In colonial South Africa this denigratory modifier metastasises into a vast naming that forces newness on a world that was not new. The landscape was named in a way that enabled it to be claimed. ‘Kaffir’ labelled as unnatural the relationship between indigenous people and their rightful claim to the land. Instead, this was portrayed as a distorted, corrupt and unfitting connection. Such a vision enabled the settlers to proclaim their own more fitting relationship with the land. . . . Symbolically ‘kaffir’ thus announces not only a claim to the land, but to a beginning of history signalled by settler arrival.

The massive land dispossession that the African people have been victims of, is thus traceable to the thinking behind the recalibrated and more-encompassing South African version of kaffir — a version that is compatible only with the notion that Africans are a despised group that would contaminate or lower the dignity of others when associated with.”

² Id at page 2.

³ *S v Puluza* 1983 (2) PH H150 (E) (*Puluza*) quoted with approval in *Ryan v Petrus* 2010 (1) SACR 274 (ECG).

⁴ Dr Baderoon above n 1 at 3 states that:

“The word ‘kaffir’ is derived from the Arabic word for non-believer or infidel, often rendered in English as ‘kafir’ (all transliterated words of Arabic origin in English are approximations, due to the non-congruence of English and Arabic script). In Islam, the root word of kafir means closed, denoting someone who has closed his or her heart from the truth constituted by Islam. Derived from this root, the general meaning of ‘kafir’ is ‘non-Muslim’, those who are seen to deny the truth of Islam. With a Muslim presence dating from 1658 when the Dutch brought Muslims to the Cape as slaves and servants, it is reasonable to assume that Islam in South Africa delivered the word to the colonial lexicon. However, the use of the word to describe people in South Africa predates the arrival of Muslims in the colonial territories. According to the DSAE, the first recorded use of ‘kafir’ applied to southern Africa (in the form ‘caffre’) appeared in Richard Hakluyt’s *The Principal Navigations, Voyages, Traffiques and Discoveries of the English Nation*, the first volume of which was published in 1589. G. Theal indicates that European settlers in South Africa adopted the word from its use by East African Muslims for ‘infidels’ in the southern part of Africa. Henry Lichtenstein writes in his *Travels in Southern Africa*, ‘[b]eing Mahommedans, they gave the general name of Cafer (Liar, Infidel) to all the inhabitants of the coasts of Southern Africa’ (1812:241).”

her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.⁵ Professor Pierre De Vos has this to say about the term kaffir:

“This term has an ugly history in South Africa and was almost exclusively used by white racists as a gross generalisation to denigrate black South Africans. To be called a ‘kaffir’ is to be called a lazy and stupid person. But the assumption behind the word is that by being lazy and stupid one is merely behaving as all black people always behave – as white people expect black people and know all black people to behave. So even when a white person is called a ‘kaffir’, the recipient of the insult is being told that he or she is just as lazy and stupid as all black people are known to be by all racist white people.”⁶

[5] It could only have been with this disrespect in mind and the need to make a decisive break from the ills of the past,⁷ that non-racialism, human dignity and freedoms (which include freedom of expression without any trace of hate speech) are

⁵ It is even worse compared to another weapon of gross insult regularly resorted to pulverise whatever racists thought was left of the dignity and self-worth of the African people. That insult is either “monkey” or “baboon”. See *Strydom v Chiloane* 2008 (2) SA 247 (T) (*Chiloane*) where Hartzenberg J was seized with a matter involving the use of the word baboon in *Chiloane*, and relying on *Mangope v Asmal* 1997 (4) SA 277 (T) at 286J-287A he said:

“[I]f a person is called a baboon, when severely criticized, the purpose is to indicate that he is base and of extremely low intelligence. It was also stated that it can be inferred from the use of the word, in the circumstances, that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It follows that the person described as a baboon in those circumstances may rightfully perceive them to be hurtful. The magistrate was accordingly not wrong to find that the words complained of fall within the definition of ‘hate speech’ as defined in section 10 of PEPUDA.”

⁶ Pierre De Vos “on ‘kaffirs’, ‘queers’, ‘moffies’ and other ‘hurtful terms’” *Constitutionally speaking* at <http://constitutionallyspeaking.co.za/on-kaffirs-queers-moffies-and-other-hurtful-terms> accessed on 26 July 2016 (Professor De Vos).

⁷ In *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262, Mahomed J said:

“The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.”

values foundational to our constitutional democracy.⁸ The healing of the divisions of the past, the national unity and reconciliation that need to be built and fostered respectively,⁹ are likewise intended to entrench peaceful co-existence, respect and the right to dignity of all our people. It was in recognition of this constitutional vision that Brooks J recently endorsed the remarks in *Puluza* in the following terms:

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

The italicised portion of the quotation captures the best rendition of the use of the word kaffir as being undoubtedly disparaging, hurtful and intentionally hateful. According to Brooks J that use clearly falls within the meaning of hate speech in section 10 of the PEPUDA.¹¹

⁸ See sections 1 and 16(2)(c) of the Constitution.

⁹ See the Preamble of the Constitution.

¹⁰ *Thembanani v Swanepoel* [2016] ZAECHMC 37 (*Swanepoel*) at para 13.

