THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

REPORTABLE

Case no: C790/2015

In the matter between:

THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE	**First Applicant**
THE SOUTH AFRICAN POLICE SERVICE	**Second Applicant**
and	
PW NIENABER N.O.	**First Respondent**
SOLIDARITY obo NICHOLAAS ADRIAAN ALBERTS	**Second Respondent**

Heard : 23 November 2016

Delivered : 21 April 2017

Summary: Review of a decision by an appeal authority in terms of section 158 (1) (h) of the LRA; The impugned decision overturned the dismissal of SAPS Station Commander who was found guilty of stating the following to his colleagues at a staff meeting "*Ek is nie god van kafferland nie.*" Decision reviewed, set aside and substituted.

JUDGMENT

RABKIN-NAICKER J

[1] This is a review application in terms of section 158(1)(h) of the Labour Relations Act[1] (LRA). The applicants seek to review the decision of the first respondent, who sat as their own appeal authority. The third respondent launched an application to dismiss the review given the delay in prosecuting the review, and also opposed an application for condonation for the unreasonable delay in launching the review application.

[2] The second respondent (Alberts) was initially dismissed from his position as Station Commander of the Suurbrak South African Police Service (SAPS). The incident leading to his dismissal was a statement he made at a station meeting. He uttered the following words in Afrikaans: *'Ek is nie god van kafferland nie'* in the presence of members of the SAPS.

[3] Alberts was charged with misconduct: in that he had breached regulation 20(q) of the disciplinary regulations and contravened the prescribed code of conduct of the police service and public service; in that he did not acknowledge the needs of the service as employer, and acted in a manner that is disrespectful and not accountable when he used discriminatory and racist words. He was found guilty on 23 March 2015. Alberts appealed against the sanction of dismissal that was handed down.

[4] It is the decision of the first respondent in respect of the appeal by Alberts that is the subject of review in this case. He upheld the appeal and reduced the sanction to a dismissal suspended for a period not exceeding six months in terms of disciplinary regulation 17(7). The first respondent stated in his finding on appeal inter alia the following:

> "After studying the testimony of the witnesses (see the testimony of Yanga Ngqawuza, the Appellant himself, Wendly Albertus, Monique Phangwa and Charlotte Apples), the most plausible version of events would be that the Appellant used the words "Ek is nie die god van Kafferland nie" at a station meeting in the presence of subordinates. The Appellant refused to retract the words immediately after it was spoken. Although the meaning is later equated to him "not being a tin god" (not being in control of the situation), it was perceived as racist by the persons present at the station meeting. It was argued that it was not aimed at any person at the meeting and the intention was not to be racist. Why then use these words? The Appellant was aware that members will perceive it as racist and continued to use the words and refused to retract it. Reference to the judgement in Ryan v Petrus 2010 (1) SA 169 (ECG) relates to whether the abuse (words) was directed at a person and

[1] Act 66 of 1995.

whether "her dignity had been impaired" and whether she is entitled to damages for the hurt and humiliation. In the case cited the court had to determine whether the requirements of the delict injuria were met or not. In *casu*, these elements need not be proven, nor whether it is directed at a particular person or not. The Appellant in my opinion had a malicious intent for using the words and thereby clearly contravened the Code of Conduct of the South African Police Service. The fact that the words were not intended to insult any person in particular has no relevance." (emphasis mine)

[5] The first respondent went on to consider as to whether Alberts had had a fair hearing and found that he did, and that the finding of guilty by the Chairperson of the disciplinary hearing was correct. Under the heading of 'Sanction', the following parts of the appeal decision bear recording:

> "When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider circumstances raised in mitigation by the employee and in aggravation by the employer. In order to prove that a sanction of dismissal was appropriate under the circumstances, the employer will have to be able to convince the chairperson that the seriousness of the offence outweighed the employee's circumstances (32 years of service) in mitigation and the circumstances in this case are such that the Appellant deserves to be dismissed.
>
> When deciding to dismiss the Appellant, the chairperson focused on the aggravating factors that weighed heavily on the person accused of misconduct and that the sanction should send a 'signal to others in the workplace that discriminatory and racist words are not allowed". The aim of a sanction is not to be a deterrent. It must be fair to the employer and the employee. (emphasis mine)
>
> Looking at the circumstances in which the misconduct was committed, it appears from the testimony of Phangwa, Kaerise and Appies that it is a practice by some at Suurbrak SAPS to use derogatory terms (especially by Mbane) in relation to themselves. (emphasis mine)
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> Major Irvin Matiyhilo testified (on behalf of Maj Gen Makhize) that there is a sound relationship between him and the appellant, but that the misconduct is of a serious nature and that the trust is broken because of the seriousness and dishonesty. He also testified that there is no alternative placement for the employee. Most of which appears to be a contradiction in terms, how can there be a breach in trust and at the same time consideration for alternative placement. Nor did this misconduct contain

