REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS232/09

In the matter between:

VICTOR BIGGAR **Applicant**

and

CITY OF JOHANNESBURG

(EMERGENCY MANAGEMENT SERVICES) **Respondent**

Heard: **18 November 2015**

Delivered: **13 December 2016**

JUDGMENT

NKUTHA-NKONTWANA AJ

Introduction

[1] This matter concerns an alleged unfair racial discrimination claim by Mr Victor Biggar, the applicant. At the time the present dispute arose, the applicant was employed by the City of Johannesburg: Emergency Management Services, the respondent, as a Fire Fighter Emergency Medical Technician ("EMT").

[2] The matter came for the first time before Lagrange J, enrolled for default judgment on the unopposed roll, and found in favour of the applicant. The

respondent applied for the rescission of the judgment and was granted in its favour on 17 July 2013.

[3] The applicant's case is pleaded as follows:

> 'During his employment with the Respondent, the Applicant and his family had been subjected to numerous acts of racism by various of the Applicant's white colleagues.
>
> Despite lodging numerous grievances with the relevant members of the Respondent, the Respondent has failed to take any steps in sanctioning the relevant colleagues of the Applicant and/or preventing further incidents of racism at the Brixton Fire Station.'

[4] In terms of the pre-trial minutes, the parties agreed that the applicant bears the *onus* to prove racism and, if established on the part of the colleagues, that the Respondent is liable.

Factual background

[5] The applicant was employed by the respondent in the year 2000 and throughout his employment he was stationed at the Brixton Fire Station ("Brixton"). He also resided in the housing apartments provided by the respondent at Brixton together with his family, his wife and three children.

[6] The applicant resigned on 12 June 2012, but his family still resides at Brixton.

[7] The core of the applicant's claim is that, between year 2000 and 2008, his family had been exposed to severe racism perpetrated by certain white colleagues and their families residing at Brixton residential apartments. The said applicant's colleagues, alleged perpetrators of racism, are:

7.1 Mr Andrew Pretorius ("Pretorius"), a firefighter EMT, stationed and residing at Brixton;

7.2 Mr Gerhard Badenhorst ("Badenhorst"), a firefighter EMT, stationed and residing at Brixton; and

7.3 Mr Tony Venter ("Venter"), a firefighter EMT, stationed and residing at Turffontein Fire Station. Venter is related to Pretorius and Badenhorst.

[8] The applicant's immediate supervisor was the Station Commander of Brixton, Mr Thamesang Gqiba ("Gqiba"), who allegedly failed to deal with racism at Brixton.

[9] In December 2006, the applicant's family were involved in racial fight with the Pretorius' and Badenhorst's families. As a result, on 2 January 2007, the applicant requested the Executive Head of EMS of Johannesburg, Dr A. Gule ("Gule"), to transfer him to another section of the department. On 5 January 2007, in response to the applicant's complaint, Gqiba convened a meeting with the applicant and two of his colleagues, Pretorius and Badenhorst.

[10] On 10 January 2007, another fight ensued between the applicant, his sons, Venter and Pretorius outside the residential premises. The applicant stabbed Venter with a knife and he sustained serious wounds. The applicant and his sons were subsequently charged with attempted murder but were acquitted.

[11] On 9 October 2007, the applicant was internally charged for the incident of 10 January 2007. He was found guilty on 23 May 2008 and issued with a final written warning and a recommendation that he should be transferred to another fire station. Venter and Pretorius were never subjected to a disciplinary hearing for the same incident. The applicant objected to his redeployment to the Central Fire Station but did not challenge the verdict and sanction.

Survey of evidence

[12] The applicant testified that he is originally from Durban and when he was employed at Brixton he relocated with his family. He was the first black fireman to be appointed at the station and take residence at the respondent's apartments. All other apartments were occupied by his white colleagues.

[13] His family was subjected to racism as soon they took occupation of their apartment. His children were not allowed to swim in the communal pool or

play soccer and were subjected to various forms of racial abuse by the children of his white colleagues. His son was called kaffir and wife Bitch. In fact, the word kaffir was uttered without thinking at Brixton.

[14] The applicant felt belittled and humiliated. This harassment continued even after the applicant complained about it to Mr. Clark, his supervisor at that time. At some point, the applicant sought Mr. D Tembe's ("Tembe"), the director of operations, intervention. Tembe did reprimand his white colleagues and told them to teach their children not to use the word kaffir. However, nothing changed after that intervention. Instead, the white colleagues launched a petition seeking to have the applicant's removed from Brixton.