¹¹ See section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) which reads as follows:

“Subject to the provision 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;

[6] The Supreme Court of Appeal per Mathopo AJA said of the word kaffir:

“In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. . . . [S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms.”¹²

[7] Calling an African a ‘kaffir’ thirteen years deep into our constitutional democracy, as happened here, does in itself make a compelling case for all of us to begin to engage in an earnest and ongoing dialogue in pursuit of strategies for a lasting solution to the bane of our peaceful co-existence that racism has continued to be. The duty to eradicate racism and its tendencies has become all the more apparent, essential and urgent now. For this reason, nothing that threatens to take us back to our racist past should be glossed over, accommodated or excused. An outrage to racism should not be condescendingly branded as irrational or emotional. This is so not only because the word kaffir is “an inescapably racial slur which is disparaging, derogatory and contemptuous”,¹³ but also because African people have over the years been addressed as kaffirs. This seems to suggest that very little attitudinal or mind-set change has taken place since the dawn of our democracy.

[8] 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

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- b) be harmful or to incite harm;
 - c) promote or propagate hatred.”

¹² *Prinsloo v The State* [2014] ZASCA 96 (SCA) (*Prinsloo*) at para 20 (unreported judgment).

¹³ *Swanepoel* above n 10 at para 13.

sensitive, emotive and hurtful effects would be an equally emotional and retaliatory reaction. But why is it that racism is still so openly practised by some despite its obviously unconstitutional and illegal character? How can racism persist notwithstanding so much profession of support for or commitment to the values enshrined in our progressive Constitution and so many active pro-Constitution non-governmental organisations?

[9] Are we perhaps too soft on racism and the use of the word kaffir in particular? Should it not be of great concern that kaffir is the embodiment of racial supremacy and hatred all wrapped up in one? My observation is that very serious racial incidents hardly ever trigger a fittingly firm and sustained disapproving response. Even in those rare instances where some revulsion is expressed in the public domain, it is but momentary and soon fizzles out. Sadly, this softness characterises the approach adopted by even some of those who occupy positions that come with the constitutional responsibility or legitimate public expectation to decisively help cure our nation of this malady and its historical allies.

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

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

coupled with the neutralising reference to the word kaffir as the “k word”, is the entrenchment and emboldenment of racism that we now have to contend with so many years into our constitutional democracy. Imagine if the same approach or attitude were to be adopted in relation to homophobia, xenophobia, arrogance of power, all facets of impunity, corruption and similar societal ills. That somewhat exculpatory or sympathetic attitude would, in my view, ensure that racism or any gross injustice similarly handled, becomes openly normalised again. Those who should help to eradicate racism or gross injustice could, with that approach, become its unwitting, unconscious or indifferent helpers.

[12] The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy-related issues, it behoves our courts to embrace that judgement call as dispassionately as the judicial affirmation or oath of office enjoins them to and unflinchingly bring an impartial mind to bear on those issues, as in all other cases.

[13] Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a Judicial Officer, amounts to a dismal failure in the execution of one’s constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office.

[14] Bekker CJ,¹⁴ Mohamed CJ¹⁵ and Zondo JP¹⁶ observed in essence that racist conduct requires a very firm and unapologetic response from the courts, particularly

¹⁴ *S v Van Wyk* 1992 (1) SACR 147 (NmS) at 172D of the concurrence.

¹⁵ *S v Salzwedel* [1999] ZASCA 93; 2000 (1) SA 786 (SCA) at para 18.

the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred and the lowest form of contempt for African people¹⁷ or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack.

Background

[15] Mr Jacobus Johannes Kruger was employed by SARS from 25 November 1991 and served as an anti-smuggling officer at the time of his dismissal. On 27 July and 2 August 2007, after an altercation with Mr Abel Mboweni, his superior, he referred to him as a kaffir. As required by a collective agreement between SARS and the unions in its workplace, SARS arranged a disciplinary enquiry.¹⁸ At the inquiry, Mr Kruger faced the following charges:

- “2.1 ‘Ek kan nie verstaan hoe kaffirs dink nie’ [direct translation: “I cannot understand how kaffirs think.”] (Charge 1)
- 2.2 ‘A kaffir must not tell me what to do’ (Charge 2)
- 2.3 By so doing he used the racist remarks ‘kaffir’ or alternatively he used derogatory and abusive language towards his Team Leader Mr Mboweni. (Charge 3).”

¹⁶ *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp* (2002) 23 ILJ 863 (LAC); (2002) 6 BLLR 493 (LAC) (*Crown Chickens*) at para 38.

¹⁷ As was correctly done by the Supreme Court of Appeal in *Prinsloo* above n 12, the Labour Appeal Court in *Crown Chickens*, above n 16 the Labour Court in judgments by Revelans J in *South African Transport Allied Workers Union obo Finca v Old Mutual Life Assurance Company (SA) Limited* [2006] ZALC 51; [2006] 8 BLLR 737 (LC) (*Old Mutual*) and Brooks J in *Swanepoel* above n 10.

¹⁸ SARS entered into the collective agreement with the Public Servants Association of South Africa and the National Education Health and Allied Workers Union on 7 June 2007. Section 6 of the collective agreement provides that “[a]n informal disciplinary procedure will apply in instances of progressive discipline that may warrant counselling, verbal warning, written warning and final written warnings as possible sanctions” and that “[a] formal disciplinary procedure will apply to serious misconduct.”

[16] He pleaded guilty and a favourable sanction was successfully negotiated by the Chairperson of the disciplinary enquiry with Mr Moodley, an employee and a representative of SARS in those proceedings. Presumably after a discussion with Mr Kruger and his representatives, the sanction was imposed. It reads:

“9.5.1 Final written warning valid for six months as well as suspension without pay for ten (10) days.

