BIZCOMMUNITY

Struggling with struggle songs during a strike

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Is it misconduct to make statements that are offensive to members of a particular race or ethnic background? If so, should an employer retain offending employees in its service? In *Duncanmec v Gaylard N.O. and Others*, the highest court considered whether employees singing struggle songs - with racial undertones - warranted dismissal.

The court heard that nine employees of Duncanmec embarked upon an unprotected strike. After rejecting the employer's ultimatum, the employees climbed onto the roof of the workplace and sang the struggle song. The employer later invited them to attend a disciplinary hearing to answer to allegations of misconduct. The alleged wrongdoing related to their participation in an unprotected strike, singing racial songs in an offensive manner and defying management's ultimatum to return to work. In terms of the allegations, the offending portion of the struggle song translates to, "tell them that my mother is rejoicing when we hit the boer". (Depending on the context, "boer" may mean "farmer" or "white person").

The chairperson of the disciplinary enquiry held that the elements of misconduct relating to racism were of such a serious nature that it warranted dismissal. The terminated employees challenged the fairness of their dismissal at the Commission for Conciliation, Mediation and Arbitration (CCMA).

The CCMA held that, although the singing of the song was inappropriate and could be offensive and hurtful to some, it did not amount to racism. It held that there was a difference between singing a struggle song - typically with historical context - and an employee using a racist term.

The strike was both peaceful and short-lived. The Commissioner disagreed with the employer that dismissal was the appropriate sanction. However, she confirmed that the singing of that struggle song in the workplace was inappropriate and limited the employees' compensation to three months' remuneration each.

The employer was dissatisfied with the outcome. It approached the Labour Court to review and set aside the CCMA award. The trade union, in opposing this application, disputed that the singing of the relevant struggle song constituted hate speech. It argued that it was a historic struggle song sung by workers during Apartheid.

The court agreed with the trade union. It held that local strikes often still involve the singing of struggle songs in support of worker demands. In dismissing the employer's application, the court disagreed that the award was unreasonable. It confirmed the distinction between the current matter and other cases involving racism.

The employer eventually approached the Constitutional Court (CC). This court held that the appropriate test was whether the award meets the requirements of reasonableness, which requirement protects parties from arbitrary decisions which are not justified by rational decisions. The CC did not clarify whether the conduct would amount to racism. Instead, it held that the dismissal of the workers did not flow automatically even if the conduct did amount to racism. Each case of misconduct must be judged on its own merits to determine whether dismissal is appropriate.

The court was, however, unequivocal that racism is a scourge that has no place in the workplace or our society. Employers can play a significant part in ensuring that all employees appreciate this message. It should adopt clear workplace rules that stipulate the exact requirements of the organisation in respect of such conduct. Dismissing staff who utter racist statements or otherwise engage in racism is an important mechanism to eradicate this vile behaviour. Ensuring that employees appreciate that there is zero tolerance for such workplace behaviour, including singing such songs, can enhance prospects of sustaining dismissals arising from this conduct. That, and of course, ensuring that the circumstances of each employee and the infringement are taken into account when determining the appropriate sanction.

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