an element of dishonesty. It is not clear if the witness believes that there is a breach in trust between the employer and the Appellant or whether Maj General Makhize (sic) believes this or whether the witness testified it in the spirit of what he believes Maj Gen Makhize believes. It is also clear that the witness does not know what a breach of trust entails. The fact that the Appellant continued his duties until July that year (incident took place in January) also indicates that the trust relationship was not irreparably damaged. Major Matyhilo testified that to his knowledge it is the first incident of this nature where the Appellant was involved.

The Appellant showed remorse during the hearing and begged for a second chance. The statement from Constable Ngqawuza (one of the "aggrieved" during the incident) also indicates that he does not want the Appellant to be dismissed, but rather that the appellant should be punished for the words uttered. The Appellant also provided various character witnesses to show he is not racist.

My first impression was that "if a person is stupid enough to utter such words, he deserves to be dismissed", but that is before all the surrounding circumstances and factors were considered. (emphasis mine)

Dismissal was, under the circumstances, not the appropriate sanction for the misconduct committed by the Appellant."

Evaluation

[6] The applicants submit that the first respondent's finding was arbitrary, unreasonable and/or irrational. In terms of section 158(1)(h) they argued in reliance on inter alia the matter of *Hendricks v Overstrand Municipality and Another*[2] that the impugned decision could be reviewed on the grounds set out in the Promotion of Administrative Justice Act[3] (PAJA), the constitutional grounds of legality and rationality and the common law grounds of reasonableness and procedural fairness.

[8] In the *Hendricks* matter[4], the LAC stated that:

"[29] In sum therefore, the Labour Court has the power under s 158(1)(h) to review the decision taken by a presiding officer of a disciplinary hearing on (i) the grounds listed in PAJA, provided the decision constitutes administrative action; (ii) in terms of the common

[2] (2015) 36 ILJ 163 (LAC)
[3] Act 3 of 2000
[4] Supra

law in relation to domestic or contractual disciplinary proceedings; or (iii) in accordance with the requirements of the constitutional principle of legality, such being grounds 'permissible in law'. The findings of the LAC and the SCA in that regard in *Ntshangase* are not inconsistent with the findings of the Constitutional Court in *Gcaba* or *Chirwa*, which are restricted to conclusions that unfair dismissals and unfair labour practices will normally not constitute administrative action on account of adequate alternative remedies existing under the LRA. Neither *Gcaba* nor *Chirwa* made any reference to *Ntshangase*, or, as I have said, s 158(1)(h) of the LRA. *Chirwa* was decided before Ntshangase, while *Gcaba* was handed down shortly after it. More recently, in *Khumalo and another v Member of the Executive Council for Education: KwaZulu-Natal, the* Constitutional Court cited *Ntshangase* with approval, indicating implicitly that it saw no inconsistency in the approach followed in that case with its own earlier pronouncements."

[9] In my view the impugned decision in this matter is indeed unreasonable and irrational on its face. It also contains a gross irregularity of the latent type i.e. that a disciplinary sanction is not a deterrent. The record of the decision further supports my view.

[10] The applicants point to the irrationality of the first respondent's decision given his own finding that the words were uttered by Alberts with 'malicious intent'. In order to reach his decision upholding the appeal, first respondent's reasoning is strained to say the least. His treatment of the evidence of Major Irvin Matyhilo, i.e. the finding that his testimony was contradictory as the misconduct did not contain an element of dishonesty, is not supported by the record. During Matyilo's evidence in chief, he was asked the question as to whether he can: "…comment regarding the trust and honesty regarding his serious misconduct'. In answer to this question, Matyhilo simply answered that: "trust and honesty has been broken". This testimony was relied on by the first respondent to find that there was no breach of trust, and that Matyilo misunderstood the nature of the offence. His reasoning on the issue of whether a breach of trust existed between SAPS qua employer and Alberts was simply not based on an object appraisal of the facts and circumstances of the case as reflected in the extensive record of the disciplinary proceedings before him.

[11] In addition, the first respondent refers to the 'context in which the offence was committed' without applying his mind to the fact that the phrase, in his words issued with malicious intent, were used by Alberts in a meeting with his subordinate staff. In my view the key to

the irrationality and unreasonableness of the impugned decision is to be found in the following statement by the first respondent:

> "My first impression was that 'If a person is stupid enough to utter such words, he deserves to be dismissed', but that is before all the surrounding circumstances and factors were considered."