9.5.2 Furthermore he should undergo counselling.”

[17] Upon receipt of the report on the outcome of the disciplinary enquiry, the SARS Commissioner changed it from a final written warning to a dismissal. This was however done without affording Mr Kruger the opportunity to contest the appropriateness of the higher and terminal sanction. As a result, Mr Kruger challenged the fairness of his dismissal. He referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation and later arbitration. The issues to be decided by the CCMA arbitrator (Arbitrator) were as follows—

“2.1 Whether the dismissal of [Mr Kruger] was procedurally and substantively unfair.

2.2 Whether a Commissioner of [SARS] had powers to convert a sanction of final written warning, and suspension without pay to dismissal.”

[18] Mr Kruger was understandably aggrieved by the SARS Commissioner’s alteration of the sanction, from a final written warning to a dismissal. Understandably because of the non-observance of his right to be heard prior to making a decision detrimental to his interests and in circumstances where the Commissioner did not appear to have the legal authority to do so. His referral of the dispute to the CCMA was on a somewhat tightly defined basis. And that was the legal impermissibility of the Commissioner’s substitution of the sanction, during the lifespan of the collective agreement that binds SARS. For that collective agreement has, he contended, effectively denuded SARS of its common law power to alter the sanction imposed on

its employees by a SARS-appointed Chairperson of the disciplinary enquiry. Mr Kruger argued that that power was for all intents and purposes wholly vested in the independent Chairperson. To have the sanction altered in the manner purportedly done by the Commissioner would, according to Mr Kruger, require a review application to the High Court in terms of section 158(1)(h) of the Labour Relations Act¹⁹ (LRA). He thus maintained that the substitution of the sanction was both substantively and procedurally unfair.

[19] SARS was apparently content with a referral in these narrow terms. The main issue the Arbitrator was called upon to decide was thus whether the SARS Commissioner was in law entitled to substitute the sanction as he did. Meaning, if he was not empowered to do so, that would be dispositive of issues relating to the substantive and procedural unfairness of the dismissal.

[20] Having listened to the evidence and heard all the parties' submissions, the Arbitrator concluded that it was legally impermissible for the Commissioner to substitute the sanction imposed by the Chairperson of the disciplinary enquiry. The legal basis for that approach is, according to the Arbitrator, that SARS has, in terms of the collective agreement that binds it, effectively waived its common law powers to reverse, as it did, the decision of the Chairperson of the disciplinary enquiry. Our case law, that she relied on, also seems to support those legal propositions in relation to the legal authority of the Commissioner.²⁰

[21] And based on those LAC judgments that were binding on her,²¹ the Arbitrator ruled that the SARS Commissioner exercised power that was no longer available to him to exercise. On that basis alone, not on the basis of the merits or demerits of the

¹⁹ 66 of 1995.

²⁰ See *County Fair Foods (Pty) Ltd v CCMA* (2003) 24 ILJ 355 (LAC) (*County Fair Foods*); *South African Revenue Services v Commission for Conciliation Mediation and Arbitration* [2013] ZALAC 26; (2014) 35 ILJ 656 (LAC) (*Chatrooghoon*) at para 35; *Hendricks v Overstrand Municipality* [2014] ZALAC 49; (2015) 36 ILJ 163 (LAC).

²¹ See generally *County Fair Foods* id and *Chatrooghoon* id.

case, the Arbitrator concluded that the substituted sanction of dismissal was unfair. She then granted the following award:

“6.1 The respondent, South African Revenue Services is therefore ordered to reinstate the applicant, Jacobus Kruger on the conditions stated by the chairperson at the disciplinary hearing, which were:

Final written warning valid for six (6) months;

Suspension without pay for ten (10) days;

Counselling.

6.2 The order is to be complied with within ten (10) days of it being served on the parties.”

This was the restoration of the position as it was before the Commissioner’s offending intervention.

[22] The Arbitrator did not specify whether her finding that Mr Kruger’s dismissal was unfair was based on the absence of a fair reason to dismiss (substantive unfairness) or a failure by SARS to follow a fair procedure before the dismissal. It can be accepted that the Arbitrator implicitly found that the dismissal was substantively unfair.

[23] SARS challenged the award in the Labour Court. The grounds were that the Arbitrator wrongly relied on the decision in *Mgobhozi*²² as authority for the proposition that the employer had no power to change a sanction of a disciplinary enquiry and that the award was vitiated by her unreasonableness. The second ground was premised on the argument relating to the interpretation of the SARS disciplinary code. The Court dismissed the application on the basis that the collective agreement did not permit SARS to substitute the sanction imposed by the Chairperson.²³

²² *Mgobhozi v Naidoo NO* (2006) 27 ILJ 786 (LAC). The Arbitrator clearly had *County Fair Foods* above n 20 in mind.

²³ The order of the judgment delivered by the Labour Court was couched in these terms:

“52. The dismissal of the employee was substantively unfair because the decision to dismiss was not one that SARS could validly make: the collective agreement barred it from

Aggrieved by that outcome, SARS again challenged the reversal of the dismissal in the Labour Appeal Court (LAC) on essentially the same grounds. That challenge was also unsuccessful hence this application for leave to appeal.

In this Court

Peremption

[24] After the challenge to Mr Kruger's dismissal had been upheld by the CCMA, the Labour Court and the LAC, SARS' attorneys, apparently on instructions from their client, informed Mr Kruger that SARS would not lodge an appeal against the order of the LAC²⁴ that was in his favour. He was also advised to consult with a certain SARS official to make arrangements for his return to work. Three days later, he was informed of the reversal of the decision not to appeal and that he should no longer return to work. Based on these developments, Mr Kruger contends that peremption has taken place.

substituting the decision of the disciplinary chairperson. Procedurally, the dismissal was also unfair because the process of dismissing the employee was not available to SARS; if it was available, then SARS should have afforded the employee a pre-dismissal hearing. That it did not do.

