

## RACIAL REMARKS IN THE WORKPLACE. DOES “SWART MAN” CONSTITUTE A RACIAL SLUR?

In a country, no stranger to racial tensions, our courts have dealt with a variety of cases and made immense strides on the matter. Notwithstanding this, the tensions occurring in the social landscape have seeped into the workplace and have manifested in both conspicuous and subtle ways.

Typically, the courts have had no difficulty impressing their intolerance towards racist remarks, however in the face of non-conspicuous racist remarks, the courts had differing views on whether the “*swart man*” remark actually constituted a racial slur. On 17 May 2018, the Constitutional Court handed down a judgment in ***Rustenburg Platinum Mine v South African Equity Workers Association obo Meyer Bester and Others*** regarding same.

### BACKGROUND

Mr Bester was charged with the offence of making a racial remark when he referred to a fellow employee, Solly Tlhomelang, as a “*swart man*” when he requested that the “*swart man*” move his vehicle. Subsequent to the disciplinary hearing, he was found guilty of insubordination and making racial remarks to a fellow employee, and accordingly dismissed.

### CCMA

Mr Bester approached the CCMA to refer an unfair dismissal dispute and the CCMA found his dismissal to have been procedurally and substantively unfair and ordered reinstatement with back pay.

### LABOUR COURT

The mine approached the Labour Court for a review of this decision. The LC found that the CCMA had reached a decision that no reasonable decision-maker could have reached. The Labour Court held that the use of the words “*swart man*”, within the context of this case, was derogatory and racist which constituted an act of serious misconduct and warranted the dismissal of Mr Bester. The Labour Court took into consideration that the mine had circulated a memorandum to all employees, which clearly indicated that the mine would not tolerate abusive and derogatory language in the workplace.

### LABOUR APPEAL COURT

SAEWA lodged an appeal in the Labour Appeal Court. (LAC). The LAC held that the LC had erred by applying a subjective test to determine whether the term “*swart man*” was racist and derogatory.

The LAC found that Mr Bester could have said “*swart man*” as a way to describe the driver of the other vehicle, whose name he did not know. On this basis, the LAC held that Mr Bester’s dismissal was both substantively and procedurally unfair.

### CONSTITUTIONAL COURT

The main issue to be decided in the Constitutional Court (CC) was whether referring to a fellow employee as a “*swart man*”, within the context of this case, was racist and derogatory and whether it was unreasonable for the commissioner of the CCMA to have found that the use of the term was racially innocuous.

Secondly, if it were found to be racist and derogatory, was dismissal an appropriate sanction. In a unanimous

judgment, the Constitutional Court held that the correct test was whether a reasonable, objective and informed person would, on the correct facts perceive “*swart man*” to be racist and derogatory. The Court held that the LAC’s starting point – that phrases are presumptively neutral – fails to recognise the impact of the legacy of apartheid and racial segregation that has left us with a racially charged present.

This starting point carries the danger that the dominant, racist view of the past – of what is neutral, normal and acceptable – may skew an objective enquiry. By ignoring the reality of our past of institutionally entrenched racism and by beginning the enquiry from a presumption that the context is neutral, the LAC sanitised the context in which the phrase “*swart man*” was used.

As such the LAC like the commissioner of the CCMA, failed to take into account the totality of circumstances in this case and came to an unreasonable conclusion that “*swart man*” was used innocuously. Consequently, it was held that Labour Court was correct in reviewing and setting aside the commissioner’s award as he had reached a conclusion that a reasonable decision-maker could not have reached.

The LAC’s order therefore stood to be set aside. With regards to sanction, the CC held that as Mr Bester had demonstrated a complete lack of remorse for his actions and made no attempt to apologise, dismissal, under these circumstances, was an appropriate sanction

In conclusion, the CC held that a seemingly neutral and/or harmless remark such as “*swart man*” could not

be viewed in isolation but always in context of our racially divisive and racially charged history. In doing so, consideration had to be paid to the entrenched institutional racism and injustices of the past, which provide full context of race relations as they exist in South African society and the workplace today. In paying heed to same, the CC held that the remark or “*swart man*” was indeed a racial slur and that same warranted the sanction of dismissal.

*This article is a general information sheet and should not be used or relied on as legal or other professional advice. No liability can be accepted for any errors or omissions nor for any loss or damage arising from reliance upon any information herein. Contact Strata-g Labour Solutions for specific and detailed advice.*

**APHELELE TAPILE  
LEGAL ADVISOR**