[12] The statement betrays a total lack of insight into the impact and meaning of the words uttered by Alberts in our constitutional democracy. A state functionary taking a decision of this nature must do so guided by the foundational values of the Constitution. To opine that using the phrase that Alberts did is merely 'stupid', suggests to me that first respondent himself has not understood the prescripts of the legislation and regulations that placed him in the position of an appeal authority in this matter.

[13] Alberts did not express remorse at the disciplinary hearing, relying on a defence that he had merely used an 'idiom'. This is apparent from the record before the first respondent and belies the finding that Alberts showed genuine remorse. In fact a look at Albert's papers in the application before me shows that he continues to refuse to express remorse. This underlines that his apparent remorse expressed for the purposes of the appeal should not, on the basis of the record of the disciplinary hearing, have been countenanced by a reasonable decision-maker. He justifies his use of an "idiom" as he did at the disciplinary before this Court. It is necessary to record two paragraphs of his answering papers:

> "2.7 On the 16th of January 2014, I convened and chaired a station meeting. During this meeting the cost curbing measures were one again raised as an issue by the Suurbraak staff. During this debate the staff blamed me personally for the curbing meansures. At this point in time I was frustrated by the issue and specifically the facts that my hands were proverbially tied. I then uttered the phrase, whilst (pointing at myself) tapping on my chest: "Dit gaan nie oor my nie ek is nie god van kafferland nie end it is slegs 'n spreekwoord."
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> 2.8 At this point I pause to explain the meaning of saying: "Ek is nie god van kafferland nie". This is an archaic saying used to explain one's helplessness in a situation. It means that one is not a tin god. It is crucial to note the following:
>
> 2.8.1 I did not refer to any person as a "kaffer" (hereinafter referred to as the "k-word");

2.8.2 the k-word is not used in isolation, but rather in front of the word "land" and together they form one word and effectively a term wholly different that the k-word on its own.

2.8.3 as with many words in the Afrikaans language, the k-word can be used in a variety of ways, not all of which is insulting. When used in front of another word, it is not meant as insulting, but rather descriptive.

2.8.4 there are many names and terms that contain the k-word that has no baring on race or intended offence, such as:

2.8.4.1 kafferbessiebos;

2.8.4.2 kafferboom

2.8.4.3 kafferbroodboom;

2.8.4.4 kafferpruim;

2.8.4.5 kaffersering, etc."

[14] It appears that the applicant does not comprehend what the implication of the words he uttered are in this land, and under our Constitution. I can do no better to explain this than by quoting portions of the unanimous judgment by the Constitutional Court in *South African Revenue Services V CCMA and Others*[5] including the references to that judgment in which Moegeng CJ stated inter alia:

> "In order to give some context and shed light on the correct attitude to adopt in dealing with the term kaffir, it is necessary to flesh out its history, meaning and implications. Dr Gabeba Baderoon says "kaffir" is "the most notorious word in South African history, known most pointedly for its license of violence towards Blacks during apartheid, but first used and elaborated during the colonial period."[6] She goes on to observe that it is offensive in all

[5] [2016] ZACC 38 at paragraphs 3-6

[6] Baderoon "The Provenance of the term 'Kafir' in South Africa and the notion of Beginning" at 1, 6-7, http://www.cilt.uct.ac.za/usr/cci/publications/aria/download_issues/2004/2004_MS4.pdf accessed on 27 July 2016 (Dr Baderoon). She sets out part of the word kaffir's historical context that reveals its more obnoxious and delegitimising effect and observes that:

> "Settlers appear to name as kaffir what must remain separate from them, clearing a space for a selfhood that is defined against the other . .[T]he creation of Otherness is a formula for the creation of the self. The alternative appears to be that indigeneity threatens to consume them, suggested by an insidious sense of time, such as 'kaffir appointment', for which one need not be punctual, or becoming

senses and combinations to the extent of being unspeakable today, its use now constitutes a hate crime in our country and is unpardonably painful and violent.[7] This is in line with the observation made about 33 years ago by Van Rensburg J and Jennett AJ that:

"When a black man is called a 'kaffir' by somebody of another race, as a rule the term is one which is disparaging, derogatory and contemptuous and causes humiliation."[8]

It follows that the word kaffir was meant to visit the worst kind of verbal abuse ever, on another person. Although the term originated in Asia,[9] in colonial and apartheid South Africa

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a 'kafferboetie' [little brother] by feeling a contaminating sympathy for the despised group or 'to go to the kaffirs', which means to deteriorate.