53. The award is therefore reasonable and not reviewable.

54. Accepting the invitation from Mr Bruinders to not put form over substance and to treat this application to review the award also as an application to review the decision of the disciplinary chairperson, the court finds that SARS must fail in this review too. SARS did not make out a case for irretrievable breakdown in the employment relationship at the disciplinary hearing. It attempted to make this case out at arbitration and in this application, emphasising that SARS is an organ of state and as such, should not be seen to be employing persons guilty of such serious misconduct.

55. In *Edcon Ltd v Pillemer NO and Others* (191/08) (2009) ZASCA 135 . . . yet another judgment of a superior court issued after the hearing in this case, the SCA held that in the absence of evidence showing damage in the trust relationship, the decision to dismiss was unfair.

56. As SARS did not make out a case for irretrievable breakdown at the disciplinary hearing there is nothing for this court to review in terms of section 158(1)(h). Furthermore, *Edcon Ltd* clarifies that an employer resisting reinstatement must prove the irretrievable breakdown in the relationship.

57. The application is dismissed with costs."

²⁴ *South African Revenue Service v CCMA* [2015] ZALAC 52; (2016) 37 ILJ 655 (LAC) (LAC judgment).

[25] The first question that arises here is whether SARS deliberately and undoubtedly abandoned or preempted its right of appeal as argued by Mr Kruger. The second is, if so, whether there are overriding policy considerations that nevertheless militate against the enforcement of peremption of SARS' right of appeal.

[26] Peremption is a waiver of one's constitutional right to appeal in a way that leaves no shred of reasonable doubt about the losing party's self-resignation to the unfavourable order that could otherwise be appealed against. *Dabner*²⁵ articulates principles that govern peremption very well in these terms:

“The rule with regard to peremption is well settled, and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the *onus* of establishing that position is upon the party alleging it.”²⁶

The onus to establish peremption would be discharged only when the conduct or communication relied on does “point indubitably and necessarily to the conclusion” that there has been an abandonment of the right to appeal and a resignation to the unfavourable judgment or order.

[27] The facts of this case leave one with no doubt that SARS had taken a conscious and firm decision not to appeal against the order of the LAC. Several factors must be taken into account in determining whether peremption has been established. Some of the key factors pointing to that conclusion, thus establishing peremption, are the:

- (a) very clear written communication by SARS to Mr Kruger that the LAC judgment would not be appealed against;

²⁵ *Dabner v South African Railways and Harbours* 1920 AD 583.

²⁶ *Id* at 594.

- (b) offer of reinstatement;
- (c) fact that the letter of peremption was written at the instance of a SARS official who had previously deposed to an affidavit on its behalf in this same matter; and
- (d) fact that it was SARS' lawyers, who were presumably familiar with the merits and demerits of the case, who actually wrote and dispatched the letter to Mr Kruger. This involvement of lawyers reasonably suggests that SARS would have taken legal advice before it waived or abandoned its right to appeal.

Peremption having taken place,²⁷ the only relevant consideration remaining is whether there are overriding constitutional considerations that justify appealability or the non-enforcement of peremption.

[28] The broader policy considerations that would establish peremption are that those litigants who have unreservedly jettisoned their right of appeal must for the sake of finality be held to their choice in the interests of the parties and of justice. But, where the enforcement of that choice would not advance the interests of justice, then that overriding constitutional standard for appealability would have to be accorded its force by purposefully departing from the abundantly clear decision not to appeal.²⁸ This principle was laid down by Nugent JA in *SANDU*:

“Bearing in mind the policy underlying [peremption,] it must necessarily be open to a court to overlook the acquiescence where the broader interests of justice would otherwise not be served.”²⁹

²⁷ *Minister of Defence and Others v South African National Defence Force Union* [2012] ZASCA 110 at para 22 (*SANDU*).

²⁸ *Government of the Republic of South Africa v Van Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA) at para 19. See also *SANDU* id at paras 23-6.

²⁹ *SANDU* above n 27 at para 23.

As in *SANDU*, SARS' peremption of its right to appeal was apparently based on incorrect legal advice. Upon further reflection and with the benefit of "perhaps sounder advice" the higher authorities "have since changed their minds", hence this application for leave to appeal.³⁰

[29] The reversal of the decision not to appeal happened within a very short period of three days, unlike in *SANDU* where there was a lapse of two weeks³¹ and the peremptor was nevertheless allowed to appeal. The central feature of this case is the mother of all historical and stubbornly persistent problems in our country: undisguised racism. This, coupled with this Court's constitutional duty to help entrench the values of equality, non-racialism and human dignity, demand that this application be appealable in the interests of justice.³² And the issue central to this dispute requires the attention of the highest Court in the land, at such a time as this. But should the application for leave to appeal succeed?

Leave to appeal

[30] SARS seeks to have part of the arbitration award in a dismissal dispute under the LRA reviewed and set aside. This relates to that part in terms of which it was required to reinstate Mr Kruger. The basis for the review and setting aside of the reinstatement portion is that it could not have been made by any similarly-situated reasonable arbitrator and is therefore unreasonable. And this Court has held that an arbitration award issued by a CCMA arbitrator in a dismissal dispute constitutes an administrative action.³³ An administrative action is in terms of section 33(1) of the Constitution required to be lawful, reasonable, and procedurally fair. Meaning, the requirement that an administrative action be reasonable is a constitutional

³⁰ *SANDU* above n 27 at para 24.