[15] The pattern of abuse by some of the white residents towards the applicant's family and other black residents in the complex continued even during Gqiba's tenure.

[16] On 2 December 2006, there was a year-end function and, thereafter, the applicant's wife was assaulted by Venter and his sister, who happens to be Badenhorst's wife. The applicant's wife fled to the fire station where the applicant was on duty at the time. He then escorted her back to their apartment. On the way, they were confronted by Venter who directed racist insults and threats at them.

[17] The next day, on 03 December 2006, the applicant was having a braai with his friends when Pretorius drew up a gun at his son. His wife intervened and verbal exchange of insults ensued between her and Pretorius. The applicant was called kaffir and threatened that "vanaand julle is dood" which means "tonight you are dead".

[18] Both incidents were reported to Gqiba who then instructed the standby supervisor, Mr Malan, to attend to the complaints or call the police. On 5 January 2007, Gqiba called the applicant, Pretorius and Badenhorst to a meeting in order to resolve the dispute. The applicant was not happy with that meeting as he was not allowed to call his friends who witnessed the incident

that took place on 3 December 2007. The applicant then suggested that the matter be referred to Mr Coby, the next in line manager but Gqiba refused.

[19] The bad blood between these families persisted and in December 2006 Pretorius and Badenhorst obtained protection orders against the applicant and his family. Whilst the applicant's wife had laid a criminal charge against Venter for an alleged assault that took place on 2 December 2006.

[20] On 10 January 2007, the applicant was off sick when a more serious incident took place. He was alerted of the altercation between Venter and his son. He then saw Venter, Pretorius, Badenhorst approaching his direction and he armed himself with a kitchen knife. Venter assaulted the applicant with a sjambok. In self-defence, the applicant stabbed Venter.

[21] Subsequently, the applicant was charged with fighting with colleagues and of bringing the reputation of the employer into disrepute. The white colleagues who were participants in the brawl were never charged, nonetheless. The applicant also referred to a separate incident that took place in 2005 wherein Pretorius and another white colleague, Mr Labuschagne, were involved in a fight in full view of other employees but no disciplinary action was taken against them.

[22] The applicant's disciplinary enquiry was held during March 2008. At the end of the enquiry, he was found guilty on the charge of fighting with colleagues and issued with a warning. In February 2008, shortly before the enquiry began, the applicant referred a complaint to the Human Rights Commission relating to the abusive treatment he and his family had suffered at the hands of his colleagues. It appears that nothing concrete resulted from that referral. On 6 March 2008, the applicant referred two disputes to the South African Local Government Bargaining Council. The first dispute was an unfair labour practice dispute over the failure of the employer to promote him to its Disaster Management department despite many requests to do so and despite his competence in that field. The second dispute concerned a complaint of unfair

discrimination arising from the racist harassment by his fellow employees which the employer had failed to eliminate.

[23] During cross-examination, the applicant was adamant that he did report the racial harassment incidents to his superiors even though it was not a formal grievance. Out of his frustration, he also reported the matter to the Human Rights Commission and to the media.

[24] The applicant denied that he was a racist and a troublemaker. After the incident of 10 January 2007, he refused to be transferred because of his daughter. Nonetheless, his family has managed to stay away from the Pretorius family. There are now more blacks residing at Brixton hence the racial tension has since been defused.

[25] Both the applicant's witnesses confirmed that racism was rife at Brixton. Mr Emmanuel Manyobe ("Manyobe"), who is no longer in the employ of the respondent as he resigned in 2008, was also stationed at Brixton and confirmed that blacks were subjected to racial harassment. He reported the fighting incidents to Gule as Gqiba failed to attend to the issue. Whites were controlling Brixton, so he testified. He further testified that Pretorius was supposed to be charged for a brawl that took place on 10 January 2007 since he was a repeated offender. He also did have a verbal exchange with Pretorius who was a weight lifter and very aggressive.

[26] Mr Matobako ("Matobako"), the respondent's DivisionalChief, joined the respondent in 1991 as an Ambulance Attendant. He was elected as a shop steward in 1993, a position he held until 2008. He testified that blacks were not welcome at Brixton and were called kaffirs. Management delayed addressing the employees' complaint in order to frustrate them. He was adamant that the applicant was within his rights to approach the Human Rights Commission and media since the respondent failed to address the issue of racism at Brixton.

[27] The respondent closed its case without leading any evidence.