'[K]affir' also functions to remake the landscape. In colonial South Africa this denigratory modifier metastasises into a vast naming that forces newness on a world that was not new. The landscape was named in a way that enabled it to be claimed. 'Kaffir' labelled as unnatural the relationship between indigenous people and their rightful claim to the land. Instead, this was portrayed as a distorted, corrupt and unfitting connection. Such a vision enabled the settlers to proclaim their own more fitting relationship with the land. . . . Symbolically 'kaffir' thus announces not only a claim to the land, but to a beginning of history signalled by settler arrival.

The massive land dispossession that the African people have been victims of, is thus traceable to the thinking behind the recalibrated and more-encompassing South African version of kaffir — a version that is compatible only with the notion that Africans are a despised group that would contaminate or lower the dignity of others when associated with."

[7] Id at page 2.

[8] *S v Puluza* 1983 (2) PH H150 (E) (*Puluza*) quoted with approval in *Ryan v Petrus* 2010 (1) SACR 274 **(**ECG).

[9] Dr Baderoon above n 1 at 3 states that:

"The word 'kaffir' is derived from the Arabic word for non-believer or infidel, often rendered in English as 'kafir' (all transliterated words of Arabic origin in English are approximations, due to the non-congruence of English and Arabic script). In Islam, the root word of kafir means closed, denoting someone who has closed his or her heart from the truth constituted by Islam. Derived from this root, the general meaning of 'kafir' is 'non-Muslim', those who are seen to deny the truth of Islam. With a Muslim presence dating from 1658 when the Dutch brought Muslims to the Cape as slaves and servants, it is reasonable to assume that Islam in South Africa delivered the word to the colonial lexicon. However, the use of the word to describe people in South Africa predates the arrival of Muslims in the colonial territories. According to the DSAE, the first recorded use of 'kafir' applied to southern Africa (in the form 'caffre') appeared in Richard Hakluyt's The Principal Navigations,

it acquired a particularly excruciating bite and a deliberately dehumanising or delegitimising effect when employed by a white person against his or her African compatriot. It has always been calculated to and almost always achieved its set objective of delivering the harshest and most hurtful blow of projecting African people as the lowest beings of superlatively moronic proportions.[10] Professor Pierre De Vos has this to say about the term kaffir:

"This term has an ugly history in South Africa and was almost exclusively used by white racists as a gross generalisation to denigrate black South Africans. To be called a 'kaffir' is to be called a lazy and stupid person. But the assumption behind the word is that by being lazy and stupid one is merely behaving as all black people always behave – as white people expect black people and know all black people to behave. So even when a white person is called a 'kaffir', the recipient of the insult is being told that he or she is just as lazy and stupid as all black people are known to be by all racist white people."[11]

Voyages, Traffiques and Discoveries of the English Nation, the first volume of which was published in 1589. G. Theal indicates that European settlers in South Africa adopted the word from its use by East African Muslims for 'infidels' in the southern part of Africa. Henry Lichtenstein writes in his Travels in Southern Africa, '[b]eing Mahommedans, they gave the general name of Cafer (Liar, Infidel) to all the inhabitants of the coasts of Southern Africa' (1812:241)."

[10] It is even worse compared to another weapon of gross insult regularly resorted to pulverise whatever racists thought was left of the dignity and self-worth of the African people. That insult is either "monkey" or "baboon". See *Strydom v Chiloane* 2008 (2) SA 247 (T) (*Chiloane*) where Hartzenberg J was seized with a matter involving the use of the word baboon in *Chiloane*, and relying on *Mangope v Asmal* 1997 (4) SA 277 (T) at 286J-287A he said:

"[I]f a person is called a baboon, when severely criticized, the purpose is to indicate that he is base and of extremely low intelligence. It was also stated that it can be inferred from the use of the word, in the circumstances, that the person mentioned is of subhuman intelligence and not worthy of being described as a human being. It follows that the person described as a baboon in those circumstances may rightfully perceive them to be hurtful. The magistrate was accordingly not wrong to find that the words complained of fall within the definition of 'hate speech' as defined in section 10 of PEPUDA."

[11] Pierre De Vos "on 'kaffirs', 'queers', 'moffies' and other 'hurtful terms'" *Constitutionally speaking* at http://constituionallyspeaking.co.za/on-kaffirs-queers-moffies-and-other-hurtful-terms accessed on 26 July 2016 (Professor De Vos).

It could only have been with this disrespect in mind and the need to make a decisive break from the ills of the past,[12] that non-racialism, human dignity and freedoms (which include freedom of expression without any trace of hate speech) are values foundational to our constitutional democracy.[13] The healing of the divisions of the past, the national unity and reconciliation that need to be built and fostered respectively,[14] are likewise intended to entrench peaceful co-existence, respect and the right to dignity of all our people. It was in recognition of this constitutional vision that Brooks J recently endorsed the remarks in *Puluza* in the following terms:

"The appropriateness of this observation has not been adversely affected by the passage of more than thirty years since it was first expressed in *S v PULUZA*. If anything, the truth which finds expression therein is even more accessible today than it was before the dawn of a constitutional democracy in South Africa and the concomitant dramatic increase in the awareness of her citizens of the need to recognize, respect and exercise the demands now made by society for the demonstration of respect for human dignity and equality. *The term 'kaffir', historically bandied about with impunity, is a term which today cannot be heard without flinching at the obvious derogatory and abusive connotations associated with the term. It is rightly to be classified as an inescapably racial slur which is disparaging, derogatory and contemptuous of the person of whom it is used or to whom it is directed. Considered objectively, its use can only be as an expression of racism with a clear intention to be hurtful and to promote hatred towards the person of whom it is used or to whom it is directed. This brings its use clearly within the ambit of section 10 of PEPUDA.*"[15]

[12] In *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 262, Mahomed J said:

> "The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic."

[13] See sections 1 and 16(2)(c) of the Constitution.

[14] See the Preamble of the Constitution.

[15] *Thembani v Swanepoel* [2016] ZAECMHC 37 (*Swanepoel*) at para 13.

> The italicised portion of the quotation captures the best rendition of the use of the word kaffir as being undoubtedly disparaging, hurtful and intentionally hateful. According to Brooks J that use clearly falls within the meaning of hate speech in section 10 of the PEPUDA.[16]
> The Supreme Court of Appeal per Mathopo AJA said of the word kaffir:
> "In our racist past it was used to hurt, humiliate, denigrate and dehumanise Africans. This obnoxious word caused untold sorrow and pain to the feelings and dignity of the African people of this country. . . . [S]uch conduct seeks to negate the valiant efforts made to break from the past and has no place in a country like ours which is founded upon the democratic values of human dignity, and the advancement of human rights and freedoms."[17] "

[15] As Mr Coetzee for the Applicants put it, the Constitutional Court has endorsed the notion that the use of the word "kaffir" or "kaffer" on its own and/or in combination with other words and terms is so offensive that it is 'unspeakable'. In all the circumstances, the decision of the first respondent falls to be considered as both irrational and unreasonable in terms of sections 158(1)(h) of the LRA.

[16] In the application to dismiss, Solidarity submitted on behalf of Alberts, that given the lengthy delay between the date of the handing down of the impugned decision, the 24 March 2015, and the launching of this application, the 29 September 2015, the application for condonation by the applicants should not be granted by this Court and that instead the review application should be dismissed. I disagree. The importance of this case to employment relations within the SAPS, and to the public interest, leads me to grant condonation in the interests of justice. Alberts also submitted that the SAPS had reconciled

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[16] See section 10(1) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA) which reads as follows:

> "Subject to the provision in section 12, no person may publish, propagate, advocate or communicate words based on one or more of the prohibited grounds, against any person, that could reasonably be construed to demonstrate a clear intention to—
>
> a) be hurtful;
>
> b) be harmful or to incite harm;
>
> c) promote or propagate hatred."

[17] *Prinsloo v The State* [2014] ZASCA 96 (SCA) (*Prinsloo*) at para 20 (unreported judgment).

itself to the first respondent's decision and this review would amount to double jeopardy, and in addition that the record is not complete. Both of these arguments are spurious. This review is not a re-hearing of the disciplinary appeal.

[17] The appeal record is extensive comprising as it does: the charge sheet; transcript of the disciplinary proceedings; the decision of the disciplinary committee; and the decision of the first respondent. Alberts submitted that the full record of the appeal process should have been included. However, all the issues that he averred would then be before Court were in fact recorded in the appeal decision by the first respondent. In addition and in any event, the decision is reviewable on its face. The applicants qua employer seek the substitution of their appeal authority's decision. There is no reason for the Court to remit it given the record before me. Both parties sought costs in their respective applications. The applicants were tardy in launching their review application. In my view the parties should pay their own costs in respect of both applications.

[18] In view of the above, I make the following order:

Order

1. Condonation is granted for the late launching of the review application.
2. The application to dismiss the review is dismissed.
3. The decision of the Appeal Chairperson (first respondent) dated the 24 March 2015 is reviewed and set aside, and substituted as follows:

> "The appeal against the sanction of dismissal by Niklaas Adriaan Alberts is dismissed."

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicants: Andre Coetzee instructed by the State Attorney

Third Respondent: Solidarity official

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