

## DOES THE SINGING OF STRUGGLE SONGS JUSTIFY TAKING DISCIPLINARY ACTION & SUBSEQUENTLY DISMISSING THE EMPLOYEES WHO SING THEM?

Struggle songs formed a major and intrinsic part of the fight against Apartheid, but what happens when same are sang by employees in the current labour environment and, more importantly, what if they take on a racial tone?

At the outset, it must be noted that our courts have taken a firm stance against racism in the workplace and have unequivocally stated that same may never be tolerated and will always justify a dismissal. Further to this, Section 10 of the Equality Act defines "Hate Speech" as follows:

- i. The words are based on one or more of the prohibited grounds referred to in the Act. Prohibited grounds include race, gender, ethnic or social origin and colour;*
- ii. Objectively it is considered to be hurtful, harmful, incite harm or propagate hatred. The intention of the person who utters the words is irrelevant; and*
- iii. It does not fall within the proviso to section 12 (the proviso refers to bona fide engagement in artistic creativity, academic and scientific inquiry and the like.)'*

It is noted further that in line with our courts' attitude to racism, in 2011, our courts banned *Dubula iBhunu (Shoot the Boer)*, a derogatory song that degraded Afrikaners, on the basis that it violated a South African law prohibiting speech that demonstrates a clear intention to be hurtful, to incite harm, or to promote hatred.

Despite the above, however, the singing of such struggles songs remains part and parcel of South African society at large, and more recently the labour sphere in particular.

The Constitutional Court (CC) is due to bring finality to the question of whether the singing of a struggle song with the lyrics "Kill the Boer" is grounds for firing black workers for being racist.

A group of eight National Union of Metalworkers of SA (NUMSA) members are currently fighting an attempt by their former employer, Duncanmec, to avoid reinstating them in accordance with an award after they were unfairly fired for singing a struggle song with those lyrics.

Duncanmec claims that its management on site was offended and felt threatened by the song. The CC is set to hear the matter during May 2018. Duncanmec has further accused the Metal and Engineering Industries Bargaining Council (MEIBC) arbitrator who handled the case of being "soft on racism" and seeking to justify the singing of the song on the basis of historical context.

The eight NUMSA members embarked on an unprotected strike in April 2013. They were subsequently dismissed a month after the strike, but took their dispute relating to unfair dismissal to the MEIBC, which ruled that their dismissal was substantively unfair and retrospectively reinstated them.

Duncanmec then took the matter on review to the Labour Court, where it again failed for largely the same reasons as at the MEIBC. Duncanmec's application for leave to appeal to the Labour Appeal Court was also denied.

As a result, Duncanmec have now approached the CC who will now hear the matter and it will remain to be seen how the court will balance the right to freedom of expression with its own stated approach to rooting out all forms of racism and discrimination within society as mandated by the Bill of Rights.

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