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Is the singing of offensive songs a dismissible offence?

by Andries Kruger

The South African Constitutional Court recently handed down judgment in ***Duncanmec Proprietary Limited v Gaylard N.O & Others*** in which it considered whether the singing of struggle songs, containing words that could be construed as offensive, warranted dismissal.

In this matter, members of the National Union of Metal Workers of South Africa ("**NUMSA**") who were employed by Duncanmec (Pty) Ltd, embarked on an unprotected strike at Duncanmec's premises. During the course of the strike, the strikers danced and sang struggle songs. The lyrics of one of the songs they sang can be translated as follows: "climb on top of the roof and tell them that my mother is rejoicing when we hit the *boer*."

The strikers rejected an ultimatum to return to work and were dismissed.

Duncanmec levelled the following charges of misconduct against nine of its employees:

- participation in an unprotected strike: and
- "gross misconduct being inappropriate behaviour in that on the 20th April 2013, while participating in an unprotected strike action, you behaved inappropriately by dancing and singing racial songs in an offensive manner while you were on duty and continue to do so while defying management's lawful ultimatum to return to work."

The disciplinary chairperson found the employees guilty of both charges. He imposed a sanction of a final written warning for the first offence. He characterised the singing of the struggle song, as reflected in the second charge, as racist conduct that merited dismissal. Duncanmec's disciplinary code did not list the singing of struggle songs a dismissible offence.

Bargaining Council

Dissatisfied with their dismissals, the employees referred an unfair dismissal dispute to the relevant bargaining council with jurisdiction. In her arbitration award, the arbitrator concluded that, while the singing of the song was inappropriate and "can be offensive and cause hurt to those who hear it", it did not constitute racist conduct: a distinction must be drawn between the singing of a song and referring to someone in racist terms. The arbitrator found that the dismissals had been unfair. She reinstated the nine employees; but to show her disapproval of the singing of the song, she limited their compensation to three-months' remuneration.

Labour Court and Labour Appeal Court

Duncanmec launched an application to review and set aside the arbitrator's award. NUMSA opposed the review application. It contended that:

- the singing of the song did not constitute hate speech or incitement to commit acts of violence against white people;
- the song was sung to show defiance of employers in the context of a strike;
- the song was an old struggle song which was sung during the apartheid era and the effects of apartheid continue to afflict the workplace in South Africa;
- the singing of struggle songs during a strike serves the purpose of marshalling the workers to stand together in solidarity in defiance of the authority of the employer whose rules and authority they were defying by holding an unprotected strike; and
- the singing was not done as a result of racial hatred.

The Labour Court endorsed the arbitrator's approach and found that the award was reasonable. The court dismissed the review application and made the arbitration award an order of court. Duncanmec's applications for leave to appeal were dismissed by the Labour Court and the Labour Appeal Court. However, leave to appeal was granted by the Constitutional Court.

Constitutional Court

The most important elements of the Constitutional Court's decision are as follows:

- the reference to "*boer*" may mean "farmer" or "a white person". Neither of these meanings is racially offensive. The contention that, in the context in which it was used, the term was racist was rejected. The distinction drawn by the arbitrator between the singing of the song and referring to somebody in racist terms, was accepted;
- Duncanmec's argument that the award was reviewable on the basis that a range of considerations had not been considered by the arbitrator, was rejected;
- Duncanmec's argument that the arbitrator had "gone soft on racism" and that dismissal was the only sanction appropriate for this type of misconduct was rejected. This was because it was based on a mistaken premise. The arbitrator had not found that the employees were guilty of racism; she found that the singing of the song was inappropriate and could be offensive;
- it reiterated its findings in previous decisions that there is no principle in South African law that requires dismissal to follow automatically in the case of racist conduct. Arbitrators and the courts should deal with racism firmly and yet treat the perpetrator fairly;

- the test for reviewing an arbitration award is not whether the award, in the eyes of the reviewing court, is correct. The test is whether the award is reasonable. The following excerpt from the decision is important:
    - "[42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material.
    - [43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons."
- The court concluded that the award met this test. The arbitrator: held that the singing of the song was inappropriate but distinguished this from crude racism; paid attention to the context in which the misconduct was committed; took account of the fact that the incident took place within a tense atmosphere but also accepted that the strike was peaceful and short-lived; and, took into account the findings of the chairperson of the disciplinary enquiry that the employees had clean disciplinary records. The arbitrator had also considered the competing interests of Duncanmec and the employees.

What does this mean for employers?

It is important to note that the Constitutional Court was faced with an application to review the arbitrator's award. As the court indicated, it was not its task to decide whether the arbitrator's decision was correct or incorrect or whether the court agreed with the arbitrator's approach. It was only required to consider whether the award was reasonable. The award passed this test. It is therefore perhaps not correct to state that the Constitutional Court agreed with the arbitrator's approach.

However, the court expressed its views on at least three issues.

The first is its reiteration, in the first few pages of the decision, of the importance of combatting the scourge of racism in the workplace. The second is that, notwithstanding the importance of combatting racism, dismissal for racist conduct is not automatic. The third is that context is important in determining whether conduct was racist or not. This means that there could be circumstances where the singing of a song with derogatory content aimed at a specific racial group could constitute racist conduct.

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