Legal principles and analysis

[28] The objects of the Employment Equity Act 55 of 1998, as amended ("EEA") are, *inter alia*, to give effect to the constitutional guarantees of equality; to eliminate unfair discrimination at the workplace; and to ensure implementation of employment equity to redress the effects of past discrimination in order to achieve a diverse workforce representative of all our people.[1] Section 6 of the EEA expressly prohibits unfair discrimination whilst section 5 of the EEA obliges every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Unlike provisions of Chapter III of the EEA which is applicable to the designated employers only, sections 5 and 6 fall under Chapter II of the EEA which mandatorily applies to all employers.

[29] Section 6 of the EEA provides that:

> '(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race,
>
> (2)...
>
> (3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grants of unfair discrimination listed in subsection (1).'

[30] Section 60 of the EEA states:

> '(1) If it is alleged that an employee, while at work, contravened any provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this act, the alleged conduct must immediately be brought to the attention of the employer.

[1] See the Preamble to the EEA.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened the provision.

(4) Despite subsection (3), an employee is not liable for the conduct of an employee if that employer is able to prove that he did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

[31] In *President of the Republic of South Africa and Another v Hugo,*[2] the Constitutional Court contextualised the rational for the prohibition of unfair discrimination as follows:

> 'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.'[3]

[32] In *IMATU and Another v City of Cape Town,*[4] Murphy AJ, as was then, expansively dealt with the tenets relating to unfair discrimination in the workplace. He then emphatically adopted the following test as laid down in *Harksen v Lane NO and Others:*[5]

> 'The first enquiry is whether the provision differentiates between people or categories of people. If so, does the differentiation bear a rational connection to a legitimate governmental purpose? If it does not, then there is a violation

[2] [1998] JOL 1543 (CC) at para 41.
[3] At para 41.
[4] [2005] 11 BLLR 1084 (LC).
[5] 1998 (1) SA 300 (CC) at paras 78 - 81.

of the guarantee of equality. Even if it does bear a rational connection, it might nevertheless amount to discrimination. The second leg of the enquiry asks whether the differentiation amounts to unfair discrimination. This requires a two-staged analysis. Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there was discrimination would depend upon whether, objectively, the ground was based on attributes and characteristics which had the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. Secondly, if the differentiation amounted to "discrimination", did it amount to "unfair discrimination"? If it is found to have been on a specified ground, unfairness will be presumed under the Bill of Rights by virtue of the provisions of section 9(5) of the Constitution, which transfers the onus to prove unfairness to the complainant who alleges discrimination on analogous grounds. As I read section 11 of the EEA, no similar transfer of onus arises under the EEA. In other words, whether the ground is specified or not the onus remains on the respondent throughout to prove fairness once discrimination is shown.'[6]

[33] In *South African Transport and Allied Workers' Union obo Members v South African Airways (Pty) Ltd and Others,*[7] concretising the above tenet, the LAC stated that:

> *'…claims of unfair discrimination are not to be lightly brushed aside and that by that it does not mean that every claim must be entertained no matter how slender the factual basis of the grounds advanced. It is however also important to note that the appellant is seeking to assert its members' rights in terms of the EEA. The purpose of the EEA is to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace.'*[8]

[6] Above n 4 at para 81.
[7] [2015] 2 BLLR 137 (LAC) at para 17.
[8] At para 17.

[34] Section 11 of the EEA, before the 2013 amendment, did not expressly restrict the presumption of unfairness to discrimination on one or more of the listed grounds save to state that "whenever an unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair". At most, the applicant had to show that he was discriminated against and the basis thereof even though the burden of proving fairness rests on the respondent.

Was there any discrimination?

[35] The applicant's case is pegged on the following main allegations:

35.1 That the respondent is vicariously liable for racial harassment perpetrated by its employees against the applicant; and

35.2 That the respondent discriminated against him on the ground of race when it selected him to be disciplined for a brawl that took place on 10 January 2007 and absolved his white colleagues.

[36] It is common cause that the applicant had been complaining about racial harassment to his superiors, particularly Mr Gqiba. In fact, in the affidavit deposed to by Gqiba on 12 February 2007, he states the following:

> 'Since I came to Brixton Fire Station in 2000 I was informed by my Director Tembe that Brixton Fire Station has racism. I instructed Andrew Pretorius to go and work with Mayor Masondo at the road show in region 4. Pretorius refused and told me that he is not his Mayor but my mayor. We later sorted out that with Pretorius but the fact that Masondo is a black Mayor is the reason why Pretorius said Masondo is my Mayor…Since December 2006 both families have been problematic.' Emphasis added

[37] The applicant's undisputed evidence was that his white colleagues and their families continued to call him and his family kaffirs even after they had been admonished by Tembe. However, no disciplinary action was taken against them. Instead, the white colleagues launched a petition seeking to have the applicant and his family removed from Brixton.

[38] Both Manyobe and Matobako also confirmed that there was racism at Brixton, at least up until the year 2008. Matobako was adamant that Brixton management did nothing to assist black employees who resided at its Brixton apartments hence, in his view, the applicant was justified to voice his frustration with media and Human Rights Commission. Therefore, the respondent's contention that Coby, Gqiba and Dr Gule were all proactive in resolving racism stands to be rejected.

[39] Nothing turns on the applicant's to failure lodge a formal grievance about the racial harassment. The respondent was aware of the racism at Brixton but failed to take necessary and sufficient steps to eliminate it. The unfortunate incident that took place on 10 January 2007 could have been avoided had the respondent decisively stemmed out racist behaviour at Brixton. I also find it strange that the respondent sought to depict the applicant as the troublemaker and a racist when the evidence clearly shows that Pretorius and his relatives ganged up against the applicant and his family solely because they are black.

[40] The respondent further contended that, although the applicant still lives in the complex and in close proximity to Pretorius, the last brawl involving the applicant and Pretorius took place in 2008. That, according to the respondent, is proof that there is a prevailing racial harmony it has proactively fostered as part of its endeavour to stamp out racism. Unfortunately, there was no evidence led in this regard. Nonetheless, for what it is worth, the above flaunted success is, in my view, a concession that there was racism at Brixton up until 2008, at least, and no decisive and sufficient measures had been taken to eliminate it, hence it persisted.

[41] Worse of all, the respondent seem not to understand the gravity of the racial slurs complained of and its effect on the victims as it flagrantly contended that Pretorius and Venter were not called as witnesses as they have "moved on with their lives" and it did not want to upset the prevailing racial harmony. This behaviour by the employers recently came under scrutiny in *South African Revenue Service and Commission for Conciliation, Mediation and Arbitration*

and Others,[9] where the Constitutional Court dealt with the issue of racism and utterance of derogative words kaffir in the workplace. The Court stated the following:

> '[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", 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 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

[9] [2016] JOL 36804 (CC).

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… 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 unintending, 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.
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> [14] Bekker CJ, Mohamed CJ and Zondo JP observed in essence that racist conduct requires a very firm and unapologetic response from the courts, particularly 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 people or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack.'[10]
> Emphasis added

[42] In this instance, the respondent trivialised the use of derogative words like kaffir and bitch by its white employees and their families at Brixton. Hence, it is expected of the applicant to just move on with life, like his white colleagues, without the respondent addressing sequel of being exposed to an environment where extremely hurtful expressions of hatred were uttered with impunity.

[43] Even though the alleged racial incidents were not work related and primarily involved the families of the fire fighters, they took place at the respondent's premises and in turn contaminated the work environment in a manner that compromised safety and job performance. The repulsiveness of the situation at Brixton did not escape criticism by the magistrate who presided over the attempted murder trial against the applicant over the incident that took place

[10] At paras 7-14.

on 12 January 2007. After acquitting the applicant, he made the following comments:[11]

> 'Before I stand down, I am shocked and displayed. I am a tax payer in this city. My taxes I used to pay your salaries. You live in accommodation provided by my tax money. Is this the way municipal officials public officials act? It is shocking.
>
> You are a disgrace if this is the thing that goes on, you are a disgrace to your profession. The fire department in this city has long history a long tradition. It is one of the first fire departments in the world. This sort of thing destroyed the reputation. It smudges the good work done by others. You do not have a right to behave in such a manner in the Council property. All three of you the accused and the witnesses…you should really look into your heads and then see how to remedy the situation.
>
> I just want to ask one thing. If this is the way you behave when you are not in uniform, how are you going to behave when your life is in danger and you have to rely on your colleague? Who is going to save Mr Bigger's life if he is trapped in a burning room? Will Mr Pretorius risk his life on the basis of this evidence? I do not think so and *vice versa*. It is an untenable situation. You cannot work like this. You have to solve this thing and have to do it amicably…'

[44] Conversely, the respondent was never alarmed by the racism that prevailed at Brixton since 2000 and resulted in the January 2007 brawl that nearly caused Venter's life and ruined the applicant and his sons' lives. It accepted Mr Oeloftse's report that there was no racism at Brixton despite the recorded allegations therein that derogative and racist words had been used. Consequently, the applicant was the only one who was charged for the 10 January 2007 incident, whilst his white colleagues and alleged instigators of the brawl were treated as victims despite the above criticism by the magistrate.

[11] See the transcribed record of the Newlands Regional Court trail in *S v Victor Biggar and 2 others* (RC 101/2007) at pages 103 to104 of the bundle of documents.

[45] The respondent had a duty to prevent discriminatory practices in the workplace. The evidence reveals that even though Gqiba took some steps to deal with the applicant's complaint, the respondent persistently denied that there was racial harassment at Brixton. Therefore, the said intervention fell short of the legal muster to eliminate unfair discrimination. I agree with the applicant's contention that the respondent failed to take necessary steps to protect the applicant and his family against racism at Brixton and more specifically by failing to deal with his complaint of his racial harassment in a decisive manner that would have reflected a clear intention to eliminate any form of unfair discrimination.[12]

[46] The respondent's contention that the racial harassment incidents that the applicant testified about were not work related and primarily involved the families of the fire fighters is without merit. The respondent deemed it fit to charge the applicant for a brawl that took place outside its premises between its employees who were off duty but failed to deal with racism when it is clear that the hostility directed towards the applicant and his family by some of his white colleagues was a threat to their working relationship as emergency officials.[13]

[47] It must be recognised by now that an employer can be directly responsible in terms of EEA for the creation or tolerance of a racially hostile work environment, which itself is the product of individual acts of a racially discriminatory nature, whether they are committed by persons under its direct control. This responsibility stems from the duty of an employer to take steps to ensure that its workplace is free of all forms of racial discrimination of which the employer is aware or should be aware.[14] An omission to act reasonably and decisively can constitute discriminatory conduct.

[12] *SATAWU obo Finca v Old Mutual Life Assurance Company (SA) Ltd & another* [2006] 8 BLLR 737 (LC). *Vodacom (Pty) Ltd and v Gildehuys and Others* [2008] ZALC 16; (2008) 29 ILJ 1762 (LC).
[13] It is trite that employers may take disciplinary action against employees for conduct committed outside the workplace if it has a bearing on the employment relationship. See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* [2015] ZALCCT at para 25; *Hoescht (Pty) Ltd v Chemical Workers Industrial Union* (1993) 14 *ILJ* 1449 (LAC) at 1459B.
[14] Media 24 Ltd and Another v Grobler [2005] ZASCA 64; [2005] 3 All SA 297 (SCA).

[48] In the premises, the applicant successfully showed that he was discriminated against on the ground of race which is ostensibly unfair unless proven otherwise. Since the burden was upon the respondent to prove the fairness of the discrimination, it was incumbent upon it to ensure that all the necessary material and evidence is before the court in order to enable it to make a finding of fairness, but it failed. It follows that the applicant was unfairly discriminated against.

Relief

[49] In terms of Section 50(2)(a) of the EEA, the Court may make "any appropriate order that is just and equitable in the circumstances, including…payment of compensation by the employer to that employee".

[50] As stated above, the applicant has since resigned his employment with the respondent and now seeks compensation. In *Christian v Colliers Properties*,[15] referred to by the applicant's counsel in her written submissions, in emphasising the rational for damages for unfair discrimination, the Court cited with approval from *Alexander v Home Office* where the following was stated:

> 'The objective of an award for unlawful racial discrimination is restitution. For the injury to feelings, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, award should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the result which it seeks as do nominal awards.'

In this instance, the racial abuse and harassment took place over a period of seven years. The applicant testified that he felt very belittled and humiliated by the racist manner in which his white colleagues treated him and his family. The respondent, on the other hand, resorted to technicalities instead of

[15] (2005) 26 ILJ 234 (LC).

dealing with the said acts of racism perpetrated against the applicant and his family resolutely. I make no comment with respect to the applicant's post-employment residence at Brixton except to note that there were no racial bawls reported after 2008.

[51] It follows that a compensation equivalent to 12 months remuneration, as at the date of the applicant's resignation, for both racial harassment and discriminatory application of discipline is just and equitable.

[52] There is no reason why costs should not follow the result.

Order

[53] In the circumstances, I make the following order concerning both matters:

1. The respondent unfairly discriminated against the applicant on the ground of race.

2. The respondent is ordered to pay the applicant an amount equivalent to 12 months' remuneration, calculated at the rate of his remuneration at the time of his resignation.

3. The respondent is ordered to pay costs.

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Nkutha-Nkontwana AJ

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT:	JM Bezuidenhout
Briefed by:	K Theunissen Attorneys
FOR THE RESPONDENTS:	WJ Hutchinson
Briefed by:	Moodey Robertson Attorneys