³¹ *Id* at para 27.

³² *City of Tshwane Metropolitan Municipality v Afriforum* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC) at paras 40-1.

³³ See *Sidumo and Another v Rustenburg Platinum Mines Ltd* [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 1558 (CC) (*Sidumo*) at paras 89 and 110.

requirement. In challenging the reasonableness of the reinstatement, SARS is in effect questioning whether the award meets the constitutional requirement that an administrative action must be reasonable. And that is a constitutional issue.

[31] Undoubtedly, this matter raises important issues that go beyond the interests of the parties before us. Some of those issues are how employers should deal with racism in the workplace and how CCMA arbitrators are to handle the possible reinstatement of an employee who is guilty of crass racism but does not acknowledge or apologise for it. Also to be considered is the approach courts should adopt in matters involving racism so that they can contribute to its elimination in the workplace and broader society.

[32] Racism arguably remains rampant in South Africa. A point of law that is enmeshed in a decision or legal atmosphere that is about whether crude racism in a workplace would be reconcilable with reinstatement, is of such general public importance that it should receive the attention of this Court.

[33] In sum, because of the centrality of the fundamental values of non-racialism and human dignity to the issues and SARS' strong prospects of success, it is in the interests of justice that leave to appeal be granted.

Merits

[34] Initially, SARS challenged the Arbitrator's decision on the basis that her construction of the collective agreement as not allowing its Commissioner to substitute the Chairperson's sanction was flawed. Also that the dismissal was substantively and procedurally fair because its Commissioner was, in terms of SARS' disciplinary code, well within his rights to increase the sanction. That ground was abandoned the day before the matter was heard by this Court. In considering the merits, it is thus necessary to bear in mind that, to the extent that the Arbitrator may have impliedly concluded that Mr Kruger's dismissal was substantively unfair, SARS does not attack that finding. It attacks only the reinstatement part of the award. We

are therefore only asked to consider the appropriateness or reasonableness of the reinstatement. And the question is whether the reinstatement is reviewable and, if so, on what basis.

[35] SARS contends that the reinstatement part of the arbitration award was unreasonable and must be reviewed and set aside. It submits that, regard being had to all the circumstances, no reasonable arbitrator could have ordered reinstatement.

[36] Unreasonableness is one of the grounds on which an arbitrator's award, issued under the auspices of the CCMA, in respect of a dismissal dispute may be reviewed and set aside. And the test for unreasonableness was set out in *Sidumo*. There, Navsa AJ said:

“To summarise, *Carephone* held that section 145 of the LRA was suffused by the then constitutional standard that the outcome of an administrative decision should be justifiable in relation to the reasons given for it. The better approach is that section 145 is now suffused by the constitutional standard of reasonableness. That standard is the one explained in *Bato Star*: Is the decision reached by the commissioner one that a reasonable decision-maker could not reach? Applying it will give effect not only to the constitutional right to fair labour practices, but also to the right to administrative action which is lawful, reasonable and procedurally fair.”³⁴

The question is thus whether the reinstatement of Mr Kruger, which really is the only live ground of review remaining, was a decision that no reasonable decision-maker could have made in the circumstances.

[37] Section 193(1) of the LRA provides for remedies that the Labour Court or an arbitrator may grant to an unfairly dismissed employee. They are an order of reinstatement or re-employment, alternatively compensation.³⁵ Section 193(2) then

³⁴ Id at para 110.

³⁵ *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* [2008] ZACC 16; 2009 (1) SA 390 (CC); 2009 (2) BCLR 111 (CC) (*Equity Aviation*) at para 42; and *Toyota SA Motors (Pty)*

tells us when the Labour Court or an arbitrator must grant the remedy of reinstatement or re-employment and when it cannot. It does so in these terms:

“The Labour Court or the arbitrator must require the employer to reinstate or re-employ the employee unless—

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is unfair only because the employer did not follow a fair procedure.”

[38] The correct approach to adopt when the dismissal has been found to be unfair, is first to consider the provisions of section 193(1) and then section 193(2) to determine which of the three remedies - reinstatement, re-employment or compensation - may be granted.³⁶ This is buttressed by these remarks by Zondo J:

“Once the Labour Court or an arbitrator has found a dismissal unfair, it or he is obliged to consider which one of the remedies listed in section 193(1) is appropriate, having regard to the meaning of section 193(2). Considering both the provisions of section 193(1) and section 193(2) is important because one cannot adopt the attitude that dismissal is unfair, therefore, reinstatement must be ordered. The Labour Court or an arbitrator should carefully consider the options of remedies in section 193(1) as well as the effect of the provisions of section 193(2) before deciding on an appropriate remedy. A failure to have regard to the provisions of section 193(1) and (2) may lead to the Court or arbitrator granting an award of reinstatement in a case in which that remedy is precluded by section 193(2).”³⁷

[39] The basis for SARS’ contention that reinstatement was unreasonable is twofold. One, Mr Kruger was guilty of racism in the workplace which is an extremely

Ltd v Commission for Conciliation, Mediation and Arbitration [2015] ZACC 557 (*Toyota*) at para 133 (unreported case).

³⁶ *Toyota* id at para 135.

³⁷ *Id.*

serious misconduct. Two, his continued employment would thus be intolerable. In particular, SARS argues that it is, as an organ of State, obliged by section 7 of the Constitution to protect and promote the rights in the Bill of Rights. Those rights include, in this context, its workers' right to equality or human dignity that racism violates.

[40] Mr Kruger maintains that SARS has failed to discharge the onus that rests on it to establish that the trust relationship has been destroyed and that the circumstances highlighted in aggravation, combined with the obvious gravity of the misconduct, outweighed the factors he relies on in mitigation, thus justifying a sanction of dismissal. He holds the view that SARS should have led evidence to demonstrate that hurling the kaffir insult in the manner he did caused the continued employment relationship between him and SARS to be intolerable. Its failure to do so, he argues, ought to result in his reinstatement. In response, SARS drew attention to the fact that it had placed evidence before the Arbitrator to the effect that the continued employment of Mr Kruger would be intolerable. It is noteworthy that the Arbitrator did not refer to this contention and the supporting evidence in determining whether reinstatement was an appropriate remedy.

[41] That evidence is also contained in SARS' supplementary affidavit in the Labour Court. There, SARS had this to say about the intolerability of a continued employment relationship with Mr Kruger:

“At the CCMA arbitration, the applicant led evidence to show that there had been a breakdown in the relationship of trust and confidence between it and the employee because of the nature of the offence. It stood undisputed before the arbitrator that the conduct of the employee was racist. . . . The applicant as an organ of state is also bound to eradicate racism at the workplace. The use of racist language (and in particular the use of the ‘k’ word) against fellow employees and supervisors strikes at the heart of the employment relationship at an employer such as the applicant. Evidence was led before the arbitrator that conduct such as that admitted by the employee, is intolerable and the continued employment of such an employee, intolerable.”

SARS thus advanced reasons for its contention that there is a breakdown of the relationship of trust between it and Mr Kruger. Its evidence supports the assertion that his misconduct has rendered a continued employment relationship intolerable.

[42] Unlike in *Crown Chickens* where an employee was dismissed for one incident,³⁸ in this case we have two inextricably-linked incidents of saying of a fellow employee that he is a kaffir. This abusive and derogatory language was directed not only at Mr Mboweni but all of Mr Kruger's fellow African workers. He impugned their thinking or intellectual capacity and underminingly pronounced on their perceived inherent leadership or managerial incapacities. None of his African colleagues was in his world-view worthy of effectively exercising authority over him. His was a demonstration of the worst kind of contempt, racism, and insubordination. A proper reflection on these racial statements alone would have been enough to lead the Arbitrator to the inescapable conclusion that reinstatement was the most inappropriate remedy.

[43] None of this should lead to the mistaken belief that the use of very strong derogatory language like kaffir would always militate against the reinstatement of an offending employee. *Crown Chickens* does not purport to lay that down or articulate it as an inflexible principle. On the contrary, the Court underlined the particularly crucial role that courts have to play of ensuring that racism or racial abuse is eliminated. And that they must fulfil that duty fairly, fully and firmly.³⁹ The notion that the use of the word kaffir in the workplace will be visited with a dismissal regardless of the circumstances of a particular case, is irreconcilable with fairness. It is conceivable that exceptional circumstances might well demonstrate that the relationship is tolerable. But, this is certainly not such a case. Even then, a lot more would have to be set out by the offending employee to explain away the obvious

³⁸ *Crown Chickens* above n 16 at para 3.

³⁹ *Id* at para 35.

intolerability of the continued working relationship. Contrary to Mr Kruger's contention, an employee would have a bigger role to play to undercut the grossly offensive nature and effect of these dignity-suffocating insults. It cannot be primarily the duty of the employer to explain the intolerability that flows effortlessly from the obviously repugnant conduct of the employee.

[44] After concluding that Mr Kruger's dismissal was unfair, the Arbitrator immediately ordered his reinstatement without taking into account the provisions of section 193(2). She was supposed to consider specifically the provisions of section 193(2) to determine whether this was perhaps a case where reinstatement is precluded. She was also obliged to give reasons for ordering SARS to reinstate Mr Kruger despite its contention and evidence that his continued employment would be intolerable. She was required to say whether she considered Mr Kruger's continued employment to be tolerable and if so, on what basis. This was not done. She does not even seem to have considered whether the seriousness of the misconduct and its potential impact in the workplace, were not such as to render reinstatement inappropriate. And those are the key factors she ought to have considered before she ordered SARS to reinstate Mr Kruger.

[45] Worse still, this was a case of an employee who, though guilty of racism, did not acknowledge his racist conduct, apologise to all concerned, show remorse or genuinely volunteer to take part in whatever programme could be designed to help him embrace the values of our Constitution, especially equality, non-racialism and human dignity. Having initially pleaded guilty to what in effect amounts to racism in a workplace, he later denied having used the word kaffir. He was disbelieved by the Arbitrator. In other words the Arbitrator was dealing with someone who tried to conceal his racist remarks and lie about them.

[46] It bears repetition that the use of the word kaffir is the worst of all racial vitriols a white person can ever direct at an African in this country.⁴⁰ To suggest that it is necessary for the employer to explain how that extremely abusive language could possibly break the trust relationship and render the employment relationship intolerable, betrays insensitivity or at best for Mr Kruger desperation of the highest order. Where such injurious disregard for human dignity and racial hatred is spewed by an employee against his colleagues in a workplace, that ordinarily renders the relationship between the employee and the employer intolerable.

[47] SARS is not only an organ of State but it obviously has numerous African and white employees. It is constitutionally and relationally intolerable to have any racist daring enough to refer to fellow employees as kaffirs, within the employ of SARS. His African co-employees know that he called one of them a kaffir and that he regards them as lazy, incapable of leading him and intellectually inferior to him solely because of their race. They would be entitled to feel extremely offended and regard as highly insensitive of SARS, to keep in their midst someone like Mr Kruger. Labour jurisprudence reveals that, where employees have discovered that there is in their workplace an active racist, it has sometimes led to labour unrest.⁴¹ To retain Mr Kruger as an employee, wherever he might be placed, would be similar to recklessly leaving a ticking time-bomb unattended to, knowing that it could self-detonate at any time, with consequences that are too ghastly to contemplate.

[48] Furthermore, the Arbitrator should have been alive to the enormous problems racism has caused and continues to cause in this country. She should also have factored into her decision the special role that SARS as an organ of State, is required to play in the fight against racism and in efforts aimed at its eradication both in the

⁴⁰ See Professor De Vos above n 6; Dr Baderoon above n 1; *Puluza* above n 3; *Swanepoel* above n 10 and *Prinsloo* above n 12.

⁴¹ *Crown Chickens* above n 16; *Old Mutual* above n 17; *Modikwa Mining Personnel Services v Commission for Conciliation Mediation and Arbitration* [2012] ZALCJHB 61; *Biggar v City of Johannesburg, Emergency Management Services* [2011] ZALCJHB 5; (2011) 32 ILJ 1665 (LC); *Ceppwawu obo Evans v Poly Oak* 2003 12 BALR 1324.

workplace and in society. She appears to have ignored or given insufficient weight to these crucial factors.

[49] By ordering SARS to reinstate Mr Kruger the Arbitrator acted unreasonably. She also does not appear to have been mindful of the fact that in terms of section 193(2) of the LRA, reinstatement would not follow as a matter of course. It would in fact not be an option “if circumstances surrounding the dismissal [were] such that a continued employment relationship would be intolerable”. No reasonable arbitrator could have ordered reinstatement. That reinstatement part of her award is thus unreasonable and should be reviewed and set aside.

Compensation

[50] To compensate or not to compensate and if compensation is to be awarded for what period, is a function of the judicious exercise of the discretionary power that an arbitrator or the court has in terms of section 194(1) of the LRA. Zondo JP outlined the applicable factors in these terms:

“There are many factors that are relevant to the question whether the court should or should not order the employer to pay compensation. It would be both impractical as well as undesirable to attempt an exhaustive list of such factors. However, some of the relevant factors may be given. They are:

...

(b) Whether the unfairness of the dismissal is on substantive or procedural grounds or both substantive and procedural grounds; obviously it counts more in favour of awarding compensation as against not awarding compensation at all that the dismissal is both substantively and procedurally unfair than is the case if it is only substantively unfair, or, even lesser, if it is only procedurally unfair.

(c) In so far as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the minor the employer’s deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer’s deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

(d) In so far as the reason for dismissal is misconduct, whether or not the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

(e) The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

(f) The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

(g) In so far as the employee may have done something wrong which gave rise to his dismissal but which has been found not to have been sufficient to warrant dismissal, the impact of such conduct of the employee upon the employer or its operations or business.

(h) Any conduct by either party that promotes or undermines any of the objects of the Act, for example, effective resolution of disputes.”⁴²

[51] Generally speaking, an unfair dismissal ought to earn an employee compensation where reinstatement is not feasible by reason of the intolerability of the continued working relationship.⁴³ SARS has offered Mr Kruger compensation for his unfair dismissal. This raises very interesting questions. Is it open to or appropriate for this Court to “deny” an employee compensation in circumstances where he was not only dismissed in an admittedly unfair manner but also where the employer who would be burdened with the obligation to pay is not necessarily averse to payment or is willing to pay? The answer is, it depends.

[52] In terms of our law⁴⁴ compensation is not automatic. It is a discretionary matter.⁴⁵ A whole range of factors must be taken in to account to determine whether

⁴² *Kemp t/a Centralmed v Rawlins* [2009] ZALAC 8; (2009) 30 ILJ 2677 (LAC) (*Kemp*) at para 20.

⁴³ See for example *Lakomski v TTS Tool Technic Systems (Pty) Ltd* (2007) 28 ILJ 2775 (LC) at para 44 where that Court granted compensation where dismissal was procedurally and substantively unfair despite the fact that the employee found employment with a higher salary shortly afterwards. However, see *Kemp* id where compensation was refused even though the dismissal was substantively and procedurally unfair.

⁴⁴ *Kemp* above n 42 at para 20(e)-(h); *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1999) 20 ILJ 89 (LAC) at paras 36-8.

compensation has to be paid and if so, for how many months.⁴⁶ In this regard one of the key factors is the need to ensure that employers are not inadvertently encouraged by the non-payment of compensation to adopt a shotgun approach of dismissing employees without affording them the opportunity to be heard. Employees are ordinarily vulnerable because, unlike employers, they do not often have the resources necessary to vindicate their rights by prosecuting cases all the way up to this Court. Condoning the flouting of laws that govern the fate of people's livelihood is a matter so serious that it always requires greater sensitivity and care. Relevant factors are, of course, the marked deviation from procedure by the SARS Commissioner when he dismissed Mr Kruger. The impact of the gross misconduct that Mr Kruger is guilty of on the employer and its workplace environment is an important factor to help decide on compensation.

[53] It can never be over-emphasised that being called a kaffir is the worst insult that can ever be visited upon an African person in South Africa, particularly by a white person.⁴⁷ It runs against the very essence of our constitutional ethos or quintessence. And the gravity of the misconduct is indeed a factor that ordinarily ought to weigh heavily against an employee in the determination of compensation.⁴⁸ Mr Kruger's dishonesty, evident from reneging on his plea of guilty by falsely accusing his union representatives of having forced him to admit guilt, exacerbates the problem. It certainly cannot be neutralised by his assertion that he has African friends and that he is a Pastor.

[54] The seriousness of the misconduct in this kind of a case was aptly articulated by Zondo JP as follows—

⁴⁵ See *Solidarity obo Van Emmenis v Sirius Risk Management (Pty) Ltd* [2015] ZALCJHB 304; (2015) 36 *ILJ* 3175 (LC) at para 35 where Ngcukaitobi AJ stated:

“Compensation accordingly is a matter of remedial discretion of the Court. The main criterion is that compensation must be just and equitable.”

⁴⁶ *Kemp id.*

⁴⁷ See Professor De Vos above n 6.

⁴⁸ See *Transnet Ltd v CCMA* (2008) 29 *ILJ* 1289 (LC) at para 29.

“The attitude of those who refer to, or call, Africans “kaffirs” is an attitude that should have no place in any workplace in this country and should be rejected with absolute contempt by all those in our country - black and white - who are committed to the values of human dignity, equality and freedom that now form the foundation of our society. In this regard the courts must play their proper role and play it with the conviction that must flow from the correctness of the values of human dignity, equality and freedom that they must promote and protect. The courts must deal with such matters in a manner that will ‘give expression to the legitimate feelings of outrage’ and revulsion that reasonable members of our society - black and white - should have when acts of racism are perpetrated.”⁴⁹

[55] It is thus an unequivocal rejection of the notion of non-racialism, the equal treatment and human dignity of African people to refer to them as kaffirs. Mr Kruger did not merely refer to Mr Mboweni as a kaffir. He explained the utter contempt he has not just for Mr Mboweni but apparently all other African employees who are all targeted by the word for denigration. All SARS’ African employees without exception are in his view low level intelligence people. So inherently inferior or subhuman they are, that none of them is fit to tell him what to do. It follows that this is so, regardless of their educational qualifications, experience or superior placement over him, purely because of their skin colour. No measure of linguistic tap dancing can lighten this obviously obnoxious and dehumanising connotation.

[56] The use of this term captures the heartland of racism, its contemptuous disregard and calculated dignity-nullifying effect on others. It bears repetition that, Mr Kruger’s utterances constitute a racial minefield in the workplace ever-ready to explode at the slightest provocation. Conduct of this kind needs to be visited with a fair and just but very firm response by this and other courts as custodians of our constitutional democracy, if we ever hope to arrest or eliminate racism. Mollycoddling cannot cut it.

⁴⁹ See *Crown Chickens* above n 16 at para 37. See also *Chiloane* at para 13.

[57] But a conspectus of all the relevant factors suggests that compensation be paid to Mr Kruger. First, the sanction of dismissal is so livelihood-threatening and serious that a breach of the relevant regulatory framework ought generally to be viewed in a serious light. Importantly, SARS is not dead against the payment of compensation provided it is not for more than six months. It is also a factor to take into account that although comparatively well-resourced, SARS has severally floated from one blunder to another thus causing Mr Kruger or his sponsors to be financially burdened through litigation, when this could have been avoided. This has truly been a tragedy of errors by SARS. Not only did Mr Moodley, its representative, effectively strike a deal with Mr Kruger in relation to sanction, but the SARS Commissioner then acted against and in effect reneged on their own deal. Even when he did, presumably with the benefit of legal advice, he reversed the sanction unilaterally. All these factors point strongly to the appropriateness of awarding some compensation to Mr Kruger.

[58] Section 194(1) of the LRA requires, very much in keeping with the spirit of section 172 of the Constitution, that the remedy for unfair dismissal be just and equitable. Without disregarding the fact that Mr Kruger's utterances amount to one of the worst violations of human dignity that according to our jurisprudence amounts to hate-speech⁵⁰ and must be rooted out, all of the above factors point to compensation as the just and equitable remedy that is appropriate in this matter. SARS has reconciled itself with the possibility of payment of up to six months. But for its offer and a series of inexplicable and prejudicial blunders, a lesser period or no compensation would arguably have been more appropriate. Compensation for the period of six months for misconduct as gross as that of Mr Kruger and the lies he told, is by any standard generous.

Costs

[59] Each party has been substantially successful. SARS has successfully argued for the reversal of the reinstatement order. Mr Kruger has also been able to persuade

⁵⁰ Brooks J in *Swanepoel* above n 10 at para 13-4. See also Hartzenberg J in *Chiloane* above n 5 at para 14.

this Court that he is entitled to compensation. For this reason, the correct costs order to make is that each party is to pay its or his own costs.

Order

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

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The orders of the Labour Court and the Labour Appeal Court are set aside and that of the Labour Court is replaced with the following:
 - “(a) To the extent reflected in paragraph (b) below, the review application succeeds.
 - (b) That part of the arbitrator’s award in terms of which Mr Jacobus Johannes Kruger was reinstated in the employ of the South African Revenue Service is reviewed, set aside and replaced with the following:
 - (i) The South African Revenue Service must pay Mr Kruger compensation equivalent to his salary for six months at the time of dismissal.
 - (ii) Each party is to pay its or his own costs.”
4. Each party is to pay its or his own costs, in this Court and in the Labour Appeal Court.

For the Applicant:

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