Unlocking labour laws

In our union we sometimes have to deal with racism in companies which takes different forms. Can you give us some cases concerning racism which we could refer to?
There are a number of cases in different areas which may be of use to you.

Derogatory language
The cases below were both heard in the Labour Appeal Court (LAC) and deal with derogatory language and how tolerant an employer should be.

In *Lebowa Platinum Mines Limited vs Hill (1998)* the supervisor forgot a worker's name and referred to him as 'bobejaan' and 'kaffir'. He refused to apologise. The union threatened industrial action if the supervisor was not dismissed. The LAC ruled that the dismissal was warranted as such racist language cannot be tolerated.

The *Crown Chicken (Pty) Limited v Kapp & Others (2002)* is an important case concerning racist language and is often cited by judges. A worker was injured but his supervisor would not call for assistance saying, 'Los die kaffir…'. On dismissal he claimed that the employer had not conducted human relations training at work.

The LAC upheld the dismissal saying: '… in being required to uphold the Constitution and the human rights entrenched in it, the courts are enjoined to play a particularly critical role in… the fight against racism, racial discrimination and racial abuse of one race by another... 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… absolute rejection of racism…'

Labelling people
At Oerlikon Electrodes an employee admitted to calling a repairman of a service provider who had done a bad job a 'Dutchman' and agreed this was a derogatory term. The Labour Court (LC) in *Oerlikon Electrodes SA vs CCMA & Others (2003)* ruled the term 'Dutchman' racist in that it implied white supremacy.

While this was not as serious as a term like 'kaffir' it was still unacceptable and the court ruled that the dismissal was fair.

From this judgment it is clear that the courts will not allow employers to practice racism. Even moderate forms of racism will not be tolerated.

Racial harassment beyond discriminatory name calling
Words and phrases that imply certain characteristics or negative perceptions of people are also covered in law as the *SA Transport & Allied Workers Union vs Old Mutual Life Assurance (2006)* case shows.

It was the first case in South Africa where an employer was sued for not acting properly against an employee guilty of racism in the workplace.

An employee, Jenny Burger, loudly asked her supervisor, Barbara van Zyl, after a rearrangement of desks in their unit: 'Why are you putting me next to the kaffirs?'

A coloured woman, Zorina Jeffreys, heard this remark and

complained to Van Zyl. Van Zyl replied that '… the word "kaffir" is used by Afrikaans-speaking people but it isn't necessarily derogatory'.

Jeffreys said Van Zyl and Burger asked her to keep quiet about the incident and not to tell Xolile Finca in the same section. However, Burger's comment reached Finca's ears and he took it up with his superiors. Pressure was placed on Finca to leave the matter.

Satawu became involved and after months of pressure on Old Mutual Burger was called before a disciplinary hearing. She was found guilty and dismissed. In an internal appeal, her dismissal was overturned and she remained at Old Mutual in the same section as Finca.

Satawu filed a complaint in the LC on behalf of Finca and demanded damages from Old Mutual under the Employment Equity Act, Burger's dismissal and that Old Mutual acknowledge it had supported unfair racial discrimination.

The court ruled that the remark was racist and that Old Mutual's delay in taking action against Burger and failure to protect Finca was direct discrimination. It ordered it to compensate Finca. The judge did not however support Burger's dismissal on the grounds of double jeopardy (she had already undergone a hearing on the same matter). He urged Old Mutual to ensure that such incidents did not occur in future.

It is clear from this judgment that racism requires immediate and strong disciplinary action by the employer. If the employer, unlike Old Mutual, does all that is reasonably practicable, it may escape liability since the aim of the Employment Equity Act (EEA) is to reward a diligent employer.

In another case a white applicant was employed as a forklift operator with an employment service. After an argument with an African colleague he said, 'Since you people took over, it's difficult on our side.' He was charged at a disciplinary hearing with making racist remarks and was dismissed.

In *Fester and AVR Labour Outsourcing (2007)* the CCMA (Commission for Conciliation Mediation & Arbitration) commissioner found that his labelling of a colleague as 'you people' showed his low opinion of the group of people to which the person belonged. The fact that the applicant did not use racist terms did not mean that his words were not racist. The commissioner noted that racism is often comes in hidden forms. The words were uttered in a derisive manner and reflected the applicant's racist attitude towards African people.

The commissioner found that the employer viewed the incident in a serious light and that the dismissal was fair.

In another case at a meeting an African employee refused to apologise to a white employee after accusing him of being a racist. The white employee then lodged a grievance against the African employee. Disciplinary action found the black employee guilty of 'insulting… behaviour' and he was dismissed. The dispute was arbitrated at the bargaining council where the dismissal was found to be fair.

On review, *Sacwu & Another v NCP Chlorchem (2007)* the Labour Court concluded that to accuse a person of being a racist is racially offensive and insulting and it upheld the dismissal. The court found further that when an employee makes an unfounded allegation that another employee is a racist this amounts to serious misconduct that can lead to dismissal. The court believed racial harmony in the workplace was very important and, 'Allowing employees willy-nilly to accuse fellow employees of being racists or displaying racist attitudes must be addressed with equal fervour by employers if such allegations are baseless.'

Racism in cartoons and satire

A case *Edcon Ltd v Grobler & Others (2007)* heard in the LC concerned a complaint against a branch manager at Jet Stores. The manager had phoned the security company responsible for installation of equipment and asked who was 'the monkey' that installed the panic button. The employee at the security company who answered the call took offence and reported the language to her manager.

Jet held a disciplinary enquiry and found that the term 'monkey' was abusive, derogatory language and the manager was dismissed. The manager brought the matter to the CCMA where the commissioner found the dismissal unfair and ordered reinstatement and compensation.

The company applied for the LC to review the decision. It found no evidence of racism and agreed that the dismissal was unfair arguing that whether language is abusive depends on the circumstances and if the language is directed at a particular employee or employees. The level of malice, the extent of the abuse and its degree are all factors.

In *Cronje vs Toyota Manufacturing (2002)* heard in the LC the employee was dismissed for distributing a racist

cartoon by email depicting a gorilla with President Mugabe's head on it. The cartoon was widely circulated and upset the company's 3 500 black staff. The company's email policy prohibited the distribution of racist messages. The LC agreed with the CCMA commissioner that the cartoon was racist and inflammatory in the context it was distributed. '… the offensive racist stereotype associating black people with apes … is a matter of deep moral, social and cultural sensitivity to black people and this sort of offensive racial stereotyping is not by any means limited to black people.'

The court was satisfied that the dismissal was fair.

What principles and laws cover racism in the workplace?

The underlying principles such as equality, dignity and freedom of expression are based on our Constitution. Racial discrimination is an act or omission which differentiates on the basis of race while racial harassment is social behaviour that belittles, marginalises, manipulates, intimidates or takes advantage of people belonging to a particular race.

There has been little litigation on race discrimination but these are examples of matters that came to court recently: wage differentials, non-appointment because of race, non-retention of affirmative action appointees in retrenchment, misapplication of affirmative action policies, disparities in relocation allowances, refusal to admit an employee to certain funds and indirect discrimination.

The laws that apply on race discrimination in the workplace are firstly the EEA. Section 6(1) deals with the prohibition of unfair discrimination on grounds of race, ethnic or social origin, colour, culture or language. While section 6(3) deals with harassment of an employee as a form of unfair discrimination.

Pepuda (Prohibition of unfair discrimination on grounds of race) is the law that deals with race discrimination more generally. It includes that no person can unfairly discriminate against any person or group through propaganda dissemination, activity that promotes exclusivity, provision of inferior services and denial of access to opportunities.

Pepuda covers the prohibition of harassment based on race and this also covers persistent or serious unwanted conduct based on sex, gender or sexual orientation.

If an employer gets a racist complaint how can it establish if it is racial harassment?

The employer must prove on a balance of probabilities that the conduct was unwanted and persistent or serious and that it humiliated or created a hostile or intimidating environment, or it was done to induce submission through some kind of threat related to race.

It is hard to establish this sometimes but section 60 of the EEA makes the employer liable for the misconduct of an employee in the workplace unless the employer takes action. So what are appropriate employer responses?

In the Old Mutual case Finca received R80 000 compensation but in reality a whole group of people at Old Mutual were offended. So a tone of tolerance must be created by management to change a hostile environment. But it can be hard to change a corporate environment.

The company needs to adopt a harassment policy jointly with employees to heighten awareness. There needs to be space in the company to talk about race. In some of the cases previously outlined it may have been better to open dialogue than to dismiss.

The Crown Chickens case was important to establish zero tolerance but it did not necessarily transform attitudes. Changing attitudes mainly happens through contact whereas discipline can result in the hardening of attitudes.

The impact of a racial incident on other workers is important as race matters are explosive and can lead to strikes. The company needs to find positive ways of dealing with attitudes. This includes:

- maintaining an environment where the dignity of employees is respected and creating this should be part of the duties of managers
- adopting a harassment policy
- worker and management education
- space to talk about race
- a zero-tolerance approach, consistent discipline and maybe reformative discipline